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Matthew Bender (R) Practice Guide: California Civil Discovery

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1 MB Practice Guide: CA Civil Discovery Editorial Consultants

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The Honorable Peter D. Lichtman

The Honorable Peter D. Lichtman is a Judge of the Los Angeles Superior Court and former Supervising Judge of the Complex Litigation Program. Prior to that, Judge Lichtman served as a civil fast track judge. He was previously an attorney in private practice for 17 years, with concentration in the area of complex civil litigation. He has authored numerous articles and contributed to legal publications, as well as lecturing widely in the area of civil litigation.

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prepared the new Judicial Council Civil Jury Instructions for California. Ms. Matthai was named by *California Lawyer* as one of the prominent California attorneys in the defense of legal malpractice actions, and by the *Los Angeles Daily Journal/San Francisco Recorder* as one of the top 30 women litigators in California.

Richard L. Seabolt

Richard L. Seabolt is a partner in the San Francisco office of Duane Morris LLP, where he serves as a co-head of the Commercial, Securities and Antitrust Litigation department of the firm's Trial Group. Mr. Seabolt has extensive experience in complex trials and appeals arising from commercial disputes in the technology, entertainment, construction, and insurance industries. Mr. Seabolt frequently speaks and writes on civil litigation topics and topics involving his particular practice areas. He is currently an Advisor to the Litigation Section Executive Committee for the California State Bar. He previously served as Chair and Vice-Chair of the Litigation Section of the State Bar of California. He also is a member of the Judicial Council's Civil Jury Instructions ("CACI") Advisory Committee, the Board of Governors of the Association of Business Trial Lawyers (ABTL), Northern California Chapter and the American Arbitration Association's Large Complex Case Panel.

The Honorable Evelio M. Grillo

The Honorable Evelio M. Grillo is a Judge of the Alameda County Superior Court. Prior to his appointment to the bench, Judge Grillo served as a discovery referee and special master by appointment of the Alameda County Superior Court and was a partner in Grillo & Stevens LLP, located in Oakland, California, a firm specializing in the representation of municipalities in civil rights litigation and businesses and individuals in litigation involving claims of fraud, negligence, breach of contract, wrongful termination, and breach of fiduciary duty. Judge Grillo is a contributing author to *California Forms of Pleading and Practice* and has published and lectured in the areas of civil procedure and summary judgment. Judge Grillo is a 1985 graduate of Harvard Law School and holds a Masters of Public Policy degree from the University of California at Berkeley.



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1 MB Practice Guide: CA Civil Discovery Abbreviations

Abbreviations

California Constitution and Statutory Sources

Cal Const California Constitution

B&P Code Business and Professions Code

CC Civil Code

CCP Code of Civil Procedure

Com Code Commercial Code

Corp Code Corporations Code

Ed Code Education Code

Elec Code Elections Code

Evid Code Evidence Code

Fam Code Family Code

Fin Code Financial Code

F&G Code Fish and Game Code

F&A Code Food and Agriculture Code

Gov Code Government Code

H&N Code Harbors and Navigation Code

H&S Code Health and Safety Code

Ins Code Insurance Code

Lab Code Labor Code

M&V Code Military and Veterans Code

Pen Code Penal Code

Prob Code Probate Code

PC Code Public Contract Code

PR Code Public Resources Code

PU Code Public Utilities Code

R&T Code Revenue and Taxation Code

1 MB Practice Guide: CA Civil Discovery Abbreviations

S&H Code Streets and Highways Code

UI Code Unemployment Insurance Code

Veh Code Vehicle Code

Water Code Water Code

W&I Code Welfare and Institutions Code

Cal Stat California Statutes

United States Constitution and Statutory Sources

US Const United States Constitution

USCS United States Code

USC app United States Code Appendices

IRC United States Code, Title 26

California and Federal Regulations

CCR California Regulations

CFR Code of Federal Regulations

Fed Reg Federal Register

California Attorney General Opinions

Ops Cal Atty Gen Opinions of California Attorney General
Case Law

C California Reports

C2d California Reports, Second Series

C3d California Reports, Third Series

C4th California Reports, Fourth Series

CA California Appellate Reports

CA2d California Appellate Reports, Second Series

CA3d California Appellate Reports, Third Series

CA4th California Appellate Reports, Fourth Series

CA Supp California Appellate Reports, Supplement

CA2d Supp California Appellate Reports, Second Series, Supplement

CA3d Supp California Appellate Reports, Third Series, Supplement

CA4th Supp California Appellate Reports, Fourth Series, Supplement

CR California Reporter

CR2d California Reporter, Second Series

P Pacific Reporter

P2d Pacific Reporter, Second Series

P3d Pacific Reporter, Third Series

US United States Supreme Court Reports

S Ct Supreme Court Reporter

L Ed Lawyer's Edition

L Ed2d Lawyer's Edition, Second Series

F Federal Reporter

F2d Federal Reporter, Second Series

F3d Federal Reporter, Third Series

F Supp Federal Supplement

F Supp2d Federal Supplement, Second Series

FRD Federal Rules Decisions
California State Court Rules

Cal Rules Ct California Rules of Court

Cal Rules Prof Conduct California Rules of Professional Conduct
Federal Rules

Fed R Civ P Rules of Civil Procedure

Fed R Civ P Appendix of Forms Rules of Civil Procedure, Forms Appendix

Fed R App P Federal Rules of Appellate Procedure

9th Cir R Circuit Rules

9th Cir R Appendix of Forms Circuit Rules, Forms Appendix

1 MB Practice Guide: CA Civil Discovery Abbreviations

Sup Ct R Supreme Court Rules

Multidistrict R Multidistrict Rules

Fed R Evid Rules of Evidence

Fed R Bankr P Rules of Bankruptcy Procedure

Fed R Crim P Rules of Criminal Procedure
Central District abbreviations

CD Cal Civ LR Local Rules

CD Cal Local Civil Appendix Civil Appendices

CD Cal Mag LR Magistrate Judge Rules

CD Cal Gen Order General Orders
Eastern District abbreviations

ED Cal Gen LR General Rules

ED Cal Civ LR Civil Rules

ED Cal Mag LR Magistrate Judge Rules

ED Cal Automated Case Assignment Plan Automated Case Assignment Plan

ED Cal Gen Order General Orders
Northern District abbreviations

ND Cal Civ LR Local Rules

ND Cal ADR LR Local Rules for Alternative Dispute Resolution

ND Cal Appendix Appendixes of Sample Forms

NC Cal Gen Order General Orders
Southern District abbreviations

SD Cal Civ LR Local Rules

SD Cal Gen Order General Orders
Miscellaneous

US Code Cong & Admin News Congressional and Admin. News

UST United States Treaties



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What's New

1 MB Practice Guide: CA Civil Discovery Scope

Scope

HIGHLIGHTS

Release 15 September 2010

2010 Midyear Update for Recent Judicial Decisions and Rules of Court

The entire publication has been updated for recent California and federal judicial decisions and California Rules of Court. For a more detailed summary of the changes incorporated into the publication in this release, see below.

This release is the 2010 midyear update for recent California and federal judicial decisions, and California Rules of Court changes operative July 1, 2010. Significant judicial decisions and other changes incorporated into this release include the following:

Document Drafting--Trade Secret Designation Insufficient. In *Perlan Therapeutics, Inc. v. Superior Court* (2009) 178 CA4th 1333, the court held that in an action alleging misappropriation of a trade secret, a trade secret statement was insufficient because it lacked clarity, did not clearly explain how secrets differed from publicly available knowledge, included a large amount of surplusage, such as legal objections, factual allegations, and reservations of right, and referenced hundreds of pages of extra documents. See *Ch. 1, Strategy and Planning*, § 1.08[5][c].

Sanctions/Interrogatories--Evidence Supported Award of Monetary Sanctions for Misuse of Discovery Process. In *Clement v. Alegre* (2009) 177 CA4th 1277, the court held that ample evidence supported the referee's determination that plaintiffs deliberately misconstrued an interrogatory requesting a description of "all economic damages you claim to have sustained" and provided an answer using a definition narrower than that provided by statute. The court also held that an interrogatory that referred to a response to a prior interrogatory did not violate the rule against referring to other materials. See *Ch. 3, Sanctions*, § 3.06[6]; *Ch. 9, Interrogatories*, § 9.08[2][b].

E-Discovery--Qualcomm Judge Summarizes Discovery Errors. In *Qualcomm Inc. v. Broadcom Corp.* (SD Cal 2010) 2010 US Dist LEXIS 33889, the latest in a series of opinions addressing sanctions for Qualcomm's failure to produce tens of thousands of documents requested in discovery, the federal district court summarized the major errors it

perceived as contributing to the massive cache of critical documents remaining undiscovered by Qualcomm's attorneys and unproduced by Qualcomm until after trial. The court blamed the discovery failures on pervasive miscommunication between Qualcomm employees and counsel, lack of agreement among the participants regarding responsibility for document collection and production, lack of candor on the part of the principal Qualcomm employees, and inadequate follow-up by counsel in response to contradictory or potentially contradictory evidence. See *Ch. 5, Discovery of Electronically Stored Information*, § 5.14.

Depositions--Proponent of Expert Opinions May Not Be Able to Expand Opinions By Offering Expert for Second Deposition. In *McCoy v. Gustafson* (2009) 180 CA4th 56, the court held that the plaintiff's desire to have an expert witness offer opinions at trial that he had not given at his deposition was not good cause for delaying a trial to take a second deposition of the expert. The trial court properly precluded the expert from offering any opinion about a subject on which he had not been designated to testify and about which he had testified at his deposition that he had no information or opinion. See *Ch. 6, Oral Depositions in California*, § 6.07[2]; *Ch. 13, Exchanging Expert Witness Information*, § 13.32.

Depositions--New Judicial Council Subpoena Form. A new version of Judicial Council Form SUBP-010, the Judicial Council subpoena form, has been incorporated into *Ch. 6, Oral Depositions in California*, § 6.66.



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HowTo.01 Finding This Publication and Other Sources on lexis.com.

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- [2] Using Content Online at lexis.com.
- [3] Selecting a Source on lexis.com.

HowTo.02 Authority and Sources Referenced in This Publication.

- [1] Using lexis.com resources to update cases.
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A searchable Directory of Online Sources can be viewed without an ID at <http://web.nexis.com/sources/>

Additionally, a task-based web page is available for this publication at <http://www.lexisnexis.com/mbpracticeguide/CA/>

[3] Selecting a Source on *lexis.com*.

Use **Source Searches** to select the source you wish to search. For example, on the **Legal** tab see the **States Legal -- US** list and follow this jurisdictional path:

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HowTo.02 Authority and Sources Referenced in This Publication.

[1] Using *lexis.com* resources to update cases.

The Matthew Bender[(R)] Practice Guide series is updated twice a year and cites the strongest, most recent cases available as of its last update. New cases are added to *lexis.com* daily, and can be combined with additional cases online to update, validate, and research fact patterns, issues, and points of law.

[2] California Case Databases.

Several sources may assist research needs. They include:

- CA Federal & State Cases, Combined (CAL;CAMEGA)
- CA Cases, Administrative Decisions & Attorney General Opinions, Combined (CAL;CACASE)
- CA Published Cases, Combined (CAL;CACTSP)
- CA State Cases, Combined (CAL;CACTS) (includes unpublished as well as published cases)
- CA Supreme Court Cases from 1850 (CAL;CAL)
- CA Courts of Appeal Cases from 1905 (CAL;APP)
- Published CA Court of Appeal Cases from 1905 (CAL;APP-P)
- Unpublished CA Court of Appeal Cases from 1966 (CAL;APP-U) n1

Although unpublished cases are not citable in California courts, users may wish to search the CA State Cases, Combined to get ideas about possible legal arguments. That source would also be preferable to CA Published Cases, Combined if a user is searching for any appellate cases in which a party, attorney, or judge has been involved.

Case law from all 50 states, the Virgin Islands, Guam, Northern Marianas Islands, Washington D.C. federal courts, state and federal agencies are also available on *lexis.com* through the Legal tab> Cases -- U.S.

[3] Hypertext Links.

Click the hypertext link to jump to the corresponding cases, codes, rules, and other publications online.

[4] Finding Related Sources and Suggested Searches.

This publication highlights additional online sources to assist your research tasks, both legal and factual, related to civil discovery. Thousands of additional sources are also available on *lexis.com*. The following list highlights frequently used sources and sample search strategies relevant to topics contained in this publication:

REFERENCED CASE LAW SOURCES ON *lexis.com*:

CA Federal & State Cases, Combined (see Sample Searches in sections 1.09, 2.08, 6.32, 13.03)

To find information regarding litigation history in federal and state cases using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

CA State Cases, Combined (see Sample Search in section 1.08)

To find a given type of expert, e.g., a toxic torts expert, in the Los Angeles area, who has testified in a reported case, try a search of the case law: *toxic tort* (see 1.08)

REFERENCED TOPICAL, PUBLIC RECORDS, COURT FILINGS, AND NEWS SOURCES ON *lexis.com*:

Forensic Services Directory (see Sample Search in sections 13.03)

To find a forensic expert for accident reconstruction in California, try this SPECIALTY segment search: *specialty (accident reconstruction) and ca* (see 13.03)

CA Public Records, Combined (see Sample Searches in sections 1.09, 2.06, 6.02)

To find basic information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

EZFIND Combined Person Locator Nationwide (see Sample Searches in sections 1.09, 2.06, 6.05)

To find witnesses to an event that occurred at a known location, e.g., the 500 block of Santa Monica Blvd., Santa Monica, CA, try this ADDRESS segment search: *ADDRESS (5** pre/5 santa monica boulev! and santa monica /5 ca)* (see 1.09)

Federal Aviation Administration Aircraft Registrations (see Sample Searches in sections 1.09, 2.06, 6.32)

To see if a witness owns any aircraft, try the search: *first name /3 last name* (see 1.09)

Stock Ownership (see Sample Searches in sections 1.09, 2.06, 6.32)

To see if a witness has any significant stock holdings, try the search: *first name /3 last name* (see 1.09)

CA Contractors State License Board Information (see Sample Searches in sections 1.09, 2.06, 6.32)

To see if a witness has a contractor's license, try the search: *first name /3 last name* (see 1.09)

CA Professional License (see Sample Searches in section 1.09, 2.06, 6.32, 13.03)

To see if a witness has a professional license, try the search: *first name /3 last name* (see 1.09)

CA Liquor Licenses (see Sample Searches in section 1.09, 2.06, 6.32)

To see if a witness has a liquor license, try the search: *first name /3 last name* (see 1.09)

California Real Estate Licenses (see Sample Search in section 1.09, 2.06, 6.32)

To see if a witness has a real estate license, try the search: *first name /3 last name* (see 1.09)

California U.S. District Civil Court Filings (see Sample Searches in sections 1.09, 2.08, 6.32, 13.03)

To find information regarding litigation history in federal civil courts using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

CA Combined Civil Court Filings from Superior and Municipal Courts (see Sample Searches in sections 1.09, 2.08, 6.32)

To find information regarding litigation history in California civil cases using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

California U.S. District Criminal Court Filings (see Sample Searches in section 1.09, 2.08, 6.32, 13.03)

To find information regarding litigation history in federal criminal cases using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

CA Criminal Case Filings (see Sample Searches in sections 1.09, 2.08, 6.32, 13.03)

To find information regarding litigation history in California criminal cases using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name* (see 1.09)

CA Judgment and Lien Filings (see Sample Searches in sections 1.09, 2.08, 6.32, 13.03)

To find judgments against a witness, try the search: *first name /3 last name* (see 1.09)

CA Bankruptcy Filings (see Sample Searches in sections 1.09, 2.08, 6.32, 13.03)

To find a bankruptcy filings by a witness, try the search: *first name /3 last name* (see 1.09)

Jury Verdicts and Settlements, Combined (see Sample Search in section 1.08, 13.03)

To investigate the potential impact on a jury of an expert in California try this CATEGORY segment search: *category (orthoped!) and beverly hills* (see 1.08)

California News Publications (see Sample Search in section 1.09)

To find news articles about a person or event in the California News Publications file, try a simple search in the format: *first name /3 last name* (see 1.09)

SEC Filings--Full-Text & Abstracts (see Sample Searches in section 5.10)

To locate SEC filings, try a search in this type of format: *company (name of company)* (see 5.10)

Combined Business and Corporation Information (see Sample Search in section 6.14)

To locate business records, try a search in this type of format: *company (name of company)* (see 6.14)

CA Deed Transfers, Tax Assessors Records and Mortgage Records--Selected Counties (see Sample Search in section 6.05)

To help you obtain information about relevant present or past real estate holdings of a witness or a witness's present or former spouse, try using a witness's name in a format allowing for unknown middle names or initials, search: *first name /3 last name* (see 6.05)

U.S. Private Company Reports (see Sample Searches in section 5.10)

To locate information on private companies, try a search in this type of format: *company (name of company)* (see 5.10)

[5] Search Advisor Links to Related Cases and Analytical Materials.

Search Advisor is a finding tool for legal data based on areas of law and related legal topics. It can help target your legal issue, identify appropriate sources, and formulate your search request.

Several **Search Advisor** areas of law relate to this publication, including **Discovery & Disclosure and Discovery Methods**.

This publication is tied to **Search Advisor**. From the sections of this publication you can link into Search Advisor ready to search the topic related to the section you are looking at in this publication.

In **Search Advisor**, at the search box for case law, you can select a jurisdiction and search within a collection of cases already restricted to the subtopic. You can use **Search Advisor** as a current awareness case law update device by leaving the search box blank and selecting, e.g., "**Previous 6 months**" from the **Restrict by Date** option.

Above the case law search box is a menu of relevant secondary sources, which may include law review articles, treatises and other practice guides, and news items. Selecting one of these sources will take you to a list of relevant articles and sections in that source.

FOOTNOTES:

(n1)Footnote 1. Unpublished CA Court of Appeal Cases from 1966 covers selected unpublished, depublished, and partially published opinions from August 1966 through current, and full coverage of Rule 977 unpublished opinions from October 2001. Although local rules generally preclude citation to unpublished opinions except in limited circumstances, this database may be useful to research similar fact patterns, case information, rulings, factual discovery, strategy, and disposition.



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1- MB Practice Guide: CA Civil Discovery HowTo.03

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Chapter 1 Strategy and Planning

1-1 MB Practice Guide: CA Civil Discovery 1.syn

§ 1.syn Synopsis to Chapter 1: Strategy and Planning

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1.19 Electronic Exchange of Information.

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1.24 Order on Motion for Protective Order Limiting Scope of Discovery or Restricting Frequency or Extent of Discovery Methods.

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Chapter 1 Strategy and Planning
I. STRATEGY

1-1 MB Practice Guide: CA Civil Discovery 1.01

1.01 Scope.

This chapter covers:

- Objectives and strategies for discovery [see 1.02].
- Discovery milestones checklists [see 1.03, 1.04].
- Checklists for discoverable matters commonly pursued [see 1.05, 1.06].
- Checklist for discovery tools [see 1.07].
- Developing a discovery plan [see 1.08].
- Self-help and nondiscovery tools for obtaining information [see 1.09].
- Relationship between contractual discovery and arbitration [see 1.10].
- Overview of discoverable matters [see 1.11].
- Overview of discovery methods [see 1.12] and timing of discovery [see 1.17; Forms: see 1.25, 1.26].
- Amounts and types of discovery in limited and unlimited civil cases [see 1.13, 1.14; Forms: see 1.20-1.22].
- Protective orders for discovery [see 1.15, 1.16; Forms: see 1.23, 1.24].
- Electronic tools to organize discovery [see 1.18, 1.19].

Core Statutes:

CCP §§ 2017.010 et seq., 2019.010 et seq., 2024.010 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryCivil ProcedureDiscoveryGeneral Overview



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Chapter 1 Strategy and Planning
I. STRATEGY

1-1 MB Practice Guide: CA Civil Discovery 1.02

1.02 Objective and Strategy.

Discovery assists plaintiffs and defendants in developing their cases through fact gathering. Discovery also helps parties identify the fact issues that are actually in dispute, and thus, narrows and focuses the case.

Developing a discovery plan and deciding discovery strategy before engaging in discovery allows a party to make the most effective and efficient use of the discovery tools. The characteristics and benefits of a good discovery plan include:

- Meeting discovery deadlines.
- Organizing information as it is gathered to tie it to the element to be proved or disproved in preparation for:
 - ☐ Bringing or resisting a summary judgment motion.
 - ☐ Trying the case.
 - ☐ Urging settlement or recognizing that a settlement opportunity should be seized.
- Putting the opposing or third parties on notice of the need to preserve evidence.
- Selecting the most appropriate discovery tools for the situation.
- Maximizing the use of informal methods of discovery before and after filing the action.
- Timing discovery to get the earliest possible outline of the opposition's case while concealing your own theories and strategies as long as possible.
- Avoiding mistakes, such as revealing confidential information that cannot later be controlled or sealed.

- Allowing use of technology to provide quicker, easier, and less expensive retrieval of evidence.

Strategic Point--Plan Early:

Plaintiff's counsel should develop a discovery plan before filing the complaint, and as the likelihood of litigation looms, defense counsel may begin to develop a plan as well. Much informal discovery should always occur before the action commences. In addition to information brought by the client, relevant locations open to the public may be observed, and willing witnesses interviewed. If plaintiff's medical records are relevant, they may be obtained before filing [see *H&S Code § 123110*]. Easily available public records can be reviewed, and additional information may be available from government agencies via the Public Records Act, *Gov Code §§ 6250-6276* (any information not exempt from disclosure) or the Information Practices Act, *CC §§ 1798-1798.40* (specific information about the client that the client can request). Websites and promotional materials issued by institutional clients can be a gold mine of information. Very often what is released for public information purposes on a website or in promotional material does not reflect favorably on the author of the material in the context of litigation. Informal discovery is also important to determine whether any judgment that may be recovered will be collectable.

A discovery plan developed before filing will help counsel approach early settlement negotiations with the best possible knowledge of the strengths and weakness of the case. It will also help counsel frame the issues on which formal discovery will be needed so that counsel can move quickly to gather more information and nail down admissions if and when the action is filed.

Strategic Point--Preservation of Evidence:

In many cases an object, writing, or electronic data in the hands of the opposing party or a third party may be important evidence. To secure this evidence, contact the party in possession, informing them that the information is needed in connection with potential litigation and admonishing them to maintain it (or if appropriate deliver it for safekeeping). The most effective way to ensure that evidence is not lost or destroyed is to send a letter to the opposing party and, if known, their counsel advising them to preserve all evidence. If the evidence is later lost or destroyed this letter can be used to establish the basis for the sanction requested. An attorney should immediately take possession custody and control of any documents or evidence which counsel believes may be lost or destroyed if not taken into the attorney's custody and control.

Promptly obtain photographs of a relevant physical location so that, e.g., the picture of the shrub blocking the view of the stop sign can be captured before the shrub is trimmed.

Strategic Point--Motions to Compel:

Be prepared to follow up with motions to compel, if necessary, to ensure that the opposing party has provided all the information that has been requested. Most motions to compel further responses must be filed within 45 days of service of the response [see, for example, *CCP § 2030.300(c)*].

Strategic Point--Summary Judgment:

In determining whether to grant a party responding to a summary judgment motion a continuance for discovery under *CCP § 437c(h)*, the trial court may consider whether that party has been diligent in

completing their discovery [*Cooksey v. Alexakis (2004) 123 CA4th 246, 257*].

Judge's Perspective:

It must be kept in mind that while *CCP* § 437c(h) does permit continuances for the purpose of further discovery, the requesting party cannot simply rely on declarations that are conclusionary and must likewise not wait until the last minute to proceed with necessary discovery or proffer a discovery plan. Delay, lack of diligence and lack of a specific plan will provide a basis for denial of the request.

**Cross References:**

For discussion on strategy and planning for discovery in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 21, Discovery Strategy and Planning.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

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Chapter 1 Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

1-1 MB Practice Guide: CA Civil Discovery 1.03

1.03 CHECKLIST: Discovery Milestones for Plaintiff.

☐ As soon as possible, send letter to opposing party or third party in possession of tangible evidence demanding that evidence be preserved. May be done before filing complaint.

☐ If expert analysis of evidence is appropriate, engage one or more experts as early in the process as practicable.

➡ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 13, Exchanging Expert Witness Information.

☐ Ten days after summons served or defendant makes appearance.

☐ Serve written interrogatories to a party.

☐ Serve demand for inspection of documents, tangible things, and land or other property.

☐ Serve requests for admission by a party.

Exceptions:

Five days in unlawful detainer or forcible entry or detainer case.

In any case plaintiff may propound interrogatories or make requests for admissions earlier on motion to shorten time.

Authority:

CCP §§ 2030.020(b), (c), 2031.020(b), (c), (d), 2033.020(b)

Discussion:

See 1.12

☐ 20 Days after summons served or defendant makes appearance in case.

☐ Serve deposition notice.

Exception:

Plaintiff may serve deposition notice earlier on motion to shorten time.

Authority:

CCP § 2025.210(b)

Discussion:

See 1.12

☐ If case goes to judicial arbitration under *CCP §§ 1141.10-1141.31*:

☐ 20 days before arbitration hearing date deliver to all opposing parties written reports of expert witness, documentary evidence, and depositions of other witnesses to be offered at the hearing.

☐ 15 days before arbitration hearing date, discovery must be completed.

Exception:

Court on good cause shown may extend time for discovery.

Authority:

Cal Rules Ct, Rules 3.822, 3.823

Discussion:

See 1.17[2]

☐ After initial trial date set, and earlier of 10 days after trial date setting or 70 days before trial date.

☐ Make demand for simultaneous exchange of information concerning each other's expert trial witnesses by this date.

Authority:

CCP § 2034.220

Discussion:

See 1.12

☐ 30 days before initial trial date.

- ☐ Discovery must be completed.

Exceptions:

If case was ordered to judicial arbitration under *CCP § 1141.16(a)* no discovery is allowed after the arbitration award other than for expert witness discovery under *CCP § 2034.010 et seq.*

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to complete discovery proceedings closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.020, 2024.040(b), 2024.050, 2024.060

Discussion:

See 1.17

- ☐ At least 60 days after appearance of opposing party, and 30 days or more before trial date.

- ☐ Summary judgment motion, if any, against that party must be heard.

Exception:

Court may shorten 60-day or 30-day period with or without notice, and on good cause shown.

Prerequisite:

75-day notice or longer, depending on method of service.

Authority:

CCP § 437c(a)

- ☐ 15 days before initial trial date.

- ☐ Discovery motions must be heard.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to have a motion concerning discovery heard closer to initial trial date.

Parties may agree to extend time.

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Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.020, 2024.040(b), 2024.050, 2024.060

Discussion:

See 1.17

☐ Discovery proceedings pertaining to an expert trial witness identified under *CCP § 2034.010 et seq.* must be completed.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to complete discovery proceedings closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.030 -2024.060

Discussion:

See 1.17

☐ Ten days before initial trial date.

☐ Motions concerning discovery of an expert trial witness identified under *CCP § 2034.010 et seq.* must be heard.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to have a motion concerning discovery heard closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.030-2024.060

Discussion:

See 1.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryMethodsGeneral Overview



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Chapter 1 Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

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1.04 CHECKLIST: Discovery Milestones for Defendant.

☐ As soon as possible, send letter to opposing party or third party in possession of tangible evidence demanding that evidence be preserved. May be done before filing complaint.

☐ If expert analysis of evidence is appropriate, engage one or more experts as early in the process as practicable.

➡ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 13, Exchanging Expert Witness Information.

☐ Anytime after service or appearance in case:

☐ Serve deposition notice.

☐ Serve written interrogatories to a party.

☐ Serve demand for inspection of documents, tangible things, and land or other property.

☐ Serve demand for appropriate physical examination of the plaintiff in a case in which the plaintiff is seeking recovery for personal injuries.

☐ Serve requests for admission by a party.

Authority:

CCP §§ 2025.210(b), 2030.020(a), 2031.020(a), 2032.220(b), 2033.020(a)

Discussion:

See 1.12

☐ If case goes to judicial arbitration under *CCP §§ 1141.10-1141.31*:

☐ 20 days before arbitration hearing date deliver to all opposing parties written reports of expert witness, documentary evidence, and depositions of other witnesses to be offered at the hearing.

☐ 15 days before arbitration hearing date, discovery must be completed.

Exception:

Court on good cause shown may extend time for discovery.

Authority:

Cal Rules Ct, Rules 3.822, 3.823

☐ After initial trial date set, and earlier of 10 days after trial date setting or 70 days before trial date.

☐ Make demand for simultaneous exchange of information concerning each other's expert trial witnesses by this date.

Authority:

CCP § 2034.220

Discussion:

See 1.12

☐ 30 days before initial trial date.

☐ Discovery must be completed.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to complete discovery proceedings concerning discovery heard closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.020, 2024.040(b), 2024.050, 2024.060

Discussion:

See 1.17

☐ 60 days after appearance of opposing party, and 30 days or more before trial date.

☐ Summary judgment motion against that party must be heard.

Exception:

Court may shorten 60-day or 30-day period with or without notice, and on good cause shown.

Prerequisite:

75-day notice or longer, depending on method of service.

Authority:

CCP § 437c(a)

☐ 15 days before initial trial date.

☐ Discovery motions must be heard.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to have a motion concerning discovery heard closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.020, 2024.040(b), 2024.050, 2024.060

Discussion:

See 1.17

☐ Discovery proceedings pertaining to an expert trial witness identified under *CCP § 2034.010 et seq.* must be completed.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to complete discovery proceedings closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.030-2024.060

Discussion:

See 1.17

☐ Ten days before initial trial date.

☐ Motions concerning discovery of an expert trial witness identified under *CCP § 2034.010 et seq.* must be heard.

Exceptions:

Cut-off date on weekend or holiday is extended to next court day closer to the trial date.

On any party's motion, court may grant leave to have a motion concerning discovery heard closer to initial trial date.

Parties may agree to extend time.

Cut-off date does not apply to unlawful detainer or forcible entry or detainer or eminent domain actions.

Authority:

CCP §§ 2016.060, 2024.030-2024.060

Discussion:

See 1.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryMethodsGeneral Overview



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Chapter 1 Strategy and Planning
II. DEVELOPING A DISCOVERY PLAN

1-1 MB Practice Guide: CA Civil Discovery 1.05

1.05 CHECKLIST: Discoverable Matters Plaintiff Commonly Pursues.

- ☐ Plaintiff commonly pursues discovery of the following facts concerning each defendant:
- ☐ Name, address, and telephone number of each defendant, whether an individual or a legal entity (e.g., a corporation or governmental entity), and sex and approximate age of each individual defendant.
 - ☐ Occupation, including name and address of employer, of each individual defendant.
 - ☐ Employment or agency status, if any, of each individual defendant.
 - ☐ Marital status of each individual defendant.
 - ☐ For each entity defendant, the identity of persons within the entity with knowledge relevant to the action.
 - ☐ For each entity defendant, information concerning the location within the entity of documents relevant to the action.
 - ☐ Defendant's insurance coverage:
 - ☐ Name and address of insurer(s) and agent(s).
 - ☐ Type(s) and amount(s) of coverage.

☐ Whether any claims were filed in connection with the transaction or occurrence.

☐ Defendant's military status, now and within the last 60 days.

Authority:

50 USC app §§ 521 (discretionary stay), 523 (stay of execution, vacation or stay of attachments), 525 (tolling)

☐ Prior criminal convictions, including crime, date and place of conviction, and penalty imposed for each.

☐ Medical devices (e.g., eyeglasses, artificial limb) used by defendant at time cause of action arose.

☐ Plaintiff commonly pursues the following facts concerning witnesses:

☐ Name, address, and telephone number of each witness and of each person to whom any parties might have spoken about the cause of action.

☐ Sex and approximate age of each witness.

☐ Occupation of each witness.

☐ Marital status of each witness.

☐ If witness identity is known, plaintiff commonly pursues the following information:

☐ The witness's observations or documentation concerning the subject matter of the cause of action, including the existence of any statements already made, and any documentation of those statements, if any.

☐ The witness's relationships, if any, to the parties; or any other basis for bias.

☐ The existence of any photographs or other recording made by the witness concerning the cause of action.

☐ For each witness that is an entity, the identity of persons within the entity with knowledge relevant to the action.

☐ For each witness that is an entity, information concerning the location within the entity of documents relevant to the action.

☐ Plaintiff commonly pursues the following information concerning documents:

1-1 MB Practice Guide: CA Civil Discovery 1.05

- ☐ Written instruments, if any, on which the action is based.
- ☐ Relevant letters or other correspondence between parties.
- ☐ Relevant written statements from parties to others.
- ☐ Insurance policies, if applicable.
- ☐ Electronic data, including e-mail and internal memoranda that may be resident on a party's computer.
- ☐ Documents filed in any prior lawsuits between parties, or between party to this action and third party, that are relevant to this action.
- ☐ Any other documents relevant to this action or containing relevant background information on defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryMethodsGeneral Overview



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II. DEVELOPING A DISCOVERY PLAN

1-1 MB Practice Guide: CA Civil Discovery 1.06

1.06 CHECKLIST: Discoverable Matters Defendant Commonly Pursues.

☐ Defendant commonly pursues the following facts concerning the plaintiff:

- ☐ Name, address, and telephone number of each plaintiff, whether an individual or a legal entity (e.g., a corporation or governmental entity), and sex and approximate age of each individual plaintiff.
- ☐ Occupation, including name and address of employer, of each individual plaintiff.
- ☐ Employment or agency status, if any, of each individual plaintiff.
- ☐ Marital status of each individual plaintiff.
- ☐ For each entity plaintiff, the identity of persons within the entity with knowledge relevant to the action.
- ☐ For each entity plaintiff, information concerning the location within the entity of documents relevant to the action.

☐ Defendant commonly pursues the following facts concerning witnesses:

- ☐ Name, address, and telephone number of each witness and of each person to whom any parties might have spoken about the cause of action.
- ☐ Sex and approximate age of each witness.

1-1 MB Practice Guide: CA Civil Discovery 1.06

- ☐ Occupation of each witness.
- ☐ Marital status of each witness.
- ☐ If witness identity is known, plaintiff commonly pursues the following information:
 - ☐ The witness's observations or documentation concerning the cause of action, including the existence of any statements already made, and any documentation of those statements, if any.
 - ☐ The witness's relationships, if any, to the parties; or any other basis for bias.
 - ☐ The existence of any photographs or other recording made by the witness concerning the cause of action.
- ☐ For each witness that is an entity, the identity of persons within the entity with knowledge relevant to the action.
- ☐ For each witness that is an entity, information concerning the location within the entity of documents relevant to the action.
- ☐ Defendant commonly pursues the following documents:
 - ☐ Written instruments, if any, on which the action is based.
 - ☐ Relevant letters or other correspondence between parties.
 - ☐ Relevant written statements from parties to others.
 - ☐ Insurance policies, if applicable.
 - ☐ Documents filed in any prior lawsuit between parties, or between party to this action and third party, that are relevant to this action.
 - ☐ Medical records, if applicable.
 - ☐ Employment records, if applicable.
 - ☐ Electronic data, including e-mail and internal memoranda that may be resident on a party's computer.

☐ Any other documents relevant to this action or containing relevant background information on plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryMethodsGeneral Overview



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1-1 MB Practice Guide: CA Civil Discovery 1.07

1.07 CHECKLIST: Discovery Tools.

☐ Informal discovery:

- ☐ Conduct interviews.
- ☐ If possible, obtain documents from cooperative third parties.
- ☐ Obtain public records pursuant to the Public Records Act, or over the Internet if possible.

Authority:

Gov Code § 6253 et seq.

- ☐ Consider hiring an investigator to conduct interviews, discover facts, retrieve documents.
- ☐ Review regulatory filings, if appropriate.
- ☐ Search for old and screen for new newspaper articles.
- ☐ Visit websites and review party's advertising.
- ☐ If handling a case in an area in which you do not practice regularly, consider subscribing to a local paper.
- ☐ Obtain documents from other cases by or against same party (such as insurer or major corporation).

Discussion:

See 1.09

- ☐ Formal discovery:
- ☐ Consider the following methods of discovery for parties:
- ☐ Oral and written depositions.
 - ☐ Interrogatories.
 - ☐ Inspections of documents, things, and places.
 - ☐ Physical and mental examinations.
 - ☐ Requests for admissions.
 - ☐ Simultaneous exchange of expert trial witness information.

Authority:*CCP §§ 2019.010, 2025.010-2034.730***Discussion:**

See 1.12

- ☐ Consider the following methods of discovery within California for nonparties:
- ☐ Oral depositions.
 - ☐ Written depositions.
 - ☐ Depositions for productions of business records and things.

Authority:*CCP §§ 2020.410-2024.510, 2025.010 et seq., 2028.010 et seq.***Discussion:**

See 1.12[8]

- ☐ Consider taking the deposition of a nonparty who is either in another state or outside the country.

Authority:*CCP §§ 2026.010-2027.010*

Discussion:

See 1.12[8]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony



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1.08 Developing a Discovery Plan.

1.08[1] Facts to Be Proved or Disproved Must Be Determined First. To develop a good discovery plan counsel must have a thorough understanding of the legal issues you need to prove or disprove. Thus, the starting point is identifying the elements of the cause or causes of action and defenses at issue. The second step is identifying the facts that must be shown to establish those elements.



Strategic Point:

Reviewing the relevant jury instructions at the beginning of the case is an excellent way to be sure that you focus on the target of exactly what you (or your opponent) need to prove or disprove to prevail.

When framing discovery requests, do not simply ask your opponent for all of the evidence that "supports your claim that ..." While this may assist in preventing the introduction at trial of materials that were not disclosed, it does not require your opponent to provide you with evidence which is adverse to their case.

Record Keeping:

Prepare a trial book as early as possible listing the elements of each cause of action and defense and what facts are needed to prove or defeat them. The trial book will help you assure that you obtain discovery on all of the relevant issues. The source of the facts can be incorporated into the trial book as discovery progresses. Keeping the evidence organized will also help you to determine what gaps in the evidence you need to fill by conducting additional discovery. It will also make preparation of a summary judgment motion more efficient, because you will be able to quickly identify undisputed and disputed facts.

1.08[2] Discovery Plan Should Identify Relevant Facts and Organize Evidence As It Is Discovered. A discovery plan should account for every fact that you will need to prove or disprove at trial. Organize by every fact you need to develop and list the evidence you have to support that fact.

Much of the basic groundwork for discovery should be done before filing the action or response. The first source, obviously, is the information the client provides. Other early sources are:

- Information gathered in interviewing witnesses identified by the client.
- Information available from public records (e.g., the status of a corporate party, the existence of UCC liens).
- Other publicly available information (e.g., weather conditions, viewing the scene of an accident).

This information is best gathered before beginning formal discovery, and you should have gathered much of it bringing the action.



Strategic Point:

It is always a good practice to place witness interviews that are not verbatim statements in the form of an attorney summary memoranda prefaced with the comment that the memoranda reflects the attorney's impressions and conclusions regarding the witness. Doing so will keep the memoranda protected as attorney work product, and not discoverable as a witness statement.

Sort the information gathered from your client, witness interviews, and publicly available resources to identify the evidence you have that supports each fact you need to prove. This will begin to fill in the plan and make it clear for what facts you still need to find evidentiary support.

As you organize evidence tied to each fact to be proved, keep track of evidence that opposes as well as that which supports your position. You will need both supporting and opposing evidence:

- To objectively assess the merits of your case during settlement negotiations.
- To efficiently prepare a statement of undisputed facts in support of a motion for summary judgment (or a responsive separate statement identifying disputed facts).
- To identify additional subjects of discovery (e.g., information to impeach a witness).
- To avoid being surprised at trial or any other point in the case.

1.08[3] Develop Plan by Analyzing Subjects for Discovery, Probable Sources, and Appropriate Tools to Use.

Based on the foundation of well-organized evidence developed from informal methods of gathering information, you can identify the issues and facts for which you need further discovery and why:

- To substantiate the evidence you already have.
- To fill in gaps in proof (particularly when much of the proof is in the opposing party's possession).
- To determine what contradictory or otherwise damaging evidence the opposing party may possess.
- To gather information to impeach witnesses.

Obtaining expert consultants, who will often ultimately become your expert witness or witnesses, early in the process can be important to your planning. Their input may help clarify the case and lead to specific issues that should be developed.

The plan can then move on to what formal discovery tools you will need and the order in which to deploy them. The order in which discovery tools are used needs to be planned for the most effective use.



Finding and Investigating Experts Using Online Resources:

Many resources are available online for finding and investigating expert witnesses. These resources can aid you in selecting an expert to help assess the strengths and weakness of your case. For example, helpful resources at *lexis.com* include:

- Legal tab > Area of Law--By Topic > Litigation > Legal Reference Materials > Forensic Services Directory



Sample Search: To find a California forensic expert in a given specialty, e.g., accident reconstruction, try this SPECIALTY segment search: *specialty (accident reconstruction) and ca.*

- To investigate the potential impact on a jury of an expert in California, search in Legal tab > States Legal--U.S. > California > Jury Instructions & Verdicts > Jury Verdicts and Settlements, Combined.



Sample Search: To investigate the impact of an orthopedics expert in Beverly Hills, try this CATEGORY segment search: *category (orthoped!) and beverly hills.*

- To find a given type of expert in the Los Angeles area, search in Legal tab > States Legal--U.S. > California > Jury Instructions & Verdicts > expert4law--The Legal Marketplace, LA County Bar Association Expert Witness Directory.



Sample Search: To find a given type of expert, e.g., a toxic torts expert, try this search: *toxic tort.*

- To find a given type of expert, e.g., a toxic torts expert, in the Los Angeles area, who has testified in a reported case, search in Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined.



Sample Search: To find a toxic torts expert, try this search: *toxic tort.*

1.08[4] Sequence of Discovery.

1.08[4][a] Methods of Discovery May Be Used in Any Sequence Absent Rule or Local Policy to Contrary.

Absent a Judicial Council rule, local court rule or local uniform written policy to the contrary, the methods of discovery may be used in any sequence. That a party is conducting discovery, whether by deposition or another method, does not operate to delay the discovery of any other party [CCP § 2019.020(a)].

However, in cases in which *Cal Rules Ct, Rule 3.721* requires a case management conference, the parties must meet and confer prior to the conference to address, among other things, resolving discovery disputes and setting a discovery schedule [*Cal Rules Ct, Rule 3.724* (covers general civil cases; exclusions include complex litigation)]. In complex litigation, the staging of discovery will usually be specifically laid out either by the court or by stipulation between the parties and reflected in the case management order [see *Cal Rules Ct, Rules 3.714(c), 3.400*].



Strategic Points:

Depositions are a fundamental tool in any discovery plan and are essential for counsel to learn about the case. To get the greatest value from them, however, you may benefit from using some other tools first to prepare for them. For example, when documents are going to be crucial evidence and provide the foundation for other discovery, as is usually true in business litigation, and often in other matters, including products liability, you will want to obtain the opposing parties' relevant documents before taking depositions of key witnesses so that you can question those witnesses regarding the content of the documents. To determine the existence and location of documents you can use form interrogatories [see, e.g., Judicial Council Form DISC-001, interrogatory nos. 15 and 50]. Alternatively, or in addition to the interrogatories, you may notice an early deposition of a corporate entity party or of a witness who you know has detailed knowledge of the opposing party's documents. Follow up with a *CCP* § 2031.010 demand to inspect documents allowing time to review them before noticing the deposition of the key witness.

Your plan may also call for propounding interrogatories early in the litigation to obtain the names of additional people with knowledge of relevant facts. Start with Judicial Council form interrogatories if possible because they do not count toward the limit of 35 interrogatories [*CCP* § 2030.030(a); see, e.g., Judicial Council Form DISC-001, interrogatory no. 12].

When suing a complex business entity, a plaintiff may want to use early interrogatories and/or requests for admissions to verify that the all appropriate entities have been brought into the action and that the subsidiary, parent, or affiliate with actual responsibility has not been overlooked.

You may be able to quickly establish some basic facts by requests for admissions. If done early in the process, this can allow you to focus discovery on the most important issues in the case.



Trap:

It is a good practice for the lawyer taking the deposition to make sure that documents requested in any outstanding request for production are produced before the deposition is opened. If a party has failed to produce responsive documents in response to a document production completed before the deposition is opened, the lawyer noticing the deposition may seek leave from the court to reopen the deposition if new issues are revealed by documents that should have been produced before the deposition was completed. Courts are more predisposed to grant a request to reopen a deposition for an opposing party's failure to produce documents if counsel reserves the right *on the record* to reopen the deposition in the event documents are untimely produced after the deposition is closed.



Cross References:

Checklists of common subjects of discovery by each party, see 1.05, 1.06.

Self-help, see 1.09.

1.08[4][b] Court May Establish Sequence and Timing on Motion and for Good Cause. On motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice [*CCP* § 2019.020(b)].

1.08[5] Balancing Requirements of Discovery With Need for Confidentiality or Nondisclosure.

1.08[5][a] Confidentiality of Trial Tactics. In analyzing a case for purposes of discovery planning and strategy,

counsel should take into account the degree to which his or her own trial materials and strategy will require confidentiality. This determination should be made as early in the pretrial process as possible.



Strategic Point:

Often it has been said that a party learns more from the questions that are asked than the answers that are received. Counsel should be conscious of the questions that are being asked whether it be by interrogatories, production requests, admissions or depositions.

Example--Interrogatory Concerning Contention May Invoke Work Product Protection:

Although the Civil Discovery Act allows a party to propound an interrogatory that relates to whether another party is making a certain contention, to the facts, witnesses, and writings on which a contention is based, or to the application of fact to law, discovery of this type may raise the question of the proper borderline between attorney work product protection under *CCP* § 2018.030 and allowable contention interrogatories [see *CCP* § 2030.010(b); *Rifkind v. Superior Court* (1994) 22 CA4th 1255, 1261, 27 CR2d 822 (legal contentions are proper subject of contention interrogatories not deposition questions); *Catanese v. Superior Court* (1996) 46 CA4th 1159, 1163, 54 CR2d 280 (contention interrogatories which require counsel to analyze volumes of deposition testimony and other evidence and provide their impressions, conclusions and opinions regarding the evidence may violate work product doctrine)].



Cross References:

Discussion of work product protection, see *Ch. 2, Scope of Discovery*, 2.25 et seq.

Discussion of contention interrogatories, see *Ch. 9, Interrogatories*, 9.05.

1.08[5][b] Party Must Assert Objections Based on Privilege and Avoid Waiver. Discovery is not permitted of privileged matters [see *CCP* § 2017.010]. A party must assert an objection to a discovery request that involves privileged matters, and further assure that he or she does not waive that privilege by inadvertent disclosure or other conduct.



Cross References:

See 1.11.

See also *Ch. 2, Scope of Discovery*.

1.08[5][c] In Action Involving Trade-Secret Misappropriation, Party Must Identify Trade Secret. In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (*CC* §§ 3426-3426.11), before commencing discovery relating to the trade secret, the party alleging the misappropriation must identify the trade secret with reasonable particularity, subject to any orders that may be appropriate under *CC* § 3426.5 [*CCP* § 2019.210]. *CC* § 3426.5 calls for the court to preserve the secrecy of alleged trade secrets by reasonable means, including:

- Protective orders.
- In camera hearings.
- Sealing records.
- Ordering persons involved in the litigation not to disclose an alleged secret without prior court

approval.

The trade secret designation is to be liberally construed, and reasonable doubts regarding its adequacy are to be resolved in favor of allowing discovery to go forward [*Brescia v. Angelin* (2009) 172 CA4th 133, 152, 90 CR3d 842 (trade secret designation that listed product's ingredients by name and percentage and particularly described each step in the mixing, testing, and code marking of the product was adequate); compare *Perlan Therapeutics, Inc. v. Superior Court* (2009) 178 CA4th 1333, 1352, 101 CR3d 211 (trade secret statement was insufficient because it lacked clarity, did not clearly explain how secrets differed from publicly available knowledge, included a large amount of surplusage such as legal objections, factual allegations, and reservations of right, and referenced hundreds of pages of extra documents)].

Strategic Point:



Plaintiffs generally try to avoid "precise and complete identification of the alleged trade secrets," and rather wish to prove "high-level generic categories" as a matter of strategy, because (1) they do not want to be "boxed in" and provide a statement that is too narrow to cover all of the trade secrets that may have been misappropriated, and (2) they do not want to further educate the defendant, "who plaintiff fears, is improperly (but hopefully imperfectly) using the plaintiff's trade secrets" [*Perlan Therapeutics, Inc. v. Superior Court* (2009) 178 CA4th 1333, 1344 n.8, 101 CR3d 211] .

If all causes of action are based on an alleged misappropriation of trade secrets, CCP § 2019.210 applies to the entire action, not only to the cause of action under the Uniform Trade Secrets Act. No discovery on any cause of action may take place until the allegedly misappropriated trade secrets have been identified with reasonable particularity, as required by CCP § 2019.210 [*Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 CA4th 826, 834-835].



Cross Reference:

Discussion/forms relating to actions based on trade secrets, see Matthew Bender[(R)] Practice Guide: California Unfair Competition and Business Torts, Ch. 8, Trade Secrets.

1.08[5][d] Balance Between Gathering Information and Giving Away Tactics. Before establishing a plan of discovery or responding to requests for discovery, counsel should be aware of the possibility of inadvertently giving away trial tactics.

Strategic Point:



Asking questions in direct sequence is not always advisable. Direct sequence questioning gives away the case, gets you less candid answers, and does not always help you at trial. Sometimes the best question is one that merely authenticates the document with damaging evidence, does not question the witness extensively and allows counsel to ask the witness to explain the damaging aspects of the document at trial, or to argue the damaging aspects of the document to the jury.

1.08[5][e] Sharing of Discovery With Aligned Parties or Parties in Similar Cases. In some cases, e.g., product liability cases based on design defect, the court may allow shared discovery of otherwise confidential information with counsel in similar pending litigation, subject to agreements that all parties concerned maintain the confidentiality of the information.

Example:

In a personal injury case involving a forklift manufactured by defendant, the defendant produced confidential documents under an interim agreement with the plaintiff that allowed the defendant to move for a protective order to prohibit plaintiff's counsel from sharing the information with counsel in other

cases against the defendant. The court issued a protective order on the ground that certain documents would reveal defendant's trade secrets; but allowed plaintiff's counsel to share the information with other counsel in similar pending litigation provided that other counsel complied with the confidentiality terms of the protective order. The order also required plaintiff's counsel to inform the court when it disclosed that information [*Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 CA4th 584, 590, 45 CR2d 885 (upholding order)].



Warning:

Before disclosing information to counsel for an aligned party, consider whether the disclosure of privileged information will result in a waiver of the attorney-client privilege. California does not recognize a "joint defense privilege" as such, since that term could suggest that communications between parties with a common interest could be protected from disclosure separate from the attorney-client privilege. Instead, the party asserting the protection of the "common interest doctrine" must establish the existence of the attorney-client privilege and that the disclosure did not waive the privilege [*Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 890]. Sharing privileged information with aligned parties will waive the attorney-client privilege unless there was a reasonable expectation the communication would be maintained in confidence, and the disclosure was reasonably necessary for the purpose for which attorneys were consulted [*Evid Code* § 912(d); *Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 889-891 ; *Raytheon Co. v. Superior Court* (1989) 208 CA3d 683, 687, 256 CR 425 ; *Insurance Co. of N. Am. v. Superior Court* (1980) 108 CA3d 758, 765-766, 166 CR 880 ; *Cooke v. Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915]. Counsel should be particularly careful when sharing otherwise privileged information with parties who have both common interests and adversarial interests. Courts may require an in camera review to determine whether the contents of the involved documents involve adversarial interests so that the disclosure constituted a waiver of the privilege. A "joint defense agreement" alone does not establish that any information or documents exchanged between the parties to the agreement are a matter of common interest or that they are privileged, instead it only "evidences an expectation of confidentiality necessary to avoid waiver by disclosure to someone outside the attorney-client relationship" [*Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 894]. Similarly, work product protection may be waived by the attorney's disclosure or consent to disclosure to someone other than the client who has no interest in maintaining the confidentiality of the work product [*McKesson HBOC, Inc. v. Superior Court* (2004) 115 CA4th 1229, 1238-1239 ; *Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 891 ; *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 CA4th 201, 214, 91 CR2d 716, 990 P2d 591].



Cross Reference:

Waiver of attorney-client privilege, see 2.14.

Waiver of work product protection, see 2.32.

1.08[6] Discovery Act Applies to Most Civil Litigation.

1.08[6][a] Discovery Act Applies to Civil Actions and Special Proceedings of Civil Nature. The Civil Discovery Act (*CCP* § 2016.010 *et seq.*) applies to civil actions and special proceedings of a civil nature [see *CCP* § 2016.020(a)]. This includes limited civil cases to the extent permitted by *CCP* §§ 94 and 95, which restrict the amount of discovery that can be conducted.



Cross Reference:

Discussion of limited civil cases, see 1.08[6][c].

1.08[6][b] Discovery Act Applies to Cases Tried Under Trial Court Delay Reduction Act. The Civil Discovery Act applies to cases subject to the Trial Court Delay Reduction Act (*Gov Code § 68600 et seq.*), except in arbitration proceedings [*see Gov Code § 68616(f)*].

 Cross Reference:

Discussion of Trial Court Delay Reduction Act, see 1.17[2][c].

1.08[6][c] Discovery Act Applies to Limited Civil Cases, Subject to Restrictions on Number of Requests to Opposing Party. In a limited civil case, discovery under the Civil Discovery Act is permitted to the extent provided in *CCP § 94* and *95* [*CCP § 94*]. Discovery must comply with the notice and format requirements of the particular method of discovery, as provided in *CCP § 2016.010 et seq.* [*CCP § 94*].

In a limited civil case, a party may use any combination of 35 of the following forms of discovery as to each adverse party [*CCP § 94(a)*]:

- Interrogatories (with no subparts) under *CCP § 2030.010 et seq.*
- Demands to produce documents or things under *CCP § 2031.010 et seq.*
- Requests for admission (with no subparts) under *CCP § 2033.010 et seq.*

A party also may take one oral or written deposition of each adverse party. A deposition of an organization is treated as a single deposition even though more than one person may be designated or required to testify pursuant to *CCP § 2025.230* [*CCP § 94(b)*]. A party may obtain documents by serving a subpoena duces tecum, seek physical and mental examinations under *CCP § 2032.010 et seq.* and seek expert witness discovery under *CCP § 2034.010 et seq.* [*CCP § 94(c), (d), (e)*].

The parties may stipulate to additional discovery or any party may, on noticed motion, obtain a court order authorizing additional written discovery or depositions in a limited civil case [*CCP § 95(b)*]. To obtain a court order for additional discovery, the moving party must show that they will be unable to prosecute or defend the action effectively without the additional discovery [*CCP § 95(a)*].

 Cross References:

Definition of limited civil case, see 1.13. Additional discovery under *CCP § 95*, see 1.13[4].

1.08[6][d] Certain Provisions of Discovery Act Apply to Enforcement of Money Judgment. The Civil Discovery Act applies to the enforcement of a money judgment to allow [*see CCP § 2016.070*]:

- Written interrogatories to the judgment debtor [*CCP § 708.020*].
- Requests for inspection of documents [*CCP § 708.030*].

 Cross References:

Discussion and forms, see Ch. 9, Interrogatories, and Ch. 10, Inspection of Documents, Tangible Things, and Land.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase

ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesTrade Secrets LawCivil ActionsIn Camera
InspectionsTrade Secrets LawCivil ActionsProtection Orders



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1.09 Self-Help and Non-Discovery Investigation Are Essential.

1.09[1] Use of Formal Discovery Devices Is Optional. The Civil Discovery Act does not prevent a party from conducting a unilateral investigation without resort to statutory discovery devices, provided the investigation is lawful [*Pullin v. Superior Court* (2000) 81 CA4th 1161, 1162, 97 CR2d 447].

If opposing counsel is concerned about how a test was conducted or some illegality in an investigator's conduct, the issue may be raised by in limine motion to exclude the evidence on an appropriate ground [*Pullin v. Superior Court* (2000) 81 CA4th 1161, 1165, 97 CR2d 447].



Warning:

Courts have refused to permit self-help discovery that violates ownership or privacy interests and is not justified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes [see, e.g., *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 CA4th 1279, 1289, 64 CR2d 698 (attorney representing employees of defendant in employment law case required to return confidential personnel documents removed from defendant's offices without its consent)].

1.09[2] Interviews and Investigations.

1.09[2][a] Investigations May Be Used Prior to or in Conjunction With Formal Discovery. In some situations, a party may use investigative techniques prior to or in conjunction with formal discovery methods. For example, property open to the public may be examined without following the requirements of *CCP* §§ 2031.010-2031.060, provided that the examination can be conducted in a lawful fashion [*Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447 (interpreting former *CCP* § 2031)].

Example:

In a slip and fall case involving defendant's grocery store, after defense counsel refused to allow plaintiff's expert to test the floor, the expert went to the store during business hours, conducted the test, purchased an item, and left. The trial court excluded the test results from evidence. The court of appeal reversed, endorsing the appropriate use of investigation rather than formal discovery in general and the

inspection of premises open to the public in particular. The expert had not violated any law in entering the premises and conducting the test, which caused no damage to defendant's property [*Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447].

1.09[2][b] Interviews May Uncover Useful Information. Interviews with relevant persons are useful tools for obtaining information that may be used either at trial, e.g., through the use of that person as a witness, or as a basis for discovery requests for further information.

Informal interviews with, for example, witnesses to motor vehicle collisions, former "noncontrol group" employees, and other percipient witnesses is critical in gathering information to prepare a case for trial. One advantage that a plaintiff is said to enjoy is the ability to conduct early informal discovery before the defendant even realizes a lawsuit will be brought.

Strategic Point:



Always place witness statements in the form of an attorney memorandum to maintain the protection of the attorney work product doctrine [see *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 54 CR2d 575 (list of witnesses interviewed and interview notes are protected; statements independently prepared by witnesses and given to attorney are not protected)]. Although the witness statements contained in the notes are not protected, if those statements are intertwined with the attorney's protected impressions, conclusions, opinions, legal research or theories, the entirety of the notes will be protected [see *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647-648, 151 CR 399 ; see also CCP § 2018.030]. Note that as of June 2010, the California Supreme Court has granted review in *Coito v. Superior Court* (2010) 182 CA4th 758, 106 CR3d 342 , rev. granted 2010 Cal. LEXIS 5133 (Cal. June 9, 2010) , in which the court of appeal had held that witness statements were not protected as work product, creating a split of authority with *Nacht & Lewis v. Superior Court* (1996) 47 CA4th 214, 52 CR2d 575 .

Interviews may be conducted by investigators. An investigator's observations concerning a witness are entitled to work product protection [see *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647-648, 151 CR 399].

1.09[2][c] Obtaining Documents and Information Through Internet and Other Public Information. In some situations a party may obtain documents and other information by means of an Internet search [see *Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447].

Strategic Point:



The Internet is often an extremely valuable source of informal discovery. Parties should always attempt to identify if the opposing party has a web site and what information is contained online. Additionally, if the case is newsworthy, television stations, newspapers and other electronic media often have valuable information which can be available to the trial lawyer.

There is a treasure trove of information available online. Everything from statements made online through web sites to public filings with the Securities and Exchange Commission. Simply using a word search using, for example, the last name of one of the parties could help identify statements made either online or to the media relative to the facts or circumstances of the future or pending litigation. Representations made by the opposing party online or in public filings available online may be retrieved, and may turn up statements that are significantly inconsistent with the positions the party has taken in the litigation.

1.09[2][d] Obtaining Documents From Cooperative Third Party. In some situations a party may obtain documents in a case without the other party's cooperation, for example, from a friendly third party [see *500 Motors, Inc. v. Superior Court* (1981) 122 CA3d 827, 829 n1, 176 CR 349 (opportunity for formal discovery not needed when investigation could retrieve relevant public documents); see also *Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447 (citing *500 Motors, Inc.* in noting scant authority on the distinction between formal discovery and investigation, with everyone apparently assuming that everyone else knows the difference)].

In most instances, however, a party's right to inspect documents or other physical evidence in the possession or custody of the opposing party depends on compliance with the procedures set out in CCP §§ 2031.010-2031.060 [*Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164, 97 CR2d 447] .

1.09[2][e] Obtaining Documents Pursuant to Public Records Act. A person may obtain copies of public records by following the procedures set forth in the Public Records Act (*Gov Code § 6250 et seq.*) [see *Pullin v. Superior Court* (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447] .

Public records are open to inspection at all times during the office hours of the state or local agency. Every person has a right to inspect any public record in accordance with the provisions of the Public Records Act provided. Any reasonably segregable portion of a record must be made available for inspection by any person requesting the record after deletion of the portions that are exempted by law [*Gov Code § 6253(a)*].

Except with respect to exempt public records, each state or local agency, on a request for a copy of records that reasonably describes identifiable records, must make the records promptly available to any person on payment of fees covering direct costs of duplication, or a statutory fee if applicable. On request, an exact copy must be provided unless impracticable to do so [*Gov Code § 6253(b)*].



Cross Reference:

Discussion and forms, see California Forms of Pleading and Practice, Ch. 470C, Public Records Act (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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1.10 Party May Waive Right to Compel Arbitration by Engaging in Discovery.

1.10[1] Conduct in Litigation Before Demanding Arbitration May Waive Right to Arbitration. A party entitled to demand contractual arbitration pursuant to *CCP § 1280 et seq.* may waive the right to arbitration by engaging in a course of litigation conduct inconsistent with the right to arbitrate, including engaging in discovery procedures before asserting the right to arbitration. In determining waiver, a court can consider the following factors [*Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43]:

- Whether the party's actions are inconsistent with the right to arbitrate.
- Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate.
- Whether a party either requested arbitration enforcement close to the trial date or delayed the request for a long period before seeking a stay of the proceedings.
- Whether a defendant seeking arbitration filed a counterclaim without asking for a stay.
- Whether important intervening steps, e.g., taking advantage of judicial discovery procedures not available in arbitration, had taken place.
- Whether the delay affected, misled, or prejudiced the opposing party.



Warning:

Merely raising the right to arbitrate as an affirmative defense may not be adequate to avoid waiver of that right. If the party proceeds to actively litigate the case, waiver can be found [*Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992, 72 CR2d 43 (overturning order compelling arbitration)].

Example:

A defendant bank's actions were inconsistent with its right to compel arbitration when, although it raised

its election to arbitrate as an affirmative defense, it did not otherwise raise the issue until the motion to compel arbitration 10 months after service of the complaint, and six weeks prior to trial. In the meantime the bank actively litigated the case (including filing two demurrers, a motion to transfer the case to the municipal court, and a cross complaint, participating in five court hearings and engaging in extensive discovery) and never objected to the court's setting a trial date or to the discovery propounded by the plaintiffs on grounds of arbitration.



Cross Reference:

Discussion, see *California Forms of Pleading and Practice*, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.25 (Matthew Bender).

1.10[2] Party Seeking to Establish Waiver Must Show Prejudice. The party who seeks to establish waiver of the right to demand contractual arbitration under *CCP* § 1280 *et seq.* must show that some prejudice has resulted from the other party's delay in seeking arbitration [see *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 995, 72 CR2d 43].

Prejudice may be found in the disclosure of defenses and strategies when a defendant uses discovery processes to gain information about plaintiff's case which defendants could not have gained in arbitration, and then belatedly seeks to compel arbitration, where plaintiff would not have equivalent discovery rights [*Sobremonte v. Superior Court* (1998) 61 CA4th 980, 996, 72 CR2d 43 ; *Davis v. Continental Airlines, Inc.* (1997) 59 CA4th 205, 215, 69 CR2d 79].

A party is also prejudiced by incurring attorney fees and costs for conducting discovery and making and opposing motions, as well as by losing any benefits of arbitration as an expedient, efficient and cost-effective method to resolve disputes [*Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992-998, 72 CR2d 43].

The party asserting waiver should describe all the circumstances surrounding the opposing party's behavior over a period of time, in addition to participating in discovery proceedings, that cumulatively indicate a waiver [see *Sobremonte v. Superior Court* (1998) 61 CA4th 980, 992-998, 72 CR2d 43]. When determining whether the other party has been prejudiced, the court may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process [*Sobremonte v. Superior Court* (1998) 61 CA4th 980, 995, 72 CR2d 43].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsWaivers



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1.11 Discoverable Matters.

1.11[1] Discoverable Matters Must Be Relevant and Not Privileged. Unless otherwise limited by order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence [*CCP* § 2017.010; see, e.g., *Schnabel v. Superior Court* (1993) 5 C4th 704, 711, 723, 21 CR2d 200, 854 P2d 1117 (in marital dissolution case, trial court and appellate court properly compelled corporation to produce its business records, its corporate tax returns, and quarterly payroll tax returns regarding spouse, but not payroll tax information identifying third persons)].

► **Cross Reference:**

Discussion, see Ch. 2, Scope of Discovery.

1.11[2] Discovery May Relate to Claim or Defense. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action [*CCP* § 2017.010].

1.11[3] Party May Discover Location of Persons With Knowledge of Discoverable Matter, and Existence and Nature of Documents, Other Property, and Land. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property [*CCP* § 2017.010].

1.11[4] Discovery of Insurance Policies.

1.11[4][a] Party May Discover Information About Insurance Policy That May Cover Judgment. A party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. This discovery may include the identity of the carrier and the nature and limits of the coverage [*CCP* § 2017.210; see *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 CA4th 579, 597-598, 40 CR3d 446] .

1.11[4][b] Party May Discover Existence of Dispute About Coverage. A party may obtain discovery as to whether an insurance carrier that may be liable to satisfy a judgment is disputing the agreement's coverage of the claim involved in the action, but not as to the nature and substance of that dispute [*CCP* § 2017.210].

1.11[4][c] Discovery of Insurance Information Does Not Make It Admissible at Trial. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial [*CCP* § 2017.210; *see CC* § 3333.1 (collateral source rule); *Evid Code* § 1155 (proof of liability insurance not admissible to prove negligence or wrongdoing)].

1.11[5] Information About Plaintiff's Sexual Conduct in Action Alleging Sexual Harassment Is Discoverable on Showing of Cause and Relevance.

1.11[5][a] Party Seeking Discovery Must Show Good Cause and Relevance. In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence [*CCP* § 2017.220(a)].

1.11[5][b] Noticed Motion and Good-Faith Declaration Required. The showing for discovery of the plaintiff's sexual conduct under *CCP* § 2017.220(a) must be made by noticed motion accompanied by a declaration showing a reasonable and goodfaith attempt at an informal resolution of each issue presented by the motion [*CCP* §§ 2016.040, 2017.220(a)].

1.11[5][c] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for sexual conduct discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2017.220(b)].



Cross Reference:

Monetary sanctions, *see* Ch. 3, Sanctions.

1.11[6] Plaintiff May Not Discover Defendant's Financial Condition to Prove Punitive Damages.

1.11[6][a] Plaintiff May Not Obtain Pretrial Discovery of Defendant's Financial Condition to Prove Punitive Damages Without Court Order. A plaintiff seeking punitive damages may not obtain pretrial discovery of a defendant's financial condition without a court order [*CC* § 3295(c)]. *CC* § 3295(c) prevents "fishing expeditions" by a plaintiff by allowing the court to grant a protective order requiring the plaintiff to establish a prima facie right to recover punitive damages before any evidence of defendant's net worth may be introduced. Plaintiff may then require the defendant to identify documents that may be admissible (not merely relevant) and provide a list of witnesses who may be competent to testify about defendant's financial condition [*Rawnsley v. Superior Court* (1986) 183 CA3d 86, 91, 227 CR 806].

1.11[6][b] Plaintiff May Discover Financial Matters That Are Fundamental to Plaintiff's Case. The restrictions on discovery under *CC* § 3295(c) do not apply when plaintiff seeks to discover matters that are fundamental to his or her case, by contrast to matters relating to defendant's financial status solely for the purpose of assessing a punitive damages claim [*Rawnsley v. Superior Court* (1986) 183 CA3d 86, 91-92, 227 CR 806 (financial information discoverable where sought to show wrongful conversion and diversion of assets)].



Cross Reference:

Discussion of protective order re punitive damages evidence, *see* California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryRelevanceCivil
ProcedureRemediesDamagesPunitive Damages



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1.12 Specific Discovery Methods and When Parties May Begin to Use Them.

1.12[1] Formal Methods of Discovery From a Party Are Depositions, Interrogatories, Inspections, Examinations, Requests for Admissions, and Exchange of Expert-Witness Lists. Any party may obtain discovery from another party without leave of court by one or more of the following methods [*CCP § 2019.010*]:

- Oral and written depositions.
- Interrogatories to a party.
- Inspections of documents, things, and places.
- Physical and mental examinations.
- Requests for admissions.
- Simultaneous exchange of expert trial witness information.

1.12[2] Oral and Written Depositions.

1.12[2][a] Plaintiff May Serve Deposition Notice 20 Days After Service on or Appearance by Defendant. A plaintiff may obtain discovery by taking oral depositions after serving a deposition notice, 20 days after service of the summons on, or appearance by, any defendant [*CCP § 2025.210(b)*].

Exception:

At any earlier time for good cause with leave of court [*CCP § 2025.210(b)*].



Cross References:

Checklists, discussion, and forms, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California.

Timing of depositions in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][b].

1.12[2][b] Defendant May Serve Deposition Notice After Being Served or Appearing. A defendant may obtain discovery by taking oral depositions after serving a deposition notice at any time after the earlier of the time the defendant is served with summons or appears in the action [see *CCP* § 2025.210(a)].

➤ **Cross References:**

Checklists, discussion, and forms, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California.

1.12[2][c] Written Depositions Follow Same Rules. Either party may take a deposition by written questions under the same rules as for oral depositions except as modified by *CCP* § 2028.010 *et seq.* [*CCP* § 2028.010].

➤ **Cross Reference:**

Checklists, discussion and forms, see Ch. 8, Depositions on Written Questions.

1.12[3] Written Interrogatories to a Party.

1.12[3][a] Plaintiff Generally May Propound Interrogatories to Party 10 Days After Summons Served or Party Makes Appearance. A plaintiff may propound interrogatories to a party at any time that is 10 days after the service of the summons on, or appearance by, that party, whichever occurs first [*CCP* § 2030.020(b)].

Exceptions:

Five days in unlawful detainer or forcible entry or detainer actions [*CCP* § 2030.020(c)].

In any case, at any earlier time for good cause with leave of court [*CCP* § 2030.020(d)].

➤ **Cross Reference:**

Timing of interrogatories in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][a].

1.12[3][b] Defendant May Propound Interrogatories to Party at Any Time. A defendant may propound interrogatories to a party to the action without leave of court at any time [*CCP* § 2030.020(a)].

➤ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 9, Interrogatories.

1.12[4] Inspections of Documents, Things, and Places.

1.12[4][a] Plaintiff Generally May Serve Demand for Inspection 10 Days After Service on, or Appearance by Party to Whom Demand Is Directed. A plaintiff may make a demand for inspection of documents, tangible things, and land or other property that are in the possession, custody, or control of any other party to the action, at any time that is 10 days after the service of summons on, or appearance by, that party, whichever occurs first [*CCP* § 2031.020(b)].

Exceptions:

Five days in unlawful detainer and forcible entry or detainer actions [*CCP* § 2031.020(c)].

In any case, at any earlier time for good cause with leave of court [*CCP* § 2031.020(d)].

➤ **Cross Reference:**

Timing of inspection demand in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][c].

1.12[4][b] Defendant May Demand Inspection at Any Time. A defendant may make a demand for inspection of documents, tangible things, and land or other property without leave of court at any time [CCP § 2031.020(a)].

➡ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 10, Inspection of Documents, Tangible Things, and Land.

1.12[5] Defendant May Demand Physical Examination of Plaintiff in Personal Injury Case After Service or Appearance. In a personal injury case, any defendant may demand an appropriate physical examination of the plaintiff after he or she has been served or has appeared in the action, whichever occurs first [see CCP § 2032.220(b)].

➡ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 11, Physical and Mental Examinations.

1.12[6] Requests for Admissions.

1.12[6][a] Plaintiff Generally May Make Requests 10 Days After Summons Served or Party Makes Appearance. A plaintiff may make requests for admission by a party at any time that is 10 days after the service of the summons on, or appearance by, that party, whichever occurs first [CCP § 2033.020(b)].

Exceptions:

- Five days in unlawful detainer and forcible entry or detainer actions [CCP § 2033.020(c)].
- In any case, at any earlier time for good cause with leave of court [CCP § 2033.020(d)].

➡ **Cross Reference:**

Timing of requests for admission in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][d].

1.12[6][b] Defendant May Make Requests at Any Time. A defendant may make requests for admission by a party at any time [CCP § 2033.020(a)].

➡ **Cross Reference:**

Checklists, discussion, and forms, see Ch. 12, Requests for Admissions.

1.12[7] Parties May Demand Simultaneous Exchange of Expert Trial Witness Information Prior to 10th Day After Trial Date Setting or 70 Days Before Trial Date. After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses [see CCP § 2034.210]. A party must make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date [CCP § 2034.220].

➡ **Cross Reference:**

Checklists, discussion, including strategy on timing, and forms, see Ch. 13, Exchanging Expert Witness Information.

1.12[8] Specific Methods of Discovery From a Nonparty.

1.12[8][a] Formal Methods of Discovery Within California From Nonparty Are Oral Depositions, Written Depositions, and Depositions for Production of Business Records and Things. The methods for obtaining discovery within California from a nonparty to the action are the following [*CCP* § 2020.010(a)]:

- Oral depositions under *CCP* § 2025.010 *et seq.*
- Written depositions under *CCP* § 2028.010 *et seq.*
- Depositions for productions of business records and things under *CCP* §§ 2020.410-2020.510.



Cross Reference:

Checklists, discussion and forms, see Ch. 6, Oral Depositions in California.

1.12[8][b] Party May Take Oral Depositions Outside California From Nonparty, Pursuant to Applicable Procedures. A party may take a deposition in another state of a nonparty by complying with the procedures in *CCP* § 2026.010 and in the foreign jurisdiction [*CCP* § 2026.010].

A party may take a deposition in a foreign nation of a nonparty by complying with the procedures in *CCP* § 2027.010 and in the foreign nation [*CCP* § 2027.010].



Cross Reference:

Checklists, discussion and forms, see Ch. 7, Oral Depositions Outside of California.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil
 ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical
 ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for
 Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions



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1.13 Amount of Discovery Available in Limited Civil Cases Is More Restricted Than in Unlimited Civil Cases.

1.13[1] Unlimited and Limited Civil Cases Are Distinguished by Amount in Controversy and Types of Relief Available. A civil action or proceeding is an unlimited civil case unless it is a limited civil case [CCP § 88]. Limited civil cases are generally those in which the demand, exclusive of interest, or the value of the property in controversy is \$25,000 or less [see CCP §§ 85 and 86]. The following types of relief cannot be obtained in a limited civil case [CCP § 580(b)]:

- Relief exceeding \$25,000, exclusive of attorney's fees, interest, and costs.
- A permanent injunction, except as otherwise authorized by statute.
- A determination of title to real property.
- Declaratory relief, except as authorized by CCP § 86(a)(7).

► **Cross Reference:**

Detailed discussion of what constitutes a limited civil case, see *California Forms of Pleading and Practice*, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*, § 324.62 (Matthew Bender).

1.13[2] Discovery in Unlimited Civil Case Is Subject to General Restriction on Unreasonably Cumulative or Unduly Burdensome Requests. The amount or method of discovery permitted by any party is generally subject to restrictions concerning reasonableness, convenience, burden, and expense [see CCP § 2019.030(a); *People v. Superior Court (Cheek)* (2001) 94 CA4th 980, 992, 114 CR2d 760 (decided under former CCP § 2019(b))]. A party that makes discovery requests exceeding these restrictions is subject to prohibitions or limitations on discovery pursuant to a protective order [see CCP § 2019.030(b)].

► **Cross Reference:**

Discussion of protective order to limit discovery, see 1.16[1].

1.13[3] Discovery in Limited Civil Case Is Restricted to 35 Total Requests for Interrogatories, Admissions, and Production From Each Adverse Party Under Economic Litigation Procedures. Most limited civil cases are subject to the *CCP* §§ 90-100 procedures for economic litigation [see *CCP* §§ 90, 91 (excluding small claims and unlawful detainer, forcible entry, and forcible detainer)]. In a limited civil case subject to the economic litigation procedures, a party may use any combination of 35 of the following forms of discovery as to each adverse party [*CCP* § 94(a)]:

- Interrogatories (with no subparts) under *CCP* § 2030.010 et seq.
- Demands to produce documents or things under *CCP* § 2031.010 et seq.
- Requests for admission (with no subparts) under *CCP* § 2033.010 et seq.

A party also may take one oral or written deposition of each adverse party. A deposition of an organization is treated as a single deposition even though more than one person may be designated or required to testify pursuant to *CCP* § 2025.230 [*CCP* § 94(b)]. A party may obtain documents by serving a subpoena duces tecum, seek physical and mental examinations under *CCP* § 2032.010 et seq. and seek expert witness discovery under *CCP* § 2034.010 et seq. [*CCP* § 94(c), (d), (e)].

1.13[4] Additional Discovery May Be Available in Limited Civil Case by Stipulation or Motion.

1.13[4][a] Parties May Stipulate to Additional Discovery. The parties in a limited civil case may stipulate to additional discovery [*CCP* § 95(b)].

1.13[4][b] Parties May Move for Additional Discovery on Showing of Necessity. The court may, on noticed motion and subject to terms and conditions that are just, authorize a party to conduct additional discovery, but only on a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery [*CCP* § 95(a)].

Prerequisite:

The court will consider whether the moving party has used all available discovery tools in good faith, and whether the party has attempted to secure the additional discovery by stipulation or by means other than formal discovery [*CCP* § 95(a)].



Cross Reference:

Forms, see 1.20 (motion), 1.21 (order).

1.13[5] Case May Be Withdrawn From Economic Litigation Restrictions. A party may move by noticed motion to withdraw a case from the economic litigation procedures. The party must show that it is impractical to prosecute or defend the action within the limitation of those procedures [*CCP* § 91(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral Overview



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1.14 Request for Statement Identifying Witnesses and Evidence in Limited Civil Case.

1.14[1] Request Precludes Use of Undisclosed Evidence. In a limited civil case under the economic litigation procedures, any party may require another party to reveal witnesses and evidence to be offered at trial by serving a request for that information [*see CCP § 96(a)*]. The information to be revealed is [*see CCP § 96(a)*]:

- The name and address of witnesses, other than individual parties, intended to be called at trial.
- A description of physical evidence intended to be offered.
- A description and copies of any documentary evidence intended to be offered, or just a description if the document is not available.

Witnesses and evidence to be used only for impeachment need not be disclosed [*CCP § 96(a)*].



Warning:

The responding party cannot call any witness or introduce any evidence not included in their response, except as otherwise provided by law [*CCP § 96(a)*; *see Thoren v. Johnston & Washer (1972) 29 CA3d 270, 272-275, 105 CR 276*].

The request must be made on the mandatory Judicial Council Form DISC-015.



Cross Reference:

Form, *see* 1.22.

1.14[2] Time for Serving Request and Response. A party serving the request must do so no more than 45 days or less than 30 days prior to the date first set for trial [*CCP § 96(b)*].

The responding party must serve the response within 20 days from the service of the request [*CCP § 96(c)*].

The time for serving and responding is computed as provided by law, including the extensions in *CCP* § 1013 based on the manner of service [*see CCP* § 96(*g*)].

No request or statement is to be filed with the court unless otherwise ordered [*CCP* § 96(*e*)].

1.14[3] Additional, Amended or Late Statement Requires Stipulation or Motion. No party may serve an additional, amended, or late statement except by written stipulation or unless ordered for good cause on a noticed motion [*CCP* § 96(*d*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory Disclosures



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II. DEVELOPING A DISCOVERY PLAN

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1.15 Protective Order to Limit Scope of Discovery.

1.15[1] Party or Other Affected Person May Move to Limit of Scope of Discovery Based on Undue Burden, Expense, or Intrusiveness. A party or other affected person may move for a protective order to limit the scope of discovery on the ground the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence [CCP § 2017.020(a)].

Prerequisite:

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [CCP §§ 2016.040, 2017.020(a)].

 Cross References:

Forms, see 1.23 (motion), 1.24 (order).

Discussion of protective orders related to specific discovery tools, see *Ch. 6, Oral Depositions in California*, 6.28; *Ch. 9, Interrogatories*, 9.19; *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.24; *Ch. 12, Requests for Admissions*, 12.26; and *Ch. 13, Exchanging Expert Witness Information*, 13.15.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing*, § 80.100 (Matthew Bender).

1.15[2] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions. Monetary sanctions are mandatory under CCP § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2017.020(b)].

 Warning:

Make a serious effort to resolve discovery disputes informally. Even if you are the successful party, discovery motions are expensive and courts rarely award a party the full amount of the attorneys' fees the

party incurs in connection with a discovery motion. Courts are very reluctant to award discovery sanctions against counsel in excess of the amount which must be reported to the State Bar, \$1000 [see *B&P Code* §§ 6068(o)(3), 6086.7(a)(3), (c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders



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1.16 Protective Order to Restrict Frequency or Extent of Discovery.

1.16[1] Party or Other Affected Person May Move to Restrict Cumulative, Duplicative or Unduly Burdensome or Expensive Discovery. A party or other affected person may move for a protective order to restrict the frequency or extent of use of allowable discovery methods on either of the following grounds:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive [CCP § 2019.030(a)(1)].
- The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation [CCP § 2019.030(a)(2)].

Distinguish:

The fact that a party already has evidence that it believes proves a disputed issue does not in itself make discovery seeking additional evidence on that same issue unreasonably cumulative or duplicative [*City of King City v. Community Bank of Cent. Cal.* (2005) 131 CA4th 913, 933].

Prerequisite:

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [CCP §§ 2016.040, 2019.030(b)].

➡ **Cross References:**

Forms, see 1.23 (motion), 1.24 (order).

Discussion of protective orders related to specific discovery tools, see *Ch. 6, Oral Depositions in California*, 6.28; *Ch. 9, Interrogatories*, 9.19; *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.24; *Ch. 12, Requests for Admissions*, 12.26; and *Ch. 13, Exchanging Expert Witness Information*, 13.15.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.100 (Matthew Bender)*.

1.16[2] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions. Monetary sanctions are mandatory under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2019.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders



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1.17 Discovery Cut-Off Dates.

1.17[1] Date Discovery and Discovery Motions Must End Is Based on Trial Date.

1.17[1][a] Discovery Cut-Off Date Is Generally 30 Days Before Initial Trial Date. The parties must complete discovery proceedings on or before the 30th day before the date initially set for the trial of the action [CCP § 2024.020].

Exceptions:

- Cases ordered to judicial arbitration: cut-off is 15 days before the date set for the arbitration hearing [CCP § 2024.040(a); Cal Rules Ct, Rule 3.822(b)].
- Unlawful detainer, forcible entry, or forcible detainer of real property: cut-off is five days before the date set for trial [CCP § 2024.040(b)].
- Eminent domain: cut-off is 20 days before the date set for trial [CCP §§ 1258.020(a), 2024.040(b)].

► Cross Reference:

Timing of discovery in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23.

1.17[1][b] Cut-Off Date for Hearing Discovery Motions Is Generally 15 Days Before Initial Trial Date.

Motions concerning discovery disputes must be heard on or before the 15th day before the date initially set for the trial of the action [CCP § 2024.020; see *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 CA4th 1568, 1571, 82 CR3d 64* (trial court abused its discretion in granting motion to compel after discovery motion cut-off date when moving party had not moved to reopen discovery under CCP § 2024.050)].

Exceptions:

- The 15-day discovery motion cut-off does not apply to unlawful detainer, forcible entry, or forcible detainer or eminent domain proceedings [*CCP* § 2024.040(b)].

- A responding party who provides false assurances that he will produce the requested discovery, inducing the requesting party to delay filing a motion to compel, is estopped from relying on the discovery motion cut-off date [*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 CA4th 1342, 1351].

1.17[1][c] Weekend or Holiday Cut-Off Dates Are Extended to Next Court Day. If either of these dates falls on a Saturday, Sunday, or judicial holiday, the last day is the next successive court day closer to the trial date [*CCP* § 2016.060].

1.17[1][d] Discovery Is Complete on Day Response Is Due or Deposition Begins. Discovery is considered completed on the day a response is due or on the day a deposition begins [*CCP* § 2024.010].

1.17[1][e] Continuance or Postponement of Trial Date Does Not Reopen Discovery. Except by stipulation or court order on motion by a party, a continuance or postponement of the trial date does not operate to reopen discovery proceedings [*CCP* §§ 2024.020(b), 2024.050, 2024.060].

1.17[1][f] Retrial or New Trial of Action Reopens Discovery Until Cut Off Based on New Initial Trial Date. The "initial" trial date that cuts off discovery is not static. If a case is set for retrial after a mistrial or on remand after appeal or a motion for new trial is granted, there will be a new initial trial date relating to that trial. Discovery may again be pursued until the clock runs out based on the new initial trial date [*Fairmont Ins. Co. v. Superior Court* (2000) 22 C4th 245, 250-253, 92 CR2d 70, 991 P2d 156].

1.17[1][g] Trial Court Delay Reduction Act Rules May Not Shorten Discovery Cut-Off Dates. Trial Court Delay Reduction Act does not allow local court rules to impose shorter time periods for discovery than those set forth in the Civil Discovery Act [see *Gov Code* § 68616; *Wagner v. Superior Court* (1993) 12 CA4th 1314, 1318-1319, 16 CR2d 534 (court cannot set cut-off date when no trial date has been set)].

Cross Reference:

Discovery milestones for each party, see 1.03, 1.04.

1.17[2] Cases Ordered to Judicial Arbitration.

1.17[2][a] Discovery Cut-Off Date for Case Ordered to Judicial Arbitration Is 15 Days Before Arbitration Hearing. Cases in which the court determines that the amount in controversy will not exceed \$50,000 must be sent to judicial arbitration [*CCP* § 1141.11]. The parties to judicial arbitration under *CCP* § 1141.10 *et seq.* have the same rights, remedies, procedures and obligations as parties to court actions except that discovery must be completed no later than 15 days prior to the date set for the arbitration hearing [*Cal Rules Ct, Rule 3.822*].

Exception:

When all arbitration proceedings, including the actual hearing date, are vacated (not merely continued), discovery is automatically reopened [see *Roe v. Superior Court* (1990) 224 CA3d 642, 645-647, 273 CR 745].



Strategic Point:

This discovery cut-off is one reason counsel might want a request to have a case mediated because no such discovery cut off occurs after judicial mediation [see *CCP* § 1775.11].

1.17[2][b] After Award in Judicial Arbitration Case, Discovery Is Limited to Exchange of Expert Witness Information. After an award in a case ordered to judicial arbitration under *CCP § 1141.11*, no further discovery is allowed other than disclosure of experts under *CCP § 2034.010 et seq.* unless the parties stipulate or the court, on a showing of good cause, orders otherwise [*CCP §§ 1141.24, 2024.040(a)*].

Exception:

CCP § 1141.24 does not preclude post-arbitration discovery if the case was submitted to arbitration under *CCP § 1141.12* by the parties' stipulation or by the plaintiff's election rather than by a mandatory referral under *CCP § 1141.11* [see *McMillan v. Superior Court* (1983) 146 CA3d 1014, 1018, 194 CR 670 (construing earlier version of *CCP § 1141.24*)].

 Cross Reference:

Discovery of expert witness information, see Ch. 13, Exchanging Expert Witness Information.

1.17[2][c] Trial Court Delay Reduction Act Provides Minimum Time for Discovery Before Referral to Arbitration. No case under the Trial Court Delay Reduction Act may be referred to arbitration prior to 210 days after the filing of the complaint. The 210-day period is extended if parties stipulated to the 30-day continuance allowed by *Gov Code § 68616(d)* [*Gov Code § 68616(g)*].

This allows time for discovery to be conducted before sending the case to arbitration.

1.17[3] Cut-Off Dates for Discovery of Expert Trial Witness.

1.17[3][a] Cut-Off Date for Completion of Discovery Proceedings Concerning Expert Trial Witnesses Is 15 Days Before Initial Trial Date. The parties must complete discovery proceedings pertaining to an expert trial witness identified under *CCP § 2034.010 et seq.* on or before the 15th day before the date initially set for the trial of the action [*CCP § 2024.030*].

1.17[3][b] Cut-Off Date for Motions Concerning Expert Trial Witnesses Is 10 Days Before Initial Trial Date. Motions concerning discovery of an expert trial witness identified under *CCP § 2034.010 et seq.* must be heard on or before the 10th day before the date initially set for the trial of the action [*CCP § 2024.030*].

 Cross Reference:

See Ch. 13, Exchanging Expert Witness Information.

1.17[4] Cut-Off Date That Falls on Weekend or Holiday Is Extended to Next Business Day. When the last day to perform or complete any act provided for in the Civil Discovery Act (*CCP § 2016.010 et seq.*) falls on a Saturday, Sunday, or judicial holiday, the time limit is extended until the next day closer to the trial date that is not a Saturday, Sunday, or holiday [*CCP § 2016.060*].

1.17[5] Agreement to Complete Discovery Proceedings or Hear Discovery Motions Closer to Initial Trial Date, or to Reopen Discovery After New Trial Date Set.

1.17[5][a] Parties May Agree to Complete Discovery Proceedings or Hear Discovery Motions Closer to Initial Trial Date, or to Reopen Discovery After New Trial Date Set. Parties to the action may enter into a written agreement [*CCP § 2024.060*]:

- To extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or
- To reopen discovery after a new date for trial of the action has been set.

1.17[5][b] Agreement May Not Require Court to Continue or Postpone Trial. In no event may an agreement to extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial of the action has been set, require a court to grant a continuance or postponement of the trial of the action [CCP § 2024.060].

1.17[6] Motion to Complete Discovery Proceedings or Hear Discovery Motion Closer to Initial Trial Date, or to Reopen Discovery After New Trial Date Set.

1.17[6][a] Any Party May Move to Extend Cut-Off Dates for Discovery Completion or Motions, or Reopen Discovery After New Trial Date Set. On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard closer to the initial trial date, or to reopen discovery after a new trial date has been set [CCP § 2024.050(a)].

Prerequisite:

Any of these motions must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [CCP §§ 2016.040, 2024.050(a)].



Cross References:

Forms, see 1.25 (motion), 1.26 (order).

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.111 (Matthew Bender)*.

1.17[6][b] Determinative Factors Include Necessity and Reasons for Discovery. In exercising its discretion to grant or deny a motion to extend the discovery cut-off date or reopen discovery under CCP § 2024.050(a), the court must take into consideration any matter relevant to the leave requested, including, but not limited to, the following [CCP § 2024.050(b)]:

- The necessity and the reasons for the discovery.
- The diligence or lack of diligence of the party seeking the discovery or the hearing of a discovery motion, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier.
- Any likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party.
- The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action.

The court may not hear a motion to compel discovery filed after the 15th day prior to the initial trial date unless the party seeking relief first files a motion to reopen discovery. In exercising its discretion to grant or deny a motion to reopen discovery, the court must take into consideration any matter relevant to consideration of the leave requested in the motion, including the matters specified in CCP § 2024.050(b) [*Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 CA4th 1568, 1586, 82 CR3d 64*] .

1.17[6][c] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions. Monetary sanctions are mandatory under CCP § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or to reopen discovery, unless the court finds that the one subject to the sanction acted with substantial

justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2024.050(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMisconductCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview



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1.18 Strategy and Options for Using Electronic Exchange of Information.

To the full extent practicable, counsel should utilize electronic technology to exchange and organize discovery. Tools that can improve communication and the discovery process include e-mail, the telephone, CD-ROMs, Internet web sites, electronic documents, electronic document depositories, Internet depositions and storage, and videoconferencing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral Overview



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1.19 Electronic Exchange of Information.

1.19[1] Court May Authorize Use of Technology for Discovery in Complex Cases, Coordinated Cases, Cases Exempt From Disposition Time Goals, and Cases Assigned to 24-Month Management Plan. Pursuant to noticed motion, a court may enter orders for the use of technology in conducting discovery in the following cases [*CCP* § 2017.730(a)]:

- Cases designated as complex (under Judicial Administration Standards § 19).
- Cases ordered to be coordinated (under *CCP* § 404 et seq.).
- Exceptional cases exempt from case disposition time goals (under *Gov Code* § 68600 et seq.).
- Cases required to be disposed of within 24 months under *Cal Rules Ct, Rule 3.714(b)(1)(C)*. These cases were formerly designated as Plan 3 cases by (now repealed) Rule 2105. Although Rule 3.714 does not define such cases as Plan 3 cases, *Code of Civil Procedure Section 2017.730(a)(4)* continues to refer to "Plan 3 cases."

1.19[2] Parties May Stipulate to Orders for Use of Technology in Conducting Discovery. In cases other than those enumerated above, the parties may stipulate to the entry of orders for the use of technology in conducting discovery [*CCP* § 2017.730(b)].



Strategic Point:

When discovery responses are voluminous, it is often helpful to request from the opposing party the right to respond to the discovery by way of providing electronic record. For example, thousands of pages of material can be produced on a single CD in lieu of tens of thousands of pages of material. However, to provide discovery responses in that manner, you must seek a stipulation, although it can be informal.

1.19[3] Order Authorizing Use of Technology in Conducting Discovery Requires Express Findings. An order

authorizing the use of technology in conducting discovery may be made only on the express findings of the court or stipulation of the parties that the procedures adopted in the order meet all of the following criteria [CCP § 2017.730(c)]:

- They promote cost-effective and efficient discovery or motions relating to it.
- They do not impose or require undue expenditures of time or money.
- They do not create an undue economic burden or hardship on any person.
- They promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants.
- They do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.

1.19[4] Discovery May Be Conducted and Maintained in Electronic Media and by Electronic Communication. Pursuant to orders authorizing the use of technology in conducting discovery, discovery may be conducted and maintained in electronic media and by electronic communication [CCP § 2017.730(d)]. The court may prescribe procedures relating to the use electronic technology, including orders for:

- Service of requests for discovery and responses;
- Service and presentation of motions;
- Production, storage, and access to information in electronic form; and
- The conduct of discovery in electronic media.

The Judicial Council is authorized to promulgate rules, standards, and guidelines relating to electronic discovery and the use of this discovery data and documents in court proceedings [CCP § 2017.730(e)].

1.19[5] Rights and Duties of Parties Are Not Diminished by Order Authorizing Use of Technology. Nothing in CCP § 2017.010 *et seq.* diminishes the rights and duties of the parties regarding discovery, privileges, procedural rights, or substantive law [CCP § 2017.720(a)].

1.19[6] Service Provider Used and Compensated by Parties.

1.19[6][a] Court Appoints Provider Chosen by Parties. If a service provider is to be used and compensated by the parties, the court appoints the person or organization agreed on by the parties and approves the contract agreed on by the parties and the service provider [CCP § 2017.740(a)].

1.19[6][b] If Parties Have Not Agreed to Provider, Court Appoints Provider Whether or Not Parties Submit Nominations. If the parties do not agree on the selection, each party must submit to the court up to three nominees for appointment together with a contract acceptable to the nominee. The court will appoint a service provider from among the nominees. The court may condition this appointment on the acceptance of modifications in the terms of the contract [CCP § 2017.740(a)].

If no nominations are received from any of the parties, the court appoints one or more service providers [CCP § 2017.740(a)].

1.19[6][c] Court May Remove Provider or Vacate Agreement on Motion and for Good Cause Shown. On

noticed motion at any time and on a showing of good cause, the court may order the removal of the service provider or vacate any agreement between the parties and the service provider, or both, effective as of the date of the order [CCP § 2017.740(b)].

1.19[6][d] Performance of Service Provider Is Subject to Periodic Review. The continued service of the service provider is subject to review periodically, as agreed by the parties and the service provider, or annually if they do not agree [CCP § 2017.740(b)].

1.19[6][e] Disputes Regarding Duties, Rights, and Obligations of Parties or Service Providers Are Determined on Noticed Motion. Any disputes involving the contract or the duties, rights, and obligations of the parties or service providers may be determined on noticed motion in the action [CCP § 2017.740(b)].

1.19[6][f] "Technology" Includes Such Devices As CD--ROM and Electronic Documents. Subject to the findings required to use technology and the purpose of permitting and encouraging cost-effective and efficient discovery, "technology" includes, but is not limited to the following [CCP § 2017.710]:

- Telephone.
- E-mail.
- CD-ROM.
- Internet web sites.
- Electronic documents.
- Electronic document depositories.
- Internet depositions and storage.
- Videoconferencing.

In addition, other electronic technology may be used that improves communication and the discovery process [CCP § 2017.710].

1.19[6][g] Rules for Use of Technology Must Be Consistent With Requirements for Stenographically Taken Deposition. Nothing in CCP §§ 2017.710-2017.740 may be construed to modify the requirement for use of a stenographic court reporter as provided in CCP § 2025.330. The rules, standards, and guidelines adopted pursuant to CCP §§ 2017.710-2017.740 must be consistent with the requirement of CCP § 2025.330(b) that deposition testimony be taken stenographically unless the parties agree or the court orders otherwise [CCP § 2017.720(b)].



Cross Reference:

Recording depositions, see *Ch. 6, Oral Depositions in California*, 6.32.

1.19[6][h] Use of Technology Does Not Affect Process Used for Court Reporter. Nothing in CCP §§ 2017.710-2017.740 may be construed to modify or affect in any way the process used for the selection of a stenographic court reporter [CCP § 2017.720(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral Overview



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1.20 Notice of Motion, Motion, and Supporting Declaration to Conduct Additional Discovery in Limited Civil Case.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],
Plaintiff,
vs.
_____[name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER ALLOWING _____ [identify
) party, e.g., DEFENDANT MARY JONES] TO CON-
) DUCT ADDITIONAL DISCOVERY, SUPPORT-
) ING DECLARATION OF _____
) [name] AND MEMORANDUM IN SUPPORT OF
) MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
thereafter as the matter may be heard, in [_____ (Department or Division) _____ of]
this court, located at _____ [street address], _____ [moving party, e.g., Defendant

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Mary Jones] will, and hereby does, move for an order allowing him/her to conduct additional discovery in this matter pursuant to *Code of Civil Procedure Section 95* on the ground that _____ [moving party, e.g., Defendant Mary Jones] will be unable to _____ [prosecute or defend] the action effectively without additional discovery.

The motion will be based on this notice of motion, on the declaration of _____ [name] served and filed herewith, on the memorandum served and filed herewith, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____ [name]

I _____ [name], declare:

1. _____ [name] I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones].

2. _____ [moving party, e.g., Defendant Mary Jones] has made a combined total of 35 requests for discovery in this case.

3. _____ [moving party, e.g., Defendant Mary Jones] is unable to defend the action effectively unless he/she is allowed to conduct further discovery because _____ [set forth reasons for additional discovery].

4. _____ [moving party, e.g., Defendant Mary Jones] therefore will further need to _____ [describe discovery requested, e.g., take the deposition of _____ (name)], in addition to the discovery already completed.

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here.]

NOTES.

Authority:

CCP §§ 95, 422.30

Grounds:

See 1.13[4]

Related Form of Order:

See 1.21



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1-1 MB Practice Guide: CA Civil Discovery 1.21

1.21 Order on Motion to Conduct Additional Discovery in Limited Civil Case.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for an order allowing him/her to conduct further discovery came on regularly for hearing on _____ [date]. Plaintiff appeared by counsel _____ [name]; defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____[*specify order, e.g.,*
Defendant Mary Jones be allowed to serve a deposition notice on Dr. Richard Perry, and after service, be allowed to
take that deposition prior to June 30, 2005].

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP § 95

Related Form of Motion:

See 1.20



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1-1 MB Practice Guide: CA Civil Discovery 1.22

1.22 Judicial Council Form DISC-015 Request for Statement of Witnesses and Evidence--For Limited Civil Cases (Under \$25,000).

Judicial Council Form DISC-015 Request for Statement of Witnesses and Evidence--For Limited Civil Cases (Under \$25,000)

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 96; California Judicial Council Form DISC-015 has been adopted for mandatory use [Cal Rules of Court, Rule 1.31]

Making Request for Statement of Witnesses and Evidence:

See 1.14



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1.23 Notice of Motion and Motion for Protective Order Limiting Scope of Discovery or Restricting Frequency or Extent of Discovery Methods With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER _____
) [LIMITING AND/OR RESTRICTING] DISCOV-
) ERY AND IMPOSING MONETARY SANCTION,
) SUPPORTING DECLARATION OF
) _____ [name] AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) (Limiting Scope of Discovery and/or Restricting Fre-
) quency or Extent of Discovery Methods)
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

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thereafter as the matter may be heard, in _____ [Department or Division] of this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order _____ [limiting the scope of discovery or restricting the frequency and/or extent of discovery methods], specifically, that _____ [specify order sought, e.g., Plaintiff John Smith's third set of interrogatories propounded to Defendant Mary Jones need not be answered at all] . _____ [moving party, e.g., Defendant Mary Jones] will also move for an order imposing a monetary sanction against _____ [propounding party and/or his/her attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] in the amount of \$ _____. The motion will be made on the grounds that _____ [specify grounds for protective order, e.g., Plaintiff John Smith's third set of interrogatories propounded to Defendant Mary Jones are duplicative within the meaning of CCP § 2019.030], and that _____ [moving party, e.g., Defendant Mary Jones] made a reasonable and good-faith attempt to resolve informally the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name] and the memorandum set forth below, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Moving party's status and name, e.g., Defendant Mary Jones]

SUPPORTING DECLARATION OF _____

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones].

2. Good cause exists for the protective order sought by _____ [moving party, e.g., Defendant Mary Jones] in that _____ [set forth facts showing good cause for particular order sought, e.g., Plaintiff John Smith's third set of interrogatories to Defendant Mary Jones consists of inquiries already made and answered in Defendant Mary Jones's responses to John Smith's first and second set of interrogatories, and in the deposition taken by Plaintiff John Smith of Mary Jones on June 30, 2005. The information sought in Plaintiff John Smith's third set of interrogatories to Defendant Mary Jones is therefore duplicative. Copies of Plaintiff John Smith's first and second set of interrogatories are attached hereto as Exhibits A and B, respectively, and are made a part hereof. Copies of Defendant Mary Jones's responses to plaintiff's first and second set of interrogatories are attached hereto as Exhibits C and D, respectively, and are made a part hereof.]

3. On _____ [date], I _____ [specify actions taken to confer with opposing party in a reasonable and good-faith attempt to resolve the issues covered by the motion informally, e.g., sent a letter to plaintiff's attorney referring to the answers provided in defendant's responses to plaintiff's first and second set of interrogatories,

and asking that plaintiff withdraw the third set of interrogatories because the answers had already been supplied. A copy of the letter is attached hereto as Exhibit E and made a part hereof. To date, I have not received an answer to this letter].

4. _____ [Identify moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the total amount of \$_____ on the following _____ [itemize and explain reasonable expenses related to efforts made to limit or restrict the frequency and/or extent of discovery methods, including attorney's fees].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP §§ 2017.020, 2019.030

Grounds for Order Based on Undue Burden, Expense or Intrusiveness:

See 1.15[1]

Grounds for Order Based on Cumulative, Duplicative, Unduly Expensive or Burdensome Discovery:

See 1.16[1]

Related Form of Order:

See 1.24

Related Form of Memorandum:

See *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.100*
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1.24 Order on Motion for Protective Order Limiting Scope of Discovery or Restricting Frequency or Extent of Discovery Methods.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for a protective order directing that _____ [describe nature of motion, e.g., the scope of discovery be limited or the frequency and/or extent of discovery methods be restricted], specifically, that _____ [describe specific object of motion, e.g., Plaintiff John Smith's third set of interrogatories propounded to Defendant Mary Jones need not be answered at all] and for monetary sanctions came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [state order, e.g., Plaintiff John Smith's third set of interrogatories propounded to Defendant Mary Jones need not be answered at all].

[AND EITHER, if imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] _____ [acted without substantial justification or specify other circumstances making imposition of a sanction just],

IT IS FURTHER ORDERED that _____ [unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] pay forthwith to _____ [successful party, e.g., Defendant Mary Jones] the sum of \$_____ as reasonable expenses and attorney's fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] _____ [acted with substantial justification or specify other circumstances making imposition of a sanction unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [unsuccessful party and/or attorney, e.g., Plaintiff John Smith or his attorney Robert Roe].

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2017.020, 2019.030

Related Form of Motion:

See 1.23



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1.25 Notice of Motion and Motion to Extend Time for Discovery or Reopen Discovery Proceedings With Supporting Declaration.

Notice of Motion and Motion to Extend Time for Discovery or Reopen Discovery Proceedings with Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Petitioner,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER _____ [EXTENDING TIME
) FOR DISCOVERY *or* REOPENING DISCOVERY
) PROCEEDINGS], SUPPORTING DECLARATION
) OF _____ [name] AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in _____ [Department or Division] of this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and

hereby does, move for an order granting him/her leave to _____ [complete discovery proceedings after June 30, 2005 or reopen discovery after the setting of the new trial date on July 7, 2005].

_____ [Moving party, e.g., Plaintiff John Smith] will also move for an order imposing a monetary sanction against _____ [responding party and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground[s] that _____ [specify ground(s), e.g., defendant's amended answer to Interrogatory No. 8 in plaintiff's first set of interrogatories to defendant has raised issues of which plaintiff was previously unaware. Plaintiff requires the additional discovery to learn facts and determine issues relevant to the subject matter of the pending action prior to trial].

The motion will be based on this notice of motion, on the declaration(s) of _____ [name], on the memorandum set forth below, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. _____ [Set forth basis for motion, e.g., On _____ (date), Plaintiff John Smith served his first set of interrogatories on Defendant Mary Jones. A copy of Interrogatory No. 8 is attached hereto as Exhibit A and made a part hereof. On _____ (date), Defendant Mary Jones served Plaintiff John Smith with her initial response to the interrogatories, a copy of which is attached hereto as Exhibit B and made a part hereof; and on _____ (date), served Plaintiff John Smith with her amended answer to Interrogatory No. 8, a copy of which is attached hereto as Exhibit C and made a part hereof].

3. The trial in the above-entitled action is set for _____ [date].

4. There is good cause for the order sought by _____ [moving party, e.g., Plaintiff John Smith] in that _____ [set forth facts, e.g., defendant's amended answer to Interrogatory No. 8 of the first set of interrogatories sets forth facts relating to several accidents involving a vehicle manufactured by defendant that are relevant to the above-entitled action. Plaintiff was injured by a similar vehicle and in a similar manner as those described in the amended answer. Plaintiff requires additional time for discovery regarding those accidents, in order to ascertain whether any issues may be resolved with respect thereto prior to trial]. Therefore, justice requires that _____ [identify moving party, e.g., Plaintiff John Smith] be allowed to _____

[continue or reopen] discovery after _____ [date].

5. On _____ [date], I _____ [specify actions taken to confer with opposing party in a reasonable and good-faith attempt to resolve the issues covered by the motion informally e.g., sent a letter to defendant's attorney referring to defendant's amended answer to Interrogatory No. 8, and requesting that plaintiff be allowed to ask defendant questions about the amended answer at another session of his/her deposition. A copy of the letter is attached hereto as Exhibit D. To date, defendant has refused to allow this deposition to take place].

6. _____ [moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the total amount of \$ _____ on the following _____ [itemize and explain reasonable expenses incurred in making the motion, including attorney's fees].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2024.050

Grounds:

See 1.17[6]

Related Form of Order:

See 1.26

Related Form of Memorandum:

See *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing, § 80.111*
(Matthew Bender)



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1.26 Order on Motion to Extend Time for Discovery or Reopen Discovery Proceedings.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Plaintiff John Smith] for an order granting him/her leave to _____ [complete discovery proceedings after June 30, 2005 or have a motion concerning discovery heard after July 7, 2005 or reopen discovery after the setting of the new trial date on August 26, 3003], came on regularly for hearing on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*specify party, e.g., Plaintiff John Smith*] is permitted to _____ [*complete discovery proceedings on or before July 15, 2005 or have a motion concerning discovery heard on or before August 6, 2005 or reopen discovery after the setting of the new trial date on August 26, 2005*].

[*AND EITHER, if imposing sanctions*]

On further proof made to the satisfaction of the court that _____ [*unsuccessful party and/or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe*] _____ [*acted without substantial justification or specify other circumstances making imposition of a sanction just*],

IT IS FURTHER ORDERED that _____ [*unsuccessful party and/or attorney, e.g., Defendant Mary Jones and her attorney Tom Doe*] pay forthwith to _____ [*successful party, e.g., Plaintiff John Smith*] the sum of \$_____ as reasonable expenses and attorney's fees.

[*OR, if not imposing sanctions*]

On further proof made to the satisfaction of the court that _____ [*unsuccessful party and/or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe*] _____ [*acted with substantial justification or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones or her attorney Tom Doe*].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2024.050

Related Form of Motion:

See 1.25



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Chapter 2 Scope of Discovery

1-2 MB Practice Guide: CA Civil Discovery 2.syn

§ 2.syn Synopsis to Chapter 2: Scope of Discovery

2.01 Scope.

2.02 Objective and Strategy.

2.03 CHECKLIST: Relevance.

2.04 Options and Strategies in Evaluating Relevance.

2.05 Relevance Is Broader Than Admissibility.

2.06 Material Sought May Relate to Claim Itself, Persons or Property.

2.07 Material Sought to Be Discovered Must Be Relevant to Subject Matter of Action.

2.07[1] Subject Matter Is Broader Than Issues Presented by Pleadings.

2.07[2] Information Not Relevant If It Is of No Practical Benefit to the Party Seeking It.

2.07[3] Doubts Are to Be Resolved in Favor of Allowing Discovery.

2.07[4] "Fishing Expedition" Is Improper Basis for Objection to Broad Discovery Request.

2.07[5] Unresolved Pleading Issues Are Not Ground for Refusing to Respond to Discovery Requests.

2.08 Special Situations May Call for Specific Limits on Discovery.

2.08[1] Insurance.

2.08[1][a] Insurance Information That Is Properly Discoverable.

2.08[1][b] Insurance Information That Is Not Discoverable.

2.08[2] Discovery of Information Pertaining to Defendant's Financial Condition.

2.08[3] Plaintiff's Sexual History.

2.08[3][a] Noticed Motion Required for Information Pertaining to Plaintiff's Sexual Conduct.

2.08[3][b] Party Seeking Discovery Must Demonstrate Relevance.

2.08[3][c] Monetary Sanctions May Be Imposed.

2.08[3][d] Discovery Not Usually Permitted in Sexual Contact Actions.

2.09 CHECKLIST: Privileges.

2.10 Options and Strategies When Material to Be Discovered May Be Privileged.

2.11 Privileges Are Statutory.

2.11[1] True Privileges Are Based on Evidence Code Provisions.

2.11[2] Work Product Protection Is Contained in Civil Discovery Act.

2.12 Party Claiming Privilege Has Burden of Proof.

2.13 Nonparty May Claim Privilege.

2.14 Privileges Can Be Waived.

2.14[1] Privilege Can Be Waived by Action or Inaction.

2.14[2] Party Can Waive Privilege by Failing to Make Timely Objection When Discovery Is Sought.

2.14[3] Party Can Waive Privilege by Disclosing Communications Voluntarily or by Consenting to Disclosure.

2.14[3][a] Waiver by Disclosure Applies to Numerous Privileges.

2.14[3][b] Holder of Privilege May Consent to Disclosure.

2.14[3][c] Attorney's Inadvertent Disclosure Does Not Automatically Waive Privilege.

2.14[3][d] Coerced Disclosure Does Not Waive Privilege.

2.14[4] Party Can Impliedly Waive Privilege by Placing Privileged Matter at Issue.

2.14[4][a] Communication Must Go to Heart of Claim.

2.14[4][b] Implied Waiver Should Be Interpreted Narrowly.

2.14[5] In Case of Joint-Privilege Holders, One Holder Cannot Waive Privilege for the Other.

2.15 Privilege Against Self-Incrimination.

2.15[1] Privilege Has Constitutional and Statutory Bases.

2.15[2] Privilege May Only Be Asserted by a Person.

2.15[3] Privilege Only Protects Against Criminal Liability.

2.15[3][a] Privilege Applicable in Criminal or Civil Proceedings.

2.15[3][b] Holder of Privilege Must Demonstrate Real Danger of Self-Incrimination.

2.15[3][c] Holder of Privilege May Have to Accept Civil Consequences of Exercising Privilege.

2.15[4] Privilege Must Be Invoked on Question-by-Question Basis.

2.15[5] Witness May Be Compelled to Answer If Prosecutorial Immunity Granted.

2.15[6] Self-Incrimination Rules Differ for Civil Defendants and Civil Plaintiffs.

2.15[6][a] Civil Defendants.

2.15[6][b] Civil Plaintiffs.

2.16 Attorney-Client Privilege.

2.16[1] Privilege Protects Against Disclosure of Confidential Communications.

2.16[2] "Attorney" and "Client" Defined.

2.16[3] Types of Communications Subject to Attorney-Client Privilege.

2.16[3][a] "Confidential Communications" Defined.

2.16[3][b] Privilege Applies to Numerous Types of Information.

2.16[3][c] Forwarding Nonprivileged Material to Attorney Does Not Create Privilege.

2.16[3][d] Communication Is Not Privileged If Client's Dominant Purpose Is Something Other Than Obtaining Legal Opinion or Advice.

2.16[3][e] Identity of Clients and Fact of Communication Are Generally Not Privileged.

2.16[3][f] Existence of Document Is Not Privileged.

2.16[3][g] Identity of Witnesses May Not Be Privileged.

2.16[3][h] Names of Witnesses Interviewed at Direction of Counsel May Be Protected by Work Product Doctrine.

2.16[4] Individuals Who May Claim Privilege.

2.16[4][a] Client As Holder of Privilege.

2.16[4][b] Guardian or Conservator of Client As Holder of Privilege.

2.16[4][c] Personal Representative of Client As Holder of Privilege.

2.16[4][d] Business Representative of Client As Holder of Privilege.

2.16[4][e] Person Authorized by Holder of Privilege to Claim Privilege.

2.16[4][f] Lawyer Asserting Privilege on Behalf of Client.

2.16[5] Application of Privilege When Corporation Is Client.

2.16[5][a] Application of Privilege Depends on Relationship and Intent of Corporation's Employee and Corporation.

2.16[5][b] Shareholder Does Not Hold Privilege.

2.16[5][c] Former Corporation's Privilege Passes to Successor Corporation.

2.16[5][d] Corporate Privilege Rules Apply to Associations.

2.16[5][e] Communications Among Corporate Employees Discussing Legal Advice May Be Privileged.

2.16[6] Attorney-Client Privilege Is Subject to Statutory Exceptions.

2.16[6][a] Commission of Crime or Tort.

2.16[6][b] Disclosure of Information May Prevent Dangerous Crime.

2.16[6][c] Parties Claiming Through Deceased Client.

2.16[6][d] Communication Relating to Issue of Breach.

2.16[6][e] Communication Concerning Intention or Competence of Client Executing Document Attested by Attorney.

2.16[6][f] Communication Relating to Deed, Will, or Other Writing.

2.16[6][g] Proceeding Between Co-Clients Who Had Common Interest.

2.16[6][h] Reporting Violations of Securities Law or Fiduciary Duties.

2.16[7] Other Protections for Clients of Legal Service Providers.

2.16[7][a] Recipient of Paralegal Services.

2.16[7][b] Client of Authorized Tax Practitioner.

2.16[7][c] Insured If Liability Insurer Must Provide Defense Through Its Attorney.

2.16[7][d] Welfare Recipient.

2.16[7][e] Trustee.

2.17 Physician-Patient Privilege.

2.17[1] Privilege Protects Against Disclosure of Confidential Communications Between Patient and Physician.

2.17[2] "Patient" and "Physician" Defined.

2.17[3] "Confidential Communications" Defined.

2.17[3][a] Communication Must Be in Course of Relationship and in Confidence.

2.17[3][b] Must Not Be Communicated to Unnecessary Third Persons.

2.17[3][c] Diagnoses and Advice May Qualify As Confidential Communications.

2.17[3][d] Photographs of Patient May Qualify As Confidential Communications.

2.17[4] Who May Claim Physician-Patient Privilege.

2.17[4][a] Generally, Patient Is the Holder.

2.17[4][b] Authorized Person or Former Physician May Also Claim Privilege.

2.17[4][c] Physician Must Claim Privilege When Disclosure Sought.

2.17[5] Privilege Does Not Generally Exist When Patient Is Litigant.

2.17[6] Physician-Patient Privilege Is Subject to Statutory Exceptions.

2.17[6][a] Commission of Crime or Tort.

2.17[6][b] Criminal Proceeding.

2.17[6][c] Damages on Account of Patient's Conduct.

2.17[6][d] Parties Claiming Privilege Through Deceased Patient.

2.17[6][e] Issue of Breach of Duty.

2.17[6][f] Validity of a Writing of Deceased Patient.

2.17[6][g] Proceeding to Commit Patient or Competency Proceeding.

2.17[6][h] Information Required to Be Publicly Reported.

2.17[6][i] Proceeding Determining Revocation of Rights.

2.18 Psychotherapist-Patient Privilege.

2.18[1] Privilege Protects Against Disclosure of Confidential Communications.

2.18[2] "Psychotherapist" and "Patient" Defined.

2.18[3] "Confidential Communications" Defined.

2.18[4] Privilege Is Broader Than Physician-Patient Privilege.

2.18[5] Rules for Claiming Psychotherapist-Patient Privilege.

2.18[5][a] Privilege Generally Claimed by Holder.

2.18[5][b] Psychotherapist Must Claim Privilege When Present.

2.18[5][c] Person Claiming Psychotherapist-Patient Privilege Has Burden.

2.18[6] Exceptions to Psychotherapist-Patient Privilege.

2.18[6][a] Patient-Litigant Exception.

2.18[6][b] Commission of Crime or Tort.

2.18[6][c] Psychotherapist Believes Patient Is Dangerous.

2.18[6][d] Competency Proceeding.

2.18[6][e] Patient Is a Child Who May Have Been Crime Victim.

2.18[6][f] Other Exceptions.

2.19 Privileges Pertaining to Marriage.

2.19[1] Privilege for Confidential Marital Communications.

2.19[2] Privilege of Spouse Not to Testify Against Other Spouse.

2.19[3] Situations in Which Confidential Marital Communications Privilege Does Not Apply.

2.19[3][a] Commission of Crime or Fraud.

2.19[3][b] Proceeding to Commit Spouse.

2.19[3][c] Competence Proceeding.

2.19[3][d] Proceeding Against Other Spouse.

2.19[3][e] Certain Criminal Proceedings.

2.19[3][f] Proceedings Under Juvenile Court Law.

2.19[4] Situations Where Privilege Not to Testify Against Spouse Does Not Apply.

2.20 Clergy-Penitent Privilege.

2.20[1] Privilege Protects Penitential Communications.

2.20[2] "Member of Clergy" Defined.

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Chapter 2 Scope of Discovery
I. STRATEGY

1-2 MB Practice Guide: CA Civil Discovery 2.01

2.01 Scope.

This chapter covers:

- What material is sufficiently relevant to be discoverable [see 2.03-2.08].
- The different grounds for claiming that material sought to be discovered is privileged [see 2.09-2.24].
- Specific requirements for asserting commonly invoked privileges, such as attorney-client and physician-patient privileges [see 2.15-2.24].
- Protection for attorney work product [see 2.25-2.32].
- Protection based on constitutional privacy interests [see 2.33-2.38].
- Materials subject to consumer and employee protections [see 2.39-2.41].
- A newspaper reporter's qualified privilege to protect sources [see 2.43].
- Privilege protecting privacy of tax returns [see 2.44].
- Confidentiality of settlement and mediation information [see 2.45].
- Privilege protecting medical records [see 2.46].
- Protections for proceedings and records of medical staff committees [see 2.47].
- Privilege protecting subject of AIDS test [see 2.48].
- Privilege protecting proceedings and records of governmental bodies [see 2.49].

- Privilege protecting financial institution Suspicious Activity Report [see 2.50].

Core Statutes:

CCP §§ 2017.010-2018.080; Evid Code §§ 900-1070

Legal Topics:

For related research and practice materials, see the following legal topics:

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I. STRATEGY

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2.02 Objective and Strategy.

Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if [CCP § 2017.010]:

- The matter is itself admissible evidence; or
- The matter appears reasonably calculated to lead to the discovery of admissible evidence.

Determining whether a (propounding) party should demand production or a (responding) party should object to a demand for production is a two-step inquiry requiring affirmative answers to these questions:

- Is the information sought within the scope of relevance articulated in *CCP § 2017.010*?
- Is the information free from protection by constitutional or statutory privilege or another type of protection, such as attorney work product protection?

The responding party will have the following additional issues to consider:

- Does the party have knowledge that the information exists?
- If so, who has it?
- How burdensome is the request?
- Is a privilege log required?

Detailed Discussion:

California Forms of Pleading and Practice, Ch. 190, Discovery: Scope, Regulation, and Timing; Ch. 191, Discovery: Privileges and Other Discovery Limitations (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Chs. 20-32 (Matthew Bender).

Hogan & Weber's California Civil Discovery (6th ed.), Chs. 11-13 (Matthew Bender).

Privilege in federal cases, see Moore's Federal Practice, Ch. 26, General Provisions Governing Discovery; Duty of Disclosure (Matthew Bender 3d ed.).

Scope, privileges and work product protection in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 24, Restrictions on Scope and Extent of Discovery: Privileges and Work Product Protection.



Cross References:

Discussion of privilege logs, see *Ch. 10, Inspection of Documents, Tangible Things, and Land, 10.20[4][b]*.

Discussion and forms relating to discovery and privileges in particular actions or proceedings, see California Forms of Pleading and Practice, Ch. 71, Attorney Discipline (State Bar Proceedings); Ch. 295, Hospitals (hospital records); Ch. 473B, Discovery in Agency Adjudications (administrative proceedings); Ch. 577, Workers Compensation (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryRelevance



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1-2 MB Practice Guide: CA Civil Discovery 2.03

2.03 CHECKLIST: Relevance.

☐ Determine propriety of seeking discovery of information, which must be relevant to:

- ☐ Subject matter involved in pending action; or
- ☐ Determination of a motion made in the action.

Authority:

CCP § 2017.010

Discussion:

See 2.05

☐ The matter is relevant if it is:

- ☐ Admissible in evidence; or
- ☐ Reasonably calculated to lead to the discovery of admissible evidence, including information relating to:

- ☐ Claim or defense of party seeking discovery or of any other party to the action;
- ☐ Identity and location of persons having knowledge of any discoverable matter; or
- ☐ Existence, description, nature, custody, condition, and location of any document,

tangible thing, or land or other property.

Authority:

CCP § 2017.010

Discussion:

See 2.06, 2.07

☐ Discovery of some information is subject to some restrictions:

☐ The nature and substance of a liability insurance coverage dispute;

Authority:

CCP § 2017.210

Discussion:

See 2.08[1]

☐ Defendant's financial condition for the purpose of calculating punitive damages purposes without obtaining court approval;

Authority:

CC § 3295(c)

Discussion:

See 2.08[2]

☐ Plaintiff's sexual conduct with individuals other than the alleged perpetrator in civil actions involving sexual misconduct, absent a showing of good cause in an adversarial hearing.

Authority:

CCP § 2017.220(a)

Discussion:

See 2.08[3]

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2.04 Options and Strategies in Evaluating Relevance.

A court may not deny discovery based on the objection that the requesting party is on a "fishing expedition." The Discovery Act authorizes "fishing expeditions" by providing for discovery of matters that are reasonably calculated to lead to the discovery of admissible evidence [see *CCP* § 2017.010; *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 384, 15 CR 90, 364 P2d 266 (court may, however, control method of "fishing")]. The courts tend to resolve doubt in favor of allowing discovery [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1760, 30 CR2d 217].

Challenges are better resolved by a protective order addressing a specific harm to the responding party rather than by objections or a more general attack on the relevancy of the information sought to be discovered [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1760, 30 CR2d 217 ; see *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 392, 15 CR 90, 364 P2d 266]. In ruling on a protective order, a court has the discretion to weigh inadmissibility as a factor in determining whether the benefit to be gained from disclosure is outweighed by the burden disclosure will entail [see *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 392, 15 CR 90, 364 P2d 266].



Strategic Point--Party Seeking Discovery:

Anything which might lead to the discovery of admissible evidence should be considered.



Cross Reference:

Forms of memoranda supporting and opposing motions to compel discovery based on claims of relevancy, see *California Points and Authorities, Ch. 80, Discovery: Scope, Regulation, and Timing, §§ 80.10, 80.40* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryRelevance



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2.05 Relevance Is Broader Than Admissibility.

Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either [CCP § 2017.010]:

- Is itself admissible in evidence; or
- Appears reasonably calculated to lead to the discovery of admissible evidence.

Discovery cannot be denied simply on the ground that the evidence to be discovered would not be admissible at trial [*Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 391-393, 15 CR 90, 364 P2d 266 (construing language in former CCP § 2016(b) comparable to CCP § 2017.010); *Volkswagen of America, Inc. v. Superior Court* (2006) 139 CA4th 1481, 1490-1491, 43 CR3d 723] .

Information is relevant if its discovery will tend to promote settlement or assist in preparation for trial [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1760, 30 CR2d 217].

In a discovery motion, ruling on whether information sought to be discovered is admissible or not, the possibility that otherwise admissible evidence might be excluded at trial under *Evid Code* § 352 or some other evidentiary ruling is not a relevant consideration [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1760-1761, 30 CR2d 217].

With respect to leading to the discovery of admissible evidence, the party seeking discovery is entitled to substantial leeway, and doubts are resolved in favor of allowing discovery [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1761, 30 CR2d 217].



Cross Reference:

Discussion of privileges, and their limitations on what is discoverable, see 2.09 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 MB Practice Guide: CA Civil Discovery 2.06

2.06 Material Sought May Relate to Claim Itself, Persons or Property.

Discovery may relate to any of the following [CCP § 2017.010]:

- The claim or defense of any party to the action, including the party seeking discovery;
- The identity and location of persons having knowledge of any discoverable matter;
- The existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.



Finding & Investigating Witnesses & Leads Using Online Resources:

Many resources are available online for investigating witnesses. These resources can help you find general information or leads for developing more focused inquiries. For example, helpful resources at *lexis.com* include:

- Public Records tab > Public Records--State Group Files > CA Public Records, Combined
 - ☐ Sample Search: To find basic information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.
 - ☐ Sample Search: To find basic information for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 X! /3 last name and riverside*.
- Public Records tab > Public Records > Find a Person > EZFIND Combined Person Locator Nationwide
 - ☐ Sample Search: To find witnesses to an event that occurred at a known location,

e.g., the 500 block of Santa Monica Blvd., Santa Monica, CA, try this ADDRESS segment search: ADDRESS (5** pre/5 santa monica boulev! and santa monica /5 ca).



Finding and Investigating a Witness's Personal Property Using Online Resources:

Many resources are available online for finding and investigating a witness's personal property, such as licenses. These resources can help you obtain information about the present or past personal property of a witness or a witness's present or former spouse. For example, helpful resources at *lexis.com* include:

- For aircraft, search in Public Records tab > Public Records > Personal Property Locator > Federal Aviation Administration Aircraft Registrations.
- For significant stock holdings, search in Public Records tab > Public Records > Personal Property Locator > Stock Information > Stock Ownership.
- For a contractor's license, search in Public Records tab > Public Records > Licenses > Professional Licenses > CA Contractors State License Board Information.
- For a professional license, search in Public Records tab > Public Records > Licenses > Professional Licenses > CA Professional License.
- For a liquor license, search in Public Records tab > Public Records > Licenses > Liquor Licenses > CA Liquor Licenses.
- For a real estate license, search in Public Records tab > Public Records > Licenses > Professional Licenses > California Real Estate Licenses.

In all these files, you may begin with a simple search of the witness's name, modified as needed with an address or middle name or other extra identification, such as:

- Sample Search: To find basic property holdings information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.
- Sample Search: To find basic property holdings information for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 X! /3 last name and riverside*.

Legal Topics:

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1-2 MB Practice Guide: CA Civil Discovery 2.07

2.07 Material Sought to Be Discovered Must Be Relevant to Subject Matter of Action.

2.07[1] Subject Matter Is Broader Than Issues Presented by Pleadings. "Subject matter" for discovery purposes is broader than the issues framed by the pleadings and includes potential issues in the case [see *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C3d 161, 172-173, 84 CR 718, 465 P2d 854 ; *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 CA3d 1, 10, 145 CR 316].

Information that may assist a party in evaluating the case, preparing for trial, or working on settlement is relevant and discoverable as well [*Lipton v. Superior Court* (1996) 48 CA4th 1599, 1616, 56 CR2d 341].

2.07[2] Information Not Relevant If It Is of No Practical Benefit to the Party Seeking It. Relevance should be determined on a case-by-case basis, but generally a party must show the information sought should provide some benefit to the party seeking it [*Shaffer v. Superior Court* (1995) 33 CA4th 993, 1000-1003, 39 CR2d 506 (attorney's profit margin not relevant to whether attorney's fee is unconscionable; total fee for services rendered and comparison with marketplace is relevant); *Covell v. Superior Court* (1984) 159 CA3d 39, 42-43, 205 CR 371].

2.07[3] Doubts Are to Be Resolved in Favor of Allowing Discovery. Relevance should be construed liberally and doubts should generally be resolved in favor of permitting discovery [*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C3d 161, 173, 84 CR 718, 465 P2d 854].

2.07[4] "Fishing Expedition" Is Improper Basis for Objection to Broad Discovery Request. A request for discovery is not subject to opposition on the ground that the proponent is engaged in a "fishing expedition" [*Irvington-Moore, Inc. v. Superior Court* (1993) 14 CA4th 733, 739 n4, 18 CR2d 49]. The Discovery Act authorizes "fishing expeditions" by providing for discovery of matters that are reasonably calculated to lead to the discovery of admissible evidence [see CCP § 2017.010; *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 384, 15 CR 90, 364 P2d 266 (court may, however, control method of "fishing")].

A party is generally entitled to discovery upon a showing, not that it knows what it will find, but that it is reasonable to expect the proposed discovery to yield pertinent and otherwise admissible evidence [*City of King City v. Community Bank of Central Cal.* (2005) 131 CA4th 913, 931].

However, the court may properly deny a discovery request if it [*Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 384-385, 15 CR 90, 364 P2d 266] :

- Insufficiently identifies the requested information;
- Attempts to place the burden and cost on the opposing party of supplying information that is equally available to both parties; or
- Places a burden on the opposing party that is not warranted by the value of the information.



Strategic Point:

A discovery request that constitutes a "fishing expedition" directed to a nonparty is more likely to be held improper; the costs and burdens of discovery should be placed on nonparties only if the parties do not possess the information sought, or the information in their possession is unreliable and subject to impeachment by information the nonparty possesses [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 225, 61 CR2d 567].

2.07[5] Unresolved Pleading Issues Are Not Ground for Refusing to Respond to Discovery Requests. It is not proper to refuse to respond to discovery because the pleading issues are not resolved [*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 CA3d 1429, 1436 fn 3, 273 CR 262] . Pleading deficiencies generally do not affect either party's right to conduct discovery [*Budget Finance Plan v. Superior Court* (1973) 34 CA3d 794, 797, 798, 110 CR 302] and this right (and corresponding obligation to respond) is particularly important to a plaintiff in need of discovery to amend its complaint [*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 CA3d 1429, 1436 fn 3, 273 CR 262 ; *Union Mutual Life Ins. Co. v. Superior Court* (1978) 80 CA3d 1, 12, 145 CR 316] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 MB Practice Guide: CA Civil Discovery 2.08

2.08 Special Situations May Call for Specific Limits on Discovery.

2.08[1] Insurance.

2.08[1][a] Insurance Information That Is Properly Discoverable. A party may discover the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse its insured for payments made to satisfy the judgment [CCP § 2017.210].

The discovery regarding insurance policies may include the identity of the carrier and the nature and the limits of the coverage [CCP § 2017.210].

A party may also obtain discovery to determine whether the carrier is disputing coverage of the claim involved in the action [CCP § 2017.210].



Warning:

While discovery regarding the existence of a coverage dispute is permissible, the nature and substance of the dispute is not [CCP § 2017.210; see 2.08[1][b]].

In a bad-faith cause of action based on an unpleaded theory that defendant had a pattern and practice of a discriminatory claims handling practice for auto theft claims filed by Hispanic, African-American, and low income insureds, discovery was permitted of those claims files; however, authorization was required from all of the insureds whose files were to be produced [*Permanent Gen. Assurance Corp. v. Superior Court* (2004) 122 CA4th 1493, 1499].

Disclosure of insurance information does not make that information admissible in evidence at trial [CCP § 2017.210].

2.08[1][b] Insurance Information That Is Not Discoverable. A party may obtain discovery to determine whether an insurance carrier is disputing a policy's coverage of the claim involved in the action, but the nature and substance of that dispute is not discoverable [CCP § 2017.210].

CCP § 2017.210 does not authorize pretrial discovery of a nonparty liability insurer's reinsurance agreements, which are indemnity contracts for the benefit of the insurance company [*Catholic Mutual Relief Society v. Superior Court* (2007) 42 C4th 358, 374, 64 CR3d 434, 165 P3d 154] .

Exceptions:

Discovery of a reinsurance agreement is appropriate if the reinsurance agreement is functioning in the same way as a liability policy (a "fronting" arrangement). In addition, if a reinsurance agreement is itself the subject matter of the litigation at hand (e.g., a coverage action between a liability insurer and its reinsurer), discovery into the reinsurance agreement is appropriate [*Catholic Mutual Relief Society v. Superior Court* (2007) 42 C4th 358, 374, 64 CR3d 434, 165 P3d 154 ; see *Lipton v. Superior Court* (1996) 48 CA4th 1599, 1617-1618, 56 CR2d 341 (reinsurance insurance was directly relevant to issues in bad faith action; discovery permitted under former CCP § 2017(a) (now CCP § 2017.010), without reference to former CCP § 2017(b) (now CCP § 2017.210)); compare *Fireman's Fund Ins. Co. v. Superior Court* (1991) 233 CA3d 1138, 1141, 286 CR 50 (refusing to allow discovery of reinsurance information even though reinsurer was direct party to bad faith action)].

2.08[2] Discovery of Information Pertaining to Defendant's Financial Condition. In an action involving a claim for punitive damages, a plaintiff may discover information relating to defendant's financial condition because that condition is relevant to the damages issue [*Coy v. Superior Court* (1962) 58 C2d 210, 223, 23 CR 393, 373 P2d 457] .

A plaintiff may not obtain pretrial discovery regarding defendant's financial condition or the profits defendant has gained by virtue of alleged wrongful conduct unless the court enters an order permitting the discovery [CC § 3295(c)].

To obtain such an order, plaintiff must show a substantial probability that he or she will prevail on a punitive damages claim [CC § 3295(c); see also *Jabro v. Superior Court* (2002) 95 CA4th 754, 755, 115 CR2d 843] .

Distinguish:

A ruling under CC § 3295(c) that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages is not a determination of contested fact issues relating to the merits so as to preclude the assertion of a peremptory challenge to a judge pursuant to CCP 170.6(a)(2) [Guardado v. Superior Court (2008) 163 CA4th 91, 93, 77 CR3d 149] .



Finding and Investigating a Witness's Litigation History Using Online Resources:

Many resources are available online for finding and investigating a witness's litigation history. These resources can help you obtain information about the witness's past or present involvement in civil, criminal or bankruptcy cases. For example, helpful resources at *lexis.com* include:

- For California federal civil lawsuits in which a witness was named as a party, search in Legal tab > Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Civil Court Filings.
- For California state civil lawsuits in which a witness was named as a party, search in Legal tab > States Legal--U.S. > California > Filings > Docket Materials > CA Combined Civil Court Filings from Superior and Municipal Courts.
- For California federal criminal actions in which a witness was named as a party, search in Legal tab > Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Criminal Court Filings.

- For California state criminal actions in which a witness was named as a party, search in Legal tab > States Legal--U.S. > California > Filings > Docket Materials > CA Criminal Case Filings.

- For federal and state court opinions from California that mention a witness, search in Legal tab > States Legal--U.S. > California > CA Federal & State Cases, Combined.

- For California judgments against a witness and liens against his or her property, search in Legal tab > States Legal--U.S. > California > Filings > CA Judgment and Lien Filings.

- For uncovering a bankruptcy filed in California by or against a witness, search in Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings.

In all these files, you may begin with a simple search of the witness's name, modified as needed with an address or middle name or other extra identification, such as:

- Sample Search: To find information regarding litigation history using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.

- Sample Search: To find information regarding litigation history for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.

2.08[3] Plaintiff's Sexual History.

2.08[3][a] Noticed Motion Required for Information Pertaining to Plaintiff's Sexual Conduct. In a civil action alleging sexual harassment, sexual assault, or sexual battery, any party seeking discovery of plaintiff's sexual conduct with individuals other than the alleged perpetrator must establish good cause by noticed motion stating specific facts in support and accompanied by a declaration showing a good-faith attempt at an informal resolution of each issue presented by the motion [CCP § 2017.220(a)].



Warning:

The court will not consider the availability of this type of discovery at an ex parte hearing. A noticed motion is required [CCP § 2017.220(a)].



Cross Reference:

See Ch. 4, Law and Motion Procedure.

2.08[3][b] Party Seeking Discovery Must Demonstrate Relevance. The party seeking discovery regarding plaintiff's sexual conduct must show the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence [CCP § 2017.220(a)].

A party may not seek discovery of plaintiff's sexual conduct strictly for impeachment purposes [*Barrenda L. v. Superior Court* (1998) 65 CA4th 794, 802, 76 CR2d 727].

Sexual conduct protected by CCP § 2017.220(a) includes nonconsensual as well as consensual sexual activity [*Knoettgen v. Superior Court* (1990) 224 CA3d 11, 13-14, 273 CR 636].

2.08[3][c] Monetary Sanctions May Be Imposed. The court may impose a CCP § 2023.010 monetary sanction against one who unsuccessfully makes or opposes a discovery motion regarding plaintiff's sexual conduct unless the

court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2017.220(b)].

2.08[3][d] Discovery Not Usually Permitted in Sexual Contact Actions. In an action for sexual contact against a psychotherapist, as opposed to sexual harassment, assault or battery actions, evidence of the plaintiff's sexual history is not subject to discovery unless plaintiff claims damages to his or her sexual functioning, or unless the court finds the history is relevant and that its probative value outweighs the prejudicial effect [*CC* § 43.93(d)].



Cross Reference:

Discussion of action for sexual conduct against psychotherapist, see California Forms of Pleading and Practice, Ch. 415, Physicians: Medical Malpractice (Matthew Bender).



Finding and Investigating a Witness's Sexual History Using Online Resources:

Many resources are available online for finding and investigating a witness's sexual history by reviewing the litigation history. These resources can help you obtain information about the witness's past or present involvement in civil or criminal cases. For example, helpful resources at *lexis.com* include:

- For California federal civil lawsuits in which a witness was named as a party, search in Legal tab > Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Civil Court Filings.

- For California state civil lawsuits in which a witness was named as a party, search in Legal tab > Area of Law--States Legal--U.S. > California > Filings > Docket Materials > CA Combined Civil Court Filings from Superior and Municipal Courts.

- For California federal criminal actions in which a witness was named as a party, search in Legal tab > Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Criminal Court Filings.

- For California state criminal actions in which a witness was named as a party, search in Legal tab > Area of Law--States Legal--U.S. > California > Filings > Docket Materials > CA Criminal Case Filings.

In all these files, you may begin with a simple search of the witness's name, modified as needed with an address or middle name or other extra identification, such as:

- Sample Search: To find information regarding litigation history using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.

- Sample Search: To find information regarding litigation history for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil

ProcedureDiscoveryRelevanceEvidenceRelevanceLiability InsuranceEvidenceRelevanceSex OffensesRape Shield Laws



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2.09 CHECKLIST: Privileges.

☐ Determine whether a discovery request calls for potentially privileged information under any of the following privileges:

☐ Privilege against self-incrimination.

Authority:
Evid Code § 940

Discussion:
See 2.15

☐ Attorney-client privilege.

Authority:
Evid Code §§ 950-962

Discussion:
See 2.16

☐ Physician-patient privilege.

Authority:
Evid Code §§ 990-1007

Discussion:
See 2.17

- ☐ Psychotherapist-patient privilege.

Authority:

Evid Code §§ 1010-1027

Discussion:

See 2.18

- ☐ Privilege for confidential marital communications.

Authority:

Evid Code §§ 980-987

Discussion:

See 2.19

- ☐ Privilege of spouse not to testify against other spouse.

Authority:

Evid Code §§ 970-973

Discussion:

See 2.19

- ☐ Clergy-penitent privilege.

Authority:

Evid Code §§ 1030-1034

Discussion:

See 2.20

- ☐ Sexual assault counselor-victim privilege.

Authority:

Evid Code §§ 1035-1036.2

- ☐ Domestic violence counselor-victim privilege.

Authority:

Evid Code §§ 1037-1037.8

Discussion:

See 2.22

- ☐ Human trafficking caseworker-victim privilege

Authority:

Evid Code §§ 1038-1038.2

Discussion:

See 2.22A

- ☐ Privilege for official information.

Authority:

Evid Code §§ 1040-1047

Discussion:

See 2.23

- ☐ Trade secret privilege.

Authority:

Evid Code §§ 1060-1063

Discussion:

See 2.24

- ☐ If privilege applies, determine who may claim the privilege:

- ☐ Generally the holder may claim the privilege.
- ☐ Nonparties generally have equal rights to claim privilege.

Authority:

Evid Code § 912 (statutes relating to each privilege define holder)

Discussion:

See 2.13

- ☐ If responding party, assert privilege, or, if propounding party, check to determine whether responding party has waived privilege:

- ☐ Party can waive privilege by failing to make timely objection.

Authority:

Various provisions, see, e.g., *CCP § 2025.460(a)*

Discussion:

See 2.14[2]

- ☐ Party can waive privilege by disclosing confidential communication or by consenting to such a disclosure.

Exceptions:

Inadvertent or coerced disclosure does not waive the privilege [*see 2.14[3][c], [d]*].

Authority:

Evid Code § 912(a)

Discussion:

See 2.14[3]

- ☐ Party can waive privilege by placing privileged matter at issue.

Authority:

Chicago Title Ins. Co. v. Superior Court (1985) 174 CA3d 1142, 1149, 220 CR 507

Discussion:

See 2.14[4]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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1-2 MB Practice Guide: CA Civil Discovery 2.10

2.10 Options and Strategies When Material to Be Discovered May Be Privileged.

All discovery requests and demands received should be examined for privilege issues, whether interrogatories, demands for production, requests for admissions, or questions asked during deposition. A privilege not timely asserted is waived.

In cases in which there is a large number of documents and the attorney cannot determine definitively whether all documents are privileged, the safer course is to assert the attorney-client and work-product privileges, identify all privileged documents on a privilege log, and produce all nonprivileged documents known at the time. If additional documents are later discovered, they may then be added to the privilege log and/or produced, as appropriate.

A party seeking discovery confronted with an objection to a question or demand based on privilege may request the production of a privilege log, or may consider a motion to compel one if the parties cannot resolve the disputes.

Cross References:

Discussion of privilege logs, see *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.20[4][b].

Forms of memoranda supporting and opposing motions to compel discovery based on claims of privilege, see *California Points and Authorities*, §§ 81.10 -81.160, 81.270 -81.278A, 81.280, 81.290-81.291, 81.297 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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2.11 Privileges Are Statutory.

2.11[1] True Privileges Are Based on Evidence Code Provisions. Unless a statutory privilege or a constitutional or work product protection to the contrary obtains, no person has a privilege to do the following [*Evid Code* § 911]:

- Refuse to be a witness;
- Refuse to disclose any matter or to produce any writing, object, or other thing; or
- Prevent another from being a witness, disclosing any matter, or producing any writing, object or other thing.

The Evidence Code contains the statutory privileges available under California law [*Evid Code* §§ 900-1070]. The privileges contained in *Evid Code* §§ 900-1070 are exclusive, and courts may not create new privileges [*American Airlines, Inc. v. Superior Court* (2003) 114 CA4th 881, 896 ; *Schnabel v. Superior Court* (1993) 5 C4th 704, 711-712, 21 CR2d 200, 854 P2d 1117]. California courts may, however, recognize privileges based on the state constitution, the federal constitution, and federal statutes [*Union Bank of Cal. v. Superior Court* (2005) 130 CA4th 378, 388-389 (recognizing privilege prohibiting banks from producing suspicious activity reports filed with federal government)].

Exception:

There are exceptions to the statutory-privilege rule for constitutional protections. Courts have recognized, for example, a nonstatutory privacy protection [*Britt v. Superior Court* (1978) 20 C3d 844, 852-856, 143 CR 695, 574 P2d 766].

Distinguish:

Fed R Evid 501 provides that the rules of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This rule provides federal courts "with the flexibility to develop rules of privilege on a case-by-case basis" [*Trammel v. United States* (1980) 445 US 40, 47, 100 S Ct 906, 63 L Ed2d 186 (citations omitted)].

► **Cross References:**

Discussion of constitutional privacy protections, see 2.33 et seq. and 2.42 et seq.

Discussion of federal rules on creation of privilege, see Moore's Federal Practice, § 26.47[2] (Matthew Bender 3d ed.).

2.11[2] Work Product Protection Is Contained in Civil Discovery Act. The Civil Discovery Act also contains the provisions relating to attorney work product protection [*CCP § 2018.010 et seq.*].

► **Cross Reference:**

Discussion of attorney work product protection, see 2.25 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview



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2.12 Party Claiming Privilege Has Burden of Proof.

The party claiming a privilege has the burden of proof to show facts constituting grounds for the privilege [*San Diego Prof'l Ass'n v. Superior Court* (1962) 58 C2d 194, 199, 23 CR 384, 373 P2d 448 ; *Chronicle Publ'g Co. v. Superior Court* (1960) 54 C2d 548, 565, 7 CR 109, 354 P2d 637].

Exceptions:

When a party asserts a privilege based on a confidential communication listed in *Evid Code* § 917, confidentiality is presumed. The opponent of the claimed privilege has the burden of proving the communication was not confidential [*Palay v. Superior Court* (1993) 18 CA4th 919, 926 n7, 22 CR2d 839 ; Assembly Judiciary Comm. Comment to *Evid Code* § 917]. This exception applies to attorney-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, and domestic violence counselor-victim relationships [*Evid Code* § 917(a)].

In addition, an opposing party has the burden of proof to show an exception to a privilege applies [*Titmas v. Superior Court* (2001) 87 CA4th 738, 745, 104 CR2d 803].



Strategic Point--Party Claiming Privilege.

A response to a document inspection demand that consists of privilege or work-product based objections should include a privilege log. The privilege log is a document in which the objecting party records specific information to aid the court in determining whether each withheld document is privileged, or not. Typically a privilege log will set out the privilege asserted for each withheld document, along with identifying information--e.g., each document's sequential number, general nature, date, author(s), and recipient(s) [see *CCP* § 2031.240(b); *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 C4th 201, 205, 91 CR2d 716, 990 P2d 591].



Cross Reference:

Discussion of claiming privilege in responses to requests for production of documents, see *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.20[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.13 Nonparty May Claim Privilege.

The Evidence Code refers to the right of "any person"--not "any party"--to claim a privilege [see, e.g., *Evid Code* § 912]. Case law has also held that a nonparty holder of a privilege has standing to assert that privilege [*Mylan Labs. Inc. v. Soon-Shiong* (1999) 76 CA4th 71, 80, 90 CR2d 111 (nonparty client does not need to intervene in lawsuit in order to assert attorney-client privilege; motion is sufficient)]. The court is obligated to exclude privileged information if no holder of the privilege is a party to the proceeding [*Evid Code* § 916(a); see *Union Bank of Cal. v. Superior Court* (2005) 130 CA4th 378, 398-399].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGeneral Overview



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2.14 Privileges Can Be Waived.

2.14[1] Privilege Can Be Waived by Action or Inaction. Waiver of a privilege can occur because of either action or inaction. For example, when the a privilege holder discloses an otherwise privileged communication voluntarily, he or she waives the privilege by that action. When the holder of a privilege fails to object timely to an interrogatory requesting otherwise privileged information, he or she waives the privilege by inaction.

► Cross References:

Discussion of voluntary waiver of privileged communication, see 2.14[3].

Waiver by failure to object, see 2.14[2].

2.14[2] Party Can Waive Privilege by Failing to Make Timely Objection When Discovery Is Sought. A party can waive a privilege by failing to make a timely and specific objection to a request for discovery on the ground that the discovery material sought is privileged.

Examples:

This type of waiver and the statutory bases includes:

- Failure to object during oral deposition [CCP § 2025.460];
- Failure to object to written deposition questions [CCP § 2028.050(a)];
- Failure to respond to interrogatories in a timely fashion [CCP § 2030.290(a)];
- Failure to respond to demand for production of documents, tangible things, land or other property in a timely fashion [CCP § 2031.300].

2.14[3] Party Can Waive Privilege by Disclosing Communications Voluntarily or by Consenting to Disclosure.

2.14[3][a] Waiver by Disclosure Applies to Numerous Privileges. The right of any person to claim certain privileges is waived with respect to a communication protected by the privilege if any holder of the privilege has, without coercion, disclosed a significant part of the communication or has consented to disclosure made by a third party [Evid Code § 912(a)]. This rule applies to the following privileges:

- Attorney-client privilege [Evid Code § 954];
- Privilege for confidential marital communications [Evid Code § 980];
- Physician-patient privilege [Evid Code § 994];
- Psychotherapist-patient privilege [Evid Code § 1014];
- Penitent privilege [Evid Code § 1033];
- Clergy privilege [Evid Code § 1034];
- Sexual assault counselor-victim privilege [Evid Code § 1035.8];
- Domestic violence counselor-victim privilege [Evid Code § 1037.5].

Distinguish:

Disclosure of the fact that a confidential communication has occurred without disclosure of the specifics of the communication does not necessarily cause a waiver of the privilege [*Southern Cal. Gas Co. v. Public Utils. Comm'n* (1990) 50 C3d 31, 49, 265 CR 801, 784 P2d 1373 ; *Mitchell v. Superior Court* (1984) 37 C3d 591, 602, 208 CR 886, 691 P2d 642].

Exception:

A disclosure in confidence of a communication protected by the lawyer-client, physician-patient, psychotherapist-patient, sexual assault counselor-victim, or domestic violence counselor-victim privilege does not waive the privilege when the disclosure is reasonably necessary to accomplish the purpose for which the professional was consulted [Evid Code § 912(d); see also Evid Code § 952 (communications remain confidential despite disclosure in presence of those who may further the interests of client in the consultation)]. This exception does not apply to the clergy-penitent privilege [Evid Code § 912(d); *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 445].



Trap:

Lawyers/parties should not be under the illusion that a joint defense agreement necessarily protects a disclosure. Unless the test of Evid Code § 912(d) is met, disclosure of information to a co-party will waive the attorney-client privilege. Unlike the Ninth Circuit, California does not recognize a joint-defense privilege per se; however, California does recognize a "common interest doctrine" which can allow privileged information to be disclosed without waiver of the privilege [see *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 CA4th 969, 981-983, 98 CR3d 422 ; *Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 888-889]. Disclosure of privileged communications to co-parties will waive the attorney-client privilege unless the following requirements are met: (1) an expectation of confidentiality; and (2) a common interest requiring disclosure in order to further the interest of the clients [*Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 890-891 ; *Raytheon Co. v. Superior Court* (1989) 208 CA3d 683, 687, 256 CR 425 ; *Insurance Co. of N. Am. v. Superior Court* (1980) 108 CA3d 758, 765-766, 166 CR 880 ; *Cooke v. Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915]. To avoid waiver, it is not sufficient simply to show that the parties who shared privileged

information had overlapping interests; the disclosure must be reasonably necessary to further the attorney-client relationship [*Meza v. H. Muehlstein & Co., Inc.* (2009) 176 CA4th 969, 982-983, 98 CR3d 422 ; *Roush v. Seagate Technology, LLC* (2007) 150 CA4th 210, 225, 58 CR3d 275 ; *McKesson HBOC, Inc. v. Superior Court* (2004) 115 CA4th 1229, 1237].

Conducting a "joint defense" with an assumption that all communications exchanged between co-defendants will remain privileged is hazardous. Counsel must ensure that the information exchanged concerns matters on which there is a common interest; otherwise a waiver can be found. If cross complaints have been filed (or deemed to have been filed) particular caution must be exercised.

The common interest doctrine only protects materials that are otherwise covered by the attorney-client or work-product privileges. The existence of a written joint defense agreement will not create a privilege for communications not covered by the attorney-client or work-product privileges. It will nevertheless provide evidence of "an expectation of confidentiality." If called upon, the courts may perform an in camera review to determine on a case-by-case basis "the nature of the communications and the effect of disclosure" [*Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 896].

Cross Reference:

Discussion of inadvertent disclosure of work product, see 2.31A[2].

2.14[3][b] Holder of Privilege May Consent to Disclosure. The holder of the privilege may manifest consent by any statement or other conduct indicating consent to disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege [*Evid Code* § 912(a)].

Consent to the disclosure of an attorney-client communication may be inferred by the attorney's disclosure on the client's behalf, such as during negotiations [*Klang v. Shell Oil Co.* (1971) 17 CA3d 933, 938, 95 CR 265 (attorney disclosed information in successful effort to prevent criminal liability of client)].

2.14[3][c] Attorney's Inadvertent Disclosure Does Not Automatically Waive Privilege. If an attorney accidentally discloses privileged material, for example, by erroneously including documents that were not intended to be among those produced to opponent, the attorney-client privilege may not be waived [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 810]. The court must take into account the subjective intent of the privilege holder and the relevant surrounding circumstances in order to decide whether the privilege is waived [*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 652-653, 82 CR2d 799].

Warning:

When an attorney receives materials subject to attorney-client privilege, and it is reasonably apparent that they were inadvertently disclosed by another attorney, the recipient attorney should refrain from examining them any more than is essential to ascertain whether they are privileged. The recipient should then immediately notify the sender. The parties should resolve the situation by agreement or with court assistance, if necessary. An attorney who violates this rule by using the privileged information faces possible disqualification [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 819-820 ; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 656-657, 82 CR2d 799 ; see also *Bak v. MCL Financial Group, Inc.* (2009) 170 CA4th 1118, 1122, 88 CR3d 800 (attorney sanctioned \$7,500 for reviewing and copying inadvertently produced privileged documents and sending copies to arbitration panel before returning them)].



Strategic Point:

Consider asking your opponent to stipulate to procedures designed to prevent waiver of privilege through inadvertent disclosure [see *FRCP 26(b)(5)*, as amended effective Dec. 1, 2006 (allowing a party to claim a privilege as to information already produced in discovery and requiring notified party to return, sequester or destroy the information)].

2.14[3][d] Coerced Disclosure Does Not Waive Privilege. A privilege is waived when, without coercion, a holder of the privilege has either disclosed or consented to the disclosure of a significant part of an otherwise privileged communication [*Evid Code § 912(a)*]. Thus, a coerced disclosure does not waive the privilege. The holder of a privilege need only take reasonable steps to protect privileged communications; failure to take extraordinary or heroic measures will not result in a waiver [*Regents of University of California v. Superior Court*, (2008) 165 CA4th 672, 675, 81 CR3d 186] .

Example:

In an antitrust case, plaintiffs asked defendants to produce attorney-client communications and attorney work product that defendants had previously disclosed to federal agencies during the course of regulatory and criminal investigations. Because the defendants had disclosed those materials in an attempt to avoid indictment or regulatory sanctions, the court held that the disclosure was coerced, and the trial court acted properly in denying plaintiff's motion to compel [*Regents of University of California v. Superior Court* (2008) 165 CA4th 672, 675, 81 CR3d 186] .

2.14[4] Party Can Impliedly Waive Privilege by Placing Privileged Matter at Issue.

2.14[4][a] Communication Must Go to Heart of Claim. A plaintiff can waive a claim of privilege if he or she places in issue a communication going to the heart of the controversy and if the following factors are present [*Chicago Title Ins. Co. v. Superior Court* (1985) 174 CA3d 1142, 1149, 1153, 220 CR 507]:

- There is a legitimate need to reach the evidence sought to be shielded;
- The relevance and materiality of that evidence to the issue before the court is shown; and
- The information cannot be secured from a less intrusive source.

Courts have referred to this as an "implied waiver" [*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 CA3d 1047, 1052, 233 CR 825].

2.14[4][b] Implied Waiver Should Be Interpreted Narrowly. An implied waiver of privilege should be defined narrowly so that only information going to the heart of the controversy will be disclosed [*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 CA3d 1047, 1052, 233 CR 825].

Examples:

- In a hostile work-environment action, an employer may waive its attorney-client privilege if it places the adequacy of the attorney-led investigation of the employee's complaint at issue [*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 CA4th 110, 125-129, 68 CR2d 844].
- When an employer conducted its investigation using non-attorney personnel and sought to protect only certain communications between that personnel and the company's attorney, the employer did not waive the attorney-client privilege because details of those communications were not essential to determination of the adequacy of the investigation [*Kaiser Found. Hosps. v. Superior Court* (1998) 66

CA4th 1217, 1227, 78 CR2d 543].

- The psychotherapist-patient privilege was not waived when a defendant driver, who had been driving a trolley when plaintiff suffered an injury on the trolley tracks, revealed in her deposition that she was seeing a psychiatrist for stress-related claims due to a previous work-related incident [*San Diego Trolley, Inc. v. Superior Court* (2001) 87 CA4th 1083, 1094, 105 CR2d 476].

- In a bad-faith action, to the extent that a defendant insurer defends the claim based on the state of mind of its in-house claims adjusters-attorneys in conducting their investigation into plaintiff's claim and intends to call them as witnesses at trial to defend its actions, it may waive its attorney-client and attorney work product privileges [*2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 CA4th 1377, 1400 , *overruled on other grounds*, *Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725].

- In an action alleging defective construction of a reservoir, the attorney-client privilege was not waived by a lawyer's transmission to an insurer of documents regarding the client water district's investigation of construction-related claims because the documents revealed nothing about the water district's knowledge before or during construction [*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 CA4th 1453, 1457-1458].

- In a marital dissolution action, the husband's disclosure to his wife of his communications with one doctor and filing of another doctor's declaration did not waive the physician-patient privilege as to the husband's communications with a third doctor many years earlier when he was a teenager [*Manela v. Superior Court* (2009) 177 CA4th 1139, 1148, 99 CR3d 736] .

2.14[5] In Case of Joint-Privilege Holders, One Holder Cannot Waive Privilege for the Other. When there are joint holders of a privilege, e.g., the attorney-client or physician-patient privileges, the waiver of the right to claim the privilege by one holder does not affect the right of another holder to claim the privilege [*Evid Code* § 912(b)]. This is also true of spouses, who jointly hold the privilege for confidential marital communications [*Evid Code* § 912(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers



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2.15 Privilege Against Self-Incrimination.

2.15[1] Privilege Has Constitutional and Statutory Bases. To the extent that a privilege against self-incrimination exists under the United States or California constitutions, a person has a privilege to refuse to disclose any matter that may incriminate him or her [*Evid Code* § 940].

2.15[2] Privilege May Only Be Asserted by a Person. The privilege against self-incrimination does not apply to corporations or other entities; only to persons [*see People v. Superior Court (1986) 181 CA3d 785, 788, 227 CR 13*].

Additionally, a person may only assert the privilege as to papers or other tangible items if the effects are his or her personal property or in his or her possession in a personal capacity [*see People ex rel. Clancy v. Superior Court (1985) 39 C3d 740, 745, 218 CR 24, 705 P2d 347* (employee of corporation may not assert privilege with respect to property possessed as a result of representation of corporation)].

2.15[3] Privilege Only Protects Against Criminal Liability.

2.15[3][a] Privilege Applicable in Criminal or Civil Proceedings. While the privilege against self-incrimination may be asserted in either a criminal or civil proceeding, it only applies to matters that would incriminate the holder in the commission of a punishable crime [*People v. Whelchel (1967) 255 CA2d 455, 460, 63 CR 258*; *see also Black v. State Bar (1972) 7 C3d 676, 685, 103 CR 288, 499 P2d 968*].

2.15[3][b] Holder of Privilege Must Demonstrate Real Danger of Self-Incrimination. The privilege against self-incrimination protects only against a real danger of incrimination, not a remote or speculative possibility of incrimination [*Warford v. Medeiros (1984) 160 CA3d 1035, 1043, 207 CR 94*; *see also In re the Marriage of Sachs (2002) 95 CA4th 1144, 1161-1162, 116 CR2d 273*]. In addition, there must be some nexus between the information requested and the risk of criminal prosecution and/or conviction [*Troy v. Superior Court (1986) 186 CA3d 1006, 1012-1013, 231 CR 108*].

2.15[3][c] Holder of Privilege May Have to Accept Civil Consequences of Exercising Privilege. If a party or witness in a civil case chooses to exercise his or her privilege against self-incrimination, he or she must accept the civil consequences of that silence [*Blackburn v. Superior Court (1993) 21 CA4th 414, 425-426, 27 CR2d 204*].

**Trap:**

A plaintiff in a civil action may not refuse to answer discovery by exercising the privilege against self-incrimination. A plaintiff's case may ultimately be dismissed if plaintiff refuses to answer discovery requests on the ground of self-incrimination [*Fremont Indem. Co. v. Superior Court* (1982) 137 CA3d 554, 560, 187 CR 137 ; see also *Dwyer v. Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1431-1432, 240 CR 297 (plaintiff who refused to answer questions or produce documents at deposition could not introduce related evidence at trial)].

2.15[4] Privilege Must Be Invoked on Question-by-Question Basis. A party or witness can only invoke the privilege against self-incrimination with regard to specific questions asked or tangible evidence sought. The person invoking the privilege must sustain the burden of showing justification for claiming the privilege for each specific claim [*Warford v. Medeiros* (1984) 160 CA3d 1035, 1045, 207 CR 94].

The privilege against self-incrimination may not be invoked with respect to questions not yet asked or demands for evidence not yet made [*Fuller v. Superior Court* (2001) 87 CA4th 299, 308, 104 CR2d 525].

2.15[5] Witness May Be Compelled to Answer If Prosecutorial Immunity Granted. In certain cases, prosecutors may grant a witness or party immunity against prosecutorial use of information provided in a civil proceeding. In this situation, a witness or party may be compelled to answer questions or produce evidence in the civil proceeding [*Daly v. Superior Court* (1977) 19 C3d 132, 142-143, 137 CR 14, 560 P2d 1193].

**Strategic Point--Responding Party:**

The proper procedure for seeking a grant of immunity relating to discovery responses is by way of a protective order pertaining to the specific method of discovery [see CCP § 2025.420 (protective orders for depositions)].

**Cross Reference:**

Discussion of protective orders, see *Ch. 1, Strategy and Planning, 1.15*.

2.15[6] Self-Incrimination Rules Differ for Civil Defendants and Civil Plaintiffs.

2.15[6][a] Civil Defendants. If a civil defendant faces possible criminal prosecution based on the same facts underlying the civil action and the prosecutor refuses to grant the defendant immunity, the defendant may not be punished in the civil case for refusing to incriminate himself or herself [*Pacers, Inc. v. Superior Court* (1984) 162 CA3d 686, 688-690, 208 CR 743 (court should stay discovery until after disposition of criminal matter or expiration of criminal statute of limitations)].

2.15[6][b] Civil Plaintiffs. A court may impose sanctions on a civil plaintiff who refuses to answer discovery on the ground of self-incrimination. Unlike a civil defendant, the civil plaintiff does not present the court with an obligation to stay discovery until after the outcome of the criminal matter [*Dwyer v. Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1431-1432, 240 CR 297].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesSelf-Incrimination PrivilegeElementsEvidencePrivilegesSelf-Incrimination
PrivilegeExceptionsEvidencePrivilegesSelf-Incrimination PrivilegeScope



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Matthew Bender (R) Practice Guide: California Civil Discovery
Kiesel, Matthai, Seabolt, Grillo

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Chapter 2 Scope of Discovery
III. PRIVILEGES

1-2 MB Practice Guide: CA Civil Discovery 2.16

2.16 Attorney-Client Privilege.

2.16[1] Privilege Protects Against Disclosure of Confidential Communications. A client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing a confidential communication with his or her attorney; however, the privilege may be waived. The privilege must be claimed by the holder of the privilege, a person who is authorized by the holder to claim the privilege, or the person who was the lawyer at the time of the communication [*Evid Code* § 954].

► Cross References:

Discussion of confidential communications, see 2.16[3].

Discussion of the holder of the attorney-client privilege, see 2.16[4].

Discussion of waiver of privileges, see 2.14.

2.16[2] "Attorney" and "Client" Defined. A "lawyer" (or attorney) as defined by the statute, is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation [*Evid Code* § 950].

A "client" is a person who, directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity. "Client" includes an incompetent who consults an attorney directly as well as a guardian or conservator who consults an attorney on behalf of an incompetent [*Evid Code* § 951].

2.16[3] Types of Communications Subject to Attorney-Client Privilege.

2.16[3][a] "Confidential Communications" Defined. "Confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is

consulted. This includes a legal opinion formed and the advice given by a lawyer in the course of the relationship [*Evid Code* § 952].

Example:

Confidential communications between corporate employees regarding legal advice and strategy are privileged, as long as the employees involved are persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation [*Zurich American Ins. Co. v. Superior Court* (2007) 155 CA4th 1485, 1495, 66 CR3d 833 (internal litigation plans and strategy reflecting legal advice from counsel held privileged even when not directly communicated by counsel to the employee)].

2.16[3][b] Privilege Applies to Numerous Types of Information. Other than the obvious oral or written statements, the attorney-client privilege has been held to apply to actions, signs, and other types of communications. It applies to transmission of documents that are publicly available, because the fact the attorney had such documents in his or her possession might reveal the attorney's strategy. It also applies to factual information [*Mitchell v. Superior Court* (1984) 37 C3d 591, 600-601, 208 CR 886, 691 P2d 642]. But a fact may not be withheld from discovery as attorney-client privileged merely because the fact was incorporated into a communication involving an attorney [*Zurich-American Ins. Co. v. Superior Court* (2007) 155 CA4th 1485, 1504, 66 CR3d 833] .

The privilege also applies to confidential communications during a preliminary session with an attorney who ultimately is not hired [*Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 CA3d 1514, 1518, 237 CR 242 ; *Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1521-1522 (letter sent by one clergy member to another was not privileged despite author's expectation that the letter would be passed on to attorney with whom author had been communicating regarding the subject matter of the letter)].

Distinguish:

The privilege applies to the disclosure of communications, but not necessarily the underlying facts on which the communications are based. For example, a party may not refuse a discovery request to identify potential witnesses simply because that information passed between attorney and client [*Huffy Corp. v. Superior Court* (2003) 112 CA4th 97, 109 ; *Aerojet-General Corp. v. Transport Indem. Ins.* (1993) 18 CA4th 996, 1004, 22 CR2d 862].

2.16[3][c] Forwarding Nonprivileged Material to Attorney Does Not Create Privilege. A party cannot render nonprivileged material privileged by forwarding it to counsel [see *Barton v. United States Dist. Court* (9th Cir 2005) 410 F3d 1104, 1111-1112 (in tort action against drug manufacturer, privilege protected questionnaires on law firm's website completed by plaintiffs before law firm represented them and with no assurance that it would); *Laguna Beach County Water Dist. v. Superior Court* (2004) 124 CA4th 1453, 1458 ; *Green & Shinee v. Superior Court* (2001) 88 CA4th 532, 537, 105 CR2d 886 (incident reports prepared by police officers and transmitted to law firm for review and legal advice not privileged simply because they were forwarded to attorney)]. However, the fact that the material was discussed with or provided to the attorney would be privileged [*State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 CA4th 625, 639, 62 CR2d 834].

2.16[3][d] Communication Is Not Privileged If Client's Dominant Purpose Is Something Other Than Obtaining Legal Opinion or Advice. When an attorney acts in a non-attorney capacity, such as negotiator or business advisor, the relationship between the parties to the communication is not one of attorney and client, and the attorney-client privilege is inapplicable [*Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725, 735-736, 101 CR3d 758, 219 P3d 736 ; *Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 CA3d 467, 475, 200 CR 471] .

When a single attorney-client communication has more than one purpose, one relating to legal advice and another nonlegal purpose, the court must first determine the dominant purpose of the relationship between the attorney and the client [*Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725, 739-740, 101 CR3d 758,

219 P3d 736]. The client, having the burden of establishing the preliminary fact that the communications were made during the course of an attorney-client relationship, may request an in camera review of the communications to aid the trial court in making that determination, but the trial court may not order disclosure of the information over the client's objection [*Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725, 739-740, 101 CR3d 758, 219 P3d 736 (*disapproving in part 2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 CA4th 1377 , in which the Court of Appeal ordered the trial court to conduct an in camera review of communications claimed to be privileged to determine the dominant purpose of each communication); *Evid Code* § 915(a) (court may not require disclosure of information claimed to be privileged in order to rule on privilege claim)].

When a communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. If such a communication contains unprivileged factual material, that unprivileged material may be discoverable by some other means, but it may not be obtained through disclosure of the privileged communication [*Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725, 736, 101 CR3d 758, 219 P3d 736 (trial court erred when it directed a referee to conduct an in camera review of an opinion letter sent by outside counsel to a corporate client, allowing the referee to redact the letter to conceal that portion the referee believed to be privileged, and ordering the client to disclose the remainder to the opposing party)].

2.16[3][e] Identity of Clients and Fact of Communication Are Generally Not Privileged. As a general rule, the identity of an attorney's clients is not privileged [*Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 CA3d 1514, 1518, 237 CR 242]. The attorney-client privilege does not protect the fact that a communication took place or the time, place, and participants to a communication [*Samuels v. Mix* (1999) 22 C4th 1, 20 n5, 91 CR2d 273, 989 P2d 701].

Exception:

When divulging the names of the clients would betray a confidence because of the degree of knowledge about the attorney-client relationship, the client's identity can be treated as privileged [*Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 CA3d 1514, 1518, 237 CR 242 (names of clients who were injured by intrauterine device were protected because nature of medical problem was confidential communication); see *Tien v. Superior Court* (2006) 139 CA4th 528, 536, 43 CR3d 121 (compelling disclosure of identities of putative class members who contacted plaintiff's counsel in action alleging wage and hour violations did not violate attorney-client privilege because no personal, confidential information was revealed)].

2.16[3][f] Existence of Document Is Not Privileged. The existence of a document containing privileged information is not privileged [*Mitchell v. Superior Court* (1984) 37 C3d 591, 601-602, 208 CR 886, 691 P2d 642 ; *Smith v. Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165].

2.16[3][g] Identity of Witnesses May Not Be Privileged. The identity of fact witnesses is not subject to the attorney-client or work product privilege [*Huffy Corp. v. Superior Court* (2003) 112 CA4th 97, 109 ; *Aerojet-General Corp. v. Transport Indem. Ins.* (1993) 18 CA4th 996, 1004, 22 CR2d 862]. However, the identity of a fact witness who the party intends to call to testify at trial is protected work product [*City of Long Beach v. Superior Court* (1976) 64 CA3d 65, 73, 134 CR 468].

2.16[3][h] Names of Witnesses Interviewed at Direction of Counsel May Be Protected by Work Product Doctrine. Even if the existence of documents or the identity of witnesses is not subject to the attorney-client privilege, the names of witnesses who have been interviewed at the direction of counsel, or compilations of documents prepared by counsel may be protected under the work product doctrine [see, e.g. *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 217-218, 54 CR2d 575]. It is therefore critical whenever the issue of privilege arises to conduct an analysis under both the attorney-client and the attorney work product doctrine, as documents or witnesses who may not be protected under one of the privileges, may retain its protection under the other privilege.

**Warning:**

Note that as of June 2010, the California Supreme Court has granted review in *Coito v. Superior Court* (2010) 182 CA4th 758, 106 CR3d 342, rev. granted 2010 Cal. LEXIS 5133 (Cal. June 9, 2010), in which the court of appeal had held that witness statements were not protected as work product, creating a split of authority with *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 54 CR2d 575.

2.16[4] Individuals Who May Claim Privilege.

2.16[4][a] Client As Holder of Privilege. The client may claim the attorney-client privilege on his or her own behalf, whether or not he or she is a party [*Evid Code* §§ 953(a), 954(a)].

To claim the privilege, the client need not be a party to the proceeding in which the allegedly privileged material is sought [*Evid Code* § 954]. A nonparty who claims a privilege in a proceeding may make a motion to prevent disclosure of that material [*Mylan Laboratories Inc. v. Soon-Shiong* (1999) 76 CA4th 71, 80, 90 CR2d 111 (nonparty may make motion to assert privilege)].

2.16[4][b] Guardian or Conservator of Client As Holder of Privilege. If the client has a guardian or conservator, the guardian or conservator may claim the attorney-client privilege on behalf the client [*Evid Code* §§ 953(b), 954(a)].

2.16[4][c] Personal Representative of Client As Holder of Privilege. If the client is dead, the client's personal representative, including a personal representative appointed pursuant to *Prob Code* § 12252, may claim the attorney-client privilege on the client's behalf [*Evid Code* §§ 953(c), 954(a)].

**Warning:**

Once the client's estate is finally distributed and the personal representative discharged, the attorney-client privilege ceases to exist [*HLC Props., Ltd. v. Superior Court* (2005) 35 C4th 54, 65-66 ; Law Revision Comm'n Comment to *Evid Code* § 954].

2.16[4][d] Business Representative of Client As Holder of Privilege. The privilege may be claimed by the successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence [*Evid Code* §§ 953(d), 954(a)].

Examples of "organizations" covered by *Evid Code* § 954(d) include labor organizations, social clubs and fraternal organizations [*HLC Props., Ltd. v. Superior Court* (2005) 35 C4th 54, 62 ; Law Revision Comm. Comment to *Evid Code* § 951].

Distinguish:

An estate does not qualify as an "organization" under *Evid Code* § 954(d) [*HLC Props., Ltd. v. Superior Court* (2005) 35 C4th 54, 66-67].

2.16[4][e] Person Authorized by Holder of Privilege to Claim Privilege. The privilege may also be claimed by a person authorized by the privilege holder to claim the privilege [*Evid Code* § 954(b)].

**Cross Reference:**

Holder of attorney-client privilege, see 2.16[4][a]-[d].

2.16[4][f] Lawyer Asserting Privilege on Behalf of Client. As a general rule, the lawyer who received or made a confidential communication subject to the attorney-client privilege must claim the privilege on behalf of the client

whenever he or she is present when the communication is sought to be disclosed [*Evid Code* §§ 954(c), 955].

This duty extends to other persons employed by an attorney's law corporation to render services to the client [*see Evid Code* § 954 (scope of attorney-client relationship); *see also B&P Code* § 6160 (defining "law corporation")].

Exception:

An attorney may not claim the attorney-client privilege if there is no holder of the privilege in existence or if the attorney is otherwise instructed by a person authorized to permit disclosure (e.g., the client) [*Evid Code* § 954(c)].



Cross Reference:

Holder of attorney-client privilege, *see* 2.16[4][a]-[d].

2.16[5] Application of Privilege When Corporation Is Client.

2.16[5][a] Application of Privilege Depends on Relationship and Intent of Corporation's Employee and Corporation. A corporation can hold a lawyer-client privilege [*Evid Code* § 953(d)]. The corporate attorney client privilege is governed by the principles set forth in landmark case of *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 C2d 723, 36 CR 468, 388 P2d 700 . In order to determine whether the attorney client privilege attaches to a corporation in a given fact situation, the *Chadbourne* principles must be applied [*Scripps Health v. Superior Court* (2003) 109 CA4th 529, 533, 135 CR2d 126]. Recognizing that a corporation can speak only through people, *Chadbourne* created eleven principles for determining when the privilege applies [*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 C2d 723, 736-738, 36 CR 468, 388 P2d 700]. The most important principles are:

- When the employee of a defendant corporation is also an individual defendant (or may be individually charged with liability), his or her statement regarding the facts chargeable against both the individual and the employer and obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as if the employer-employee relationship did not exist.
 - When an employee of a defendant corporation is not a codefendant (or person who may be charged with liability), his or her communication should not be privileged unless, under all the circumstances of the case, he or she is the natural person to be speaking for the corporation; that is, the privilege will not attach unless the communication is of information emanating from the corporation (rather than the nonlitigant employee), and the employee is a person who would ordinarily be used for communication to the corporation's attorney.
 - When an employee has witnessed matters that must be communicated to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, the employee is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter the employee's status or make the statement subject to the attorney-client privilege.
 - If the employee's connection with the matter grows out of his or her employment to the extent that the report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his or her statement or report is that of the employer.
- If the employer requires (by standing rule or otherwise) that the employee make a report, the privilege attaching to that report is to be determined by the employer's purpose in requiring it; that is, if the employer directs the report to be made for confidential

transmittal to its attorney, the communication may be privileged.

☐ If the employer has more than one purpose in directing the employee to make the report or statement, the dominant purpose will control, unless the secondary use is of a nature that waived confidentiality.

■ If otherwise privileged under the rules stated above, a communication does not lose its privilege merely because it was obtained, with the employer's knowledge and consent, by an agent of the employer acting under the agency.

☐ For that purpose, an employer's indemnity insurer, and its duly appointed agents, are agents of the employer corporation. But the point to which this doctrine may be carried and the number of hands through which the communication may travel without losing confidentiality, depends on reason and the particular facts of the case.

■ In all corporate employer-employee situations it is the intent of the person from whom the information emanates that originally governs its confidentiality (and thus its privilege). Therefore, if the employee who has not been expressly directed by the employer to make a statement, does not know that the statement is sought on a confidential basis (or knowing that fact does not engender an intent that it be confidential), the intent of the party receiving and transmitting that statement cannot control the question of privilege.

■ Similarly, if the corporate employer, at its insurance carrier's request, directs the employee to make a statement, the employer's intent controls; and it cannot be said that the corporation intended the statement to be made as a confidential attorney-client communication unless the insurance carrier (or its agent) has advised the employer that the employee's statement was to be so obtained and used.

■ No greater liberality should be applied to the facts which determine privilege in the case of a corporation than would be applied in the case of a natural person (or association of persons), except as may be necessary to allow the corporation to speak.

Cross Reference:

Privilege of communications with insurer and within self-insured entity, see 2.16[7][c].

2.16[5][b] Shareholder Does Not Hold Privilege. With respect to communications between a corporation and outside corporate counsel, the holder of the attorney-client privilege is the corporation itself, not the corporation's shareholders [*National Football League Props., Inc. v. Superior Court* (1998) 65 CA4th 100, 109, 75 CR2d 893].

Shareholders may not claim the attorney-client privilege to discover the corporation's protected information [*National Football League Props., Inc. v. Superior Court* (1998) 65 CA4th 100, 107-108, 75 CR2d 893].

Similarly, a corporation's shareholders may not waive the corporation's attorney-client privilege [*McDermott, Will & Emery v. Superior Court* (2000) 83 CA4th 378, 383-384, 99 CR2d 622].

Example:

With respect to confidential communications with outside corporate counsel, the corporation itself holds the attorney-client privilege. Consequently, if shareholders attempt to bring a derivative malpractice lawsuit against outside corporate counsel, the outside counsel's confidential communications with the corporation will remain privileged, absent a waiver by the corporation [*McDermott, Will & Emery v.*

Superior Court (2000) 83 CA4th 378, 383-386, 99 CR2d 622 (derivative malpractice suit could not proceed because attorney defendant would be foreclosed, absent waiver by corporation, from disclosing very communications alleged to constitute breach of duty)].

2.16[5][c] Former Corporation's Privilege Passes to Successor Corporation. When a corporation ceases to exist as the result of a merger, its attorney-client privilege belongs to the successor corporation [*Venture Law Group v. Superior Court (2004) 118 CA4th 96, 98* ; *Dickerson v. Superior Court (1982) 135 CA3d 93, 98, 185 CR 97*]. After a merger, the former managers of a merged corporation do not hold the merged corporation's attorney-client privilege, and therefore they cannot waive it [*Venture Law Group v. Superior Court (2004) 118 CA4th 96, 104*].

2.16[5][d] Corporate Privilege Rules Apply to Associations. When an unincorporated association is the client, the association itself is the client. For example, in the case of a condominium association, the individual condominium owners cannot demand privileged material or waive the privilege [see *Smith v. Laguna Sur Villas Cmty. Ass'n (2000) 79 CA4th 639, 644, 94 CR2d 321*].

2.16[5][e] Communications Among Corporate Employees Discussing Legal Advice May Be Privileged. The corporate attorney-client privilege extends to confidential communications between agents of the client regarding legal advice and strategy, as long as disclosure to the corporate personnel involved is reasonably necessary to further the purpose of the legal consultation [*Zurich American Ins. Co. v. Superior Court (2007) 155 CA4th 1485, 1495, 66 CR3d 833* (internal litigation plans and strategy reflecting legal advice from counsel held privileged even when not directly communicated by counsel to the employee)].

Distinguish:

While corporation communications regarding legal advice are privileged, discussion of corporate policy is not [*Insurance Co. of North America v. Superior Court (1980) 108 CA3d 758, 770, 166 CR 880*].

2.16[6] Attorney-Client Privilege Is Subject to Statutory Exceptions.

2.16[6][a] Commission of Crime or Tort. The attorney-client privilege does not exist if the client sought or obtained the attorney's services to enable or aid anyone to commit or plan to commit a crime or fraud [*Evid Code* § 956; *State Farm Fire & Cas. Co. v. Superior Court (1997) 54 CA4th 625, 643-649, 62 CR2d 834* (exception applied); *BP Alaska Exploration, Inc. v. Superior Court (1988) 199 CA3d 1240, 1262-1270, 245 CR 682*].

The party invoking the exception must make a prima facie showing that it applies [*State Farm Fire & Cas. Co. v. Superior Court (1997) 54 CA4th 625, 643, 62 CR2d 834*]. The issues are whether the services of the firm were used to enable the client to commit a crime or fraud and whether there is a reasonable relationship between the crime or fraud and the attorney-client communication [*State Farm Fire & Cas. Co. v. Superior Court (1997) 54 CA4th 625, 645, 62 CR2d 834* (prima facie case made based on allegedly concealing evidence, presenting forgeries, and destroying evidence in pending litigation)].



Cross References:

Discussion of crime-fraud exception to work product doctrine, see 2.31[3].

Discussion of related professional responsibility issues, see *California Forms of Pleading and Practice*, Ch. 72, *Attorney Practice and Ethics*, § 72.270 et seq. (Matthew Bender).

2.16[6][b] Disclosure of Information May Prevent Dangerous Crime. The attorney-client privilege does not exist if the attorney reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual [*Evid Code* § 956.5].

 Cross Reference:

Affirmative duty to warn and protect others, see *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.30 *et seq.* (Matthew Bender).

2.16[6][c] Parties Claiming Through Deceased Client. The privilege does not exist as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession, nonprobate transfer, or inter vivos transaction [*Evid Code* § 957].

2.16[6][d] Communication Relating to Issue of Breach. The privilege does not exist as to a communication relevant to an issue of breach, by the attorney or by the client, of a duty arising out of the attorney-client relationship [*Evid Code* § 958].

2.16[6][e] Communication Concerning Intention or Competence of Client Executing Document Attested by Attorney. The privilege does not exist as to a communication relevant to the intention or competence of a client executing an attested document of which the attorney is an attesting witness, or concerning the execution or attestation of such a document [*Evid Code* § 959].

2.16[6][f] Communication Relating to Deed, Will, or Other Writing. The privilege does not exist as to a communication relevant to the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property, or relevant to the validity of such a writing [*Evid Code* §§ 960, 961].

2.16[6][g] Proceeding Between Co-Clients Who Had Common Interest. The privilege does not exist when two or more clients have retained or consulted an attorney on a matter of common interest. None of them, nor the successor in interest of any of them, may claim the privilege as to a communication made in the course of that relationship if the communication is offered in a civil proceeding between one of the clients (or his or her successor in interest) and another of the clients (or his or her successor in interest) [*Evid Code* § 962].

 Cross Reference:

Discussion of when the attorney-client privilege is inapplicable in the context of public meetings, see *California Forms of Pleading and Practice*, Ch. 470B, *Public Agency Meetings* (Matthew Bender).

2.16[6][h] Reporting Violations of Securities Law or Fiduciary Duties. Under the Sarbanes-Oxley Act, the Securities and Exchange Commission is directed to adopt rules to protect investors by requiring attorneys that practice before the Commission and represent issuers of securities to report evidence of material violations of the securities laws or breaches of fiduciary duty or similar violations by the company or any agent of it to the chief legal counsel or chief executive officer (or equivalent). If that person does not take appropriate action in response, the attorney must report the violation to the audit committee of the board of directors, or to another committee made up of directors who are not employed directly or indirectly by the company, or to the board of directors [*15 USC* § 7245].

2.16[7] Other Protections for Clients of Legal Service Providers.

2.16[7][a] Recipient of Paralegal Services. A paralegal has the same obligations as an attorney to maintain inviolate the clients' confidences, and at every peril to himself or herself, to preserve the secrets of his or her client [*B&P Code* § 6453; see *B&P Code* § 6068(e)(1)].

2.16[7][b] Client of Authorized Tax Practitioner. A communication between a taxpayer and any federally authorized tax practitioner amounting to advice given with respect to a state tax matter is covered by the attorney-client privilege to the extent the communication would be considered a privileged communication if it were between a client and an attorney [*R&T Code* §§ 7099.1(a)(1), 21028(a)(1); *UI Code* § 13019(a)(1)].

The privilege may only be asserted in noncriminal tax proceedings before the Franchise Tax Board, the State Board of Equalization, or the Employment Development Department [R&T Code §§ 7099.1(a)(2), 21028(a)(2); *UI Code* § 13019(a)(2)].

The privilege does not apply to a written communication in connection with the promotion of the direct or indirect participation in any tax shelter or in any proceeding to revoke or otherwise discipline any license or right to practice by any governmental agency [R&T Code §§ 7099.1(b), 21028(b); *UI Code* § 13019(b)].

2.16[7][c] Insured If Liability Insurer Must Provide Defense Through Its Attorney. Communications by an insured to his or her liability insurer concerning an event which may be a basis of a claim covered by the policy is subject to attorney-client privilege, if [*Travelers Ins. Co. v. Superior Court* (1983) 143 CA3d 436, 448-449, 191 CR 871]:

- The policy requires insurer to defend using its attorneys; and
- The communication is intended for the information or assistance of the attorney in the defense of the insured.

The privilege applies even if no action has been commenced when the communication is made or even if the insurer has not yet retained an attorney to represent the insured [*Soltani-Rastegar v. Superior Court* (1989) 208 CA3d 424, 426-427, 256 CR 255].

The privilege also applies to an internal communication within a self-insured entity if the dominant purpose of the communication is for review by counsel and for use by risk managers acting as de facto claim handlers [*Scripps Health v. Superior Court* (2003) 109 CA4th 529, 535, 135 CR2d 126 (occurrence reports were privileged)].

The fact that factual aspects of the report may be revealed during other aspects of discovery does not make the report discoverable [*Scripps Health v. Superior Court* (2003) 109 CA4th 529, 536, 135 CR2d 126].

Cross Reference:

Discussion of protection for internal corporate communication, see 2.16[5].

2.16[7][d] Welfare Recipient. An implicit "attorney-client" privilege exists between an authorized representative of a welfare recipient and the recipient during a hearing on discontinuation of the recipient's welfare benefits [*Welfare Rights Org. v. Crisan* (1983) 33 C3d 766, 772, 190 CR 919, 661 P2d 1073 ; *W&I Code* § 10950].

2.16[7][e] Trustee. When an attorney is retained on behalf of a trust, the holder of the privilege is the office of the trustee and not any particular individual or entity. If a successor trustee takes over administration of the trust, the previous trustee loses the privilege and the successor acquires the privilege [*Moeller v. Superior Court* (1997) 16 C4th 1124, 1130-1133, 69 CR2d 317, 947 P2d 279 (prior trustee could not refuse to produce documents demanded by successor trustee by claiming attorney-client privilege)].

A trustee may invoke the attorney-client privilege to withhold communications or documents from the trust beneficiaries [*Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 C4th 201, 206-207, 91 CR2d 716, 990 P2d 591 (beneficiaries denied access to privileged documents relating to trust administration and to trustee's personal liability)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeEvidencePrivilegesAttorney-Client

PrivilegeElementsEvidencePrivilegesAttorney-Client PrivilegeExceptionsEvidencePrivilegesAttorney-Client
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Chapter 2 Scope of Discovery
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1-2 MB Practice Guide: CA Civil Discovery 2.17

2.17 Physician-Patient Privilege.

2.17[1] Privilege Protects Against Disclosure of Confidential Communications Between Patient and Physician. A patient, whether or not a party to a lawsuit, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician, subject to waiver provisions and rules regarding claiming the privilege [*Evid Code* § 994].

► Cross References:

Definitions of patient and physician, see 2.17[2].

Discussion of waiver, see 2.14.

Discussion of who may properly claim the physician-patient privilege, see 2.17[4].

2.17[2] "Patient" and "Physician" Defined. A "patient" is a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of a physical or mental or emotional condition [*Evid Code* § 991].

A "physician" is a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation [*Evid Code* § 990].

The physician-patient relationship exists between a medical or podiatry corporation and a patient to whom it renders professional services, as well as between the patient and the licensed physicians and surgeons employed by the corporations to render services to patients [*Evid Code* § 994].

2.17[3] "Confidential Communications" Defined.

2.17[3][a] Communication Must Be in Course of Relationship and in Confidence. A "confidential communication between physician and patient" refers to information, including information obtained by an examination of the patient, transmitted between a patient and his or her physician in the course of that relationship and in confidence [*Evid Code* § 992].

2.17[3][b] Must Not Be Communicated to Unnecessary Third Persons. To qualify as a confidential communication, the communication must be made by a means that, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted [*Evid Code* § 992; see *Manela v. Superior Court* (2009) 177 CA4th 1139, 1147, 99 CR3d 736 (communication between patient and physician in presence of patient's wife was not privileged because wife's presence was not reasonably necessary for physician's diagnosis and treatment of patient)].

2.17[3][c] Diagnoses and Advice May Qualify As Confidential Communications. Confidential communications include diagnoses made and advice given by the physician in the course of the physician-patient relationship [*Evid Code* § 992].

2.17[3][d] Photographs of Patient May Qualify As Confidential Communications. Confidential communications may include photographs taken of the patient [*Binder v. Superior Court* (1987) 196 CA3d 893, 897, 242 CR 231 (photographs were taken for the sole purpose of obtaining confidential and private information regarding the patient's condition to assist in diagnosis)].

2.17[4] Who May Claim Physician-Patient Privilege.

2.17[4][a] Generally, Patient Is the Holder. Generally, the holder of the privilege is the patient, who has the statutory right to claim it [*Evid Code* § 994(a)].

If the patient has a guardian or conservator, that person is the holder. Similarly, if the patient has died, the patient's personal representative is the holder [*Evid Code* § 993].

Exception:

When the interests of the parent and minor child conflict, courts have held that the right of a parent to claim the physician-patient privilege on behalf of a child is not absolute [*In re Troy D.* (1989) 215 CA3d 889, 900-901, 263 CR 869 (proceeding in which child was allegedly born under influence of dangerous drugs and mother attempted to assert privilege to prevent disclosure of medical records)].

2.17[4][b] Authorized Person or Former Physician May Also Claim Privilege. A person authorized to claim the privilege by its holder may claim the privilege [*Evid Code* § 994(b)].

The person who was the physician at the time of the confidential communication may also claim the privilege, unless the holder of the privilege is not in existence or the physician is otherwise instructed by a person authorized to permit disclosure of the information [*Evid Code* § 994(c)].

2.17[4][c] Physician Must Claim Privilege When Disclosure Sought. The physician who participated in a privileged communication must claim the privilege if he or she is present when disclosure of the communication is sought and he or she is otherwise authorized to claim the privilege [*Evid Code* § 995; see *Evid Code* § 994(c)].

Distinguish:

Although a physician may claim a privilege, he or she may not waive the privilege; only the patient may waive it [*Roberts v. Superior Court* (1973) 9 C3d 330, 341, 107 CR 309, 508 P2d 309; *City & County of San Francisco v. Superior Court* (1951) 37 C2d 227, 233, 231 P2d 26].

2.17[5] Privilege Does Not Generally Exist When Patient Is Litigant. There is no privilege as to a communication relevant to an issue concerning the condition of the patient if the issue has been tendered by any of the following [*Evid Code* § 996]:

- The patient;

- A party claiming through or under the patient;
- A party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- The plaintiff in an action for injury to or wrongful death of his or her minor child or ward.

A defendant does not tender his or her medical condition simply by denying the plaintiff's allegations regarding the same [*Manela v. Superior Court* (2009) 177 CA4th 1139, 1149, 99 CR3d 736 (in medical dissolution action, husband did not tender his medical condition when he denied wife's allegations regarding his medical condition and submitted supporting evidence)].



Warning:

Courts have narrowly construed the patient-litigant exception to the physician-patient privilege. The plaintiff-patient waives the privilege only as to communications regarding the medical condition that he or she has placed in issue--not as to his or her entire past medical history [*Britt v. Superior Court* (1978) 20 C3d 844, 863-864, 143 CR 695, 574 P2d 766].

2.17[6] Physician-Patient Privilege Is Subject to Statutory Exceptions.

2.17[6][a] Commission of Crime or Tort. There is no physician-patient privilege if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or tort [*Evid Code* § 997].

2.17[6][b] Criminal Proceeding. There is no physician-patient privilege in a criminal proceeding [*Evid Code* § 998].

2.17[6][c] Damages on Account of Patient's Conduct. There is no physician-patient privilege as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown [*Evid Code* § 999].

2.17[6][d] Parties Claiming Privilege Through Deceased Patient. There is no physician-patient privilege as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate succession, intestate succession, or inter vivos transaction [*Evid Code* § 1000].

2.17[6][e] Issue of Breach of Duty. There is no physician-patient privilege as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship [*Evid Code* § 1001].

2.17[6][f] Validity of a Writing of Deceased Patient. There is no physician-patient privilege as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property, or with respect to an issue concerning the validity of such a writing [*Evid Code* §§ 1002, 1003].

2.17[6][g] Proceeding to Commit Patient or Competency Proceeding. There is no physician-patient privilege in a proceeding to commit the patient or otherwise place the patient or the patient's property, or both, under the control of another because of the patient's alleged mental or physical condition, or in a proceeding to establish a patient's competence [*Evid Code* §§ 1004, 1005].

2.17[6][h] Information Required to Be Publicly Reported. There is no physician-patient privilege as to

information that the physician or patient is required to report to a public employee, or as to information required to be recorded in a public office, if the report or record is open to public inspection [*Evid Code § 1006*].

2.17[6][i] Proceeding Determining Revocation of Rights. There is no physician-patient privilege in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned [*Evid Code § 1007*].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient
PrivilegeExceptionsEvidencePrivilegesDoctor-Patient PrivilegeScope



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1-2 MB Practice Guide: CA Civil Discovery 2.18

2.18 Psychotherapist-Patient Privilege.

2.18[1] Privilege Protects Against Disclosure of Confidential Communications. The patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist, subject to waiver provisions and rules regarding claiming the privilege [*Evid Code § 1014*].



Cross References:

Discussion of waiver, see 2.14.

Definitions of patient and psychotherapist, see 2.18[2].

Discussion of who may properly claim the psychotherapist-patient privilege, see 2.18[5].

2.18[2] "Psychotherapist" and "Patient" Defined. The statutory definition of "psychotherapist" is lengthy and can be found at *Evid Code § 1010*. It also specifically includes a situation in which a patient reasonably believes a person to be a psychotherapist [*Evid Code § 1010*].

A "patient" is a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purposes of securing a diagnosis or preventive, palliative, or curative treatment of his or her mental or emotional condition or who submits to an examination of his or her mental or emotional condition for the purpose of scientific research on mental or emotional problems [*Evid Code § 1011*].

2.18[3] "Confidential Communications" Defined. "Confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his or her psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the patient's interests or to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted [*Evid Code § 1012*].

Examples:

- Disclosure to the juvenile court and probation officer of privileged communications between a juvenile patient and his psychotherapist during court-ordered counseling was reasonably necessary to accomplish the rehabilitative purpose for which the psychotherapist was consulted [*In re Christopher M.* (2005) 127 CA4th 684, 695-696].

- A memorandum from church personnel to a priest's psychotherapist supplying information about the priest's personal history as an aid to diagnosis and treatment was protected under the psychotherapist-patient privilege because it was a disclosure reasonably necessary to accomplish the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 445].

- In a dependency proceeding, evidence from the psychotherapist of the child's siblings was properly excluded because the purpose of the therapy was not to assist the dependency court in making its findings at the jurisdiction and disposition hearing [*In re Cole C.* (2009) 174 CA4th 900, 912-913, 95 CR3d 62].

2.18[4] Privilege Is Broader Than Physician-Patient Privilege. The psychotherapist privilege is generally broader than the physician-patient privilege; for example, it includes the names, addresses, and phone numbers of a psychotherapist's patients and the fact that a party has obtained psychotherapy [*Smith v. Superior Court* (1981) 118 CA3d 136, 139-140, 173 CR 145 ; *City of Alhambra v. Superior Court* (1980) 110 CA3d 513, 518, 168 CR 49]. However, there can be exceptions to these rules when the need for disclosure is crucial to the cause of action [*County of Alameda v. Superior Court* (1987) 194 CA3d 254, 261, 263-264 (court ordered disclosure of name of mental hospital patient who raped plaintiff)].

2.18[5] Rules for Claiming Psychotherapist-Patient Privilege.

2.18[5][a] Privilege Generally Claimed by Holder. The patient is the holder of the privilege, unless the patient has a guardian or conservator, or is dead, in which case the personal representative is the holder [*Evid Code § 1013*; see *Boling v. Superior Court* (1980) 105 CA3d 430, 439, 164 CR 432 (privilege survives the patient's death)]. The privilege may be claimed by the holder, a person authorized by the holder to claim the privilege, or by the person who was the psychotherapist at the time of the confidential communication, unless the holder is no longer in existence or unless the psychotherapist has been instructed by an authorized person to permit disclosure [*Evid Code § 1014*].

2.18[5][b] Psychotherapist Must Claim Privilege When Present. The psychotherapist who received or made a communication subject to the privilege must claim the privilege whenever disclosure of the communication is sought in his or her presence and he or she is otherwise authorized to claim the privilege [*Evid Code § 1015*; see *Evid Code § 1014(c)*].

The psychotherapist has no power to waive the privilege [*Roberts v. Superior Court* (1973) 9 C3d 330, 341, 107 CR 309, 508 P2d 309].

2.18[5][c] Person Claiming Psychotherapist-Patient Privilege Has Burden. The party claiming the privilege has the burden of showing the privilege obtains. For the privilege to apply, the particular communication must be for the "dominant purpose" of transmittal to a psychotherapist in the course of professional counseling [*People v. Cabral* (1993) 12 CA4th 820, 827-828, 15 CR2d 866].

2.18[6] Exceptions to Psychotherapist-Patient Privilege.

2.18[6][a] Patient-Litigant Exception. There is no privilege as to a communication relevant to an issue concerning the mental or emotional condition of the patient if the issue has been tendered by either [*Evid Code* § 1016]:

- The patient;
- Any party claiming through or under the patient;
- Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- The plaintiff in an action for injury to or wrongful death of his or her minor child or ward.

Despite this exception, the privilege is still construed liberally in favor of the patient. The exception only authorizes disclosure of matters directly relevant to the nature of the specific emotional or mental condition that the patient voluntarily disclosed and tendered in the pleadings or in answers to discovery requests [*In re Lifschutz* (1970) 2 C3d 415, 431, 435, 85 CR 829, 467 P2d 557].

2.18[6][b] Commission of Crime or Tort. There is no privilege if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan a crime or a tort or to escape detection or apprehension after the commission of a crime or tort [*Evid Code* § 1018].

2.18[6][c] Psychotherapist Believes Patient Is Dangerous. There is no privilege if the psychotherapist has reasonable cause to believe that [*Evid Code* § 1024]:

- The patient is in such mental or emotional condition as to be dangerous to himself or herself or to the person or property of another; and
- Disclosure of the communication is necessary to prevent the threatened danger.

Cross Reference:

Affirmative duty to warn and protect others, see *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.30 *et seq.* (Matthew Bender).

2.18[6][d] Competency Proceeding. There is no privilege in a proceeding to establish a patient's competence [*Evid Code* § 1025].

2.18[6][e] Patient Is a Child Who May Have Been Crime Victim. There is no privilege when the patient is a child under 16 and the psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child [*Evid Code* § 1027].

2.18[6][f] Other Exceptions. Other exceptions to the psychotherapist-patient privilege can be found in *Evid Code* §§ 1017, 1019, 1020, 1021, 1022, 1023, 1026.

Cross Reference:

Exceptions to psychotherapist-patient privilege, see *California Forms of Pleading and Practice*, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.72 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient

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2.19 Privileges Pertaining to Marriage.

2.19[1] Privilege for Confidential Marital Communications. A spouse, whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a confidential communication made between him or her and the other spouse when they were married [*Evid Code* § 980].

If a spouse has a guardian or conservator, that person may exercise the privilege for confidential marital communications [*Evid Code* § 980].

2.19[2] Privilege of Spouse Not to Testify Against Other Spouse. A married person has a privilege not to testify against his or her spouse in any proceeding, and a privilege not to be called by the adverse party as a witness in a proceeding in which his or her spouse is a party [*Evid Code* §§ 970, 971].

2.19[3] Situations in Which Confidential Marital Communications Privilege Does Not Apply.

2.19[3][a] Commission of Crime or Fraud. There is no privilege for confidential marital communications if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud [*Evid Code* § 981].

2.19[3][b] Proceeding to Commit Spouse. There is no privilege for confidential marital communications in a proceeding to commit either spouse or otherwise place a spouse or a spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition [*Evid Code* § 982].

2.19[3][c] Competence Proceeding. There is no privilege for confidential marital communications in a proceeding brought by or on behalf of either spouse to establish his or her competence [*Evid Code* § 983].

2.19[3][d] Proceeding Against Other Spouse. There is no privilege for confidential marital communications in either a proceeding brought by or on behalf of one spouse against the other, or in proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by inter vivos transaction [*Evid Code* § 984; see *Manela v. Superior Court* (2009) 177 CA4th 1139, 1147, 99 CR3d 736 (communication between patient and physician in presence of patient's wife was not protected by the marital communications privilege in a marital dissolution action)].

2.19[3][e] Certain Criminal Proceedings. There is no privilege in a criminal proceeding in which one spouse is charged with any of the following crimes [*Evid Code* § 985]:

- A crime committed at any time against the person or property of the other spouse or of a child of either;
- A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse;
- Bigamy;
- Crimes under *Pen Code* §§ 270, 270a relating to failure to furnish necessities for a spouse or child.

There is also no privilege for confidential marital communications in a criminal proceeding in which the communication is offered into evidence by a defendant who is one of the spouses between whom the communication was made [*Evid Code* § 987].

2.19[3][f] Proceedings Under Juvenile Court Law. The privilege for confidential marital communications does not apply in a proceeding under the Juvenile Court Law [*Evid Code* § 986; *see also W&I Code* §§ 200-987 (Juvenile Court law)].

2.19[4] Situations Where Privilege Not to Testify Against Spouse Does Not Apply. All of the exceptions relating to the privilege for confidential marital communications apply to the privilege not to testify against a spouse [*Evid Code* § 972].

Additional exceptions to the privilege not to testify against a spouse include the following [*Evid Code* §§ 972(f), (g), 973]:

- **Knowledge of criminal act preceding marriage.** There is no privilege in a proceeding resulting from a criminal act that preceded legal marriage of the spouses to each other regarding knowledge acquired before that marriage if, before the legal marriage, the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify;
- **Proceeding by spouse against former spouse.** There is no privilege in a proceeding against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, and in certain proceedings relating to child support obligations;
- **Waiver by testimony.** There is no privilege for a married person who testifies in a proceeding to which his or her spouse is a party, or who testifies against his or her spouse in any proceeding, in the proceeding in which such testimony is given; and
- **Proceeding for benefit of spouse.** There is no privilege in a civil proceeding brought or defended by a married person for the immediate benefit of the spouse or of both spouses.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyElementsEvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyExceptionsEvidencePrivilegesMarital PrivilegesAdverse Spousal

TestimonyScopeEvidencePrivilegesMarital PrivilegesConfidential CommunicationsScope



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2.20 Clergy-Penitent Privilege.

2.20[1] Privilege Protects Penitential Communications. A penitent and a member of the clergy both have a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication [*Evid Code* §§ 1033, 1034].

A "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret [*Evid Code* § 1032; *see also* *People v. Edwards* (1988) 203 CA3d 1358, 1362-1363, 248 CR 53].

If the parties to the communication know that it likely will be transmitted to a third person, even a third person within the church, the communication is not a penitential communication under *Evid Code* § 1032 [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 444-445 ; *see also* *Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1518-1519 (statements made to clergy member by participants in religious retreat in presence of other participants are not privileged because of the presence of other persons)].

As long as a church or denomination authorizes a clergy member to hear particular communications and requires that the clergy member keep those communications secret, a communication is privileged from disclosure even though it is not a confession [*Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1518-1519].

The penitent is not required to be a member of any particular church or to be of the same faith as the clergy member to whom he or she makes the penitential communication, unless the discipline of that church limits the clergy member's authority to receive penitential communications to church members only [*Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1518-1519].



Cross Reference:

The clergy-penitent privilege may be waived. For a discussion of waiver, see 2.14.

2.20[2] "Member of Clergy" Defined. Member of clergy means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization [*Evid Code § 1030*].

2.20[3] "Penitent" Defined. Penitent means a person who has made a penitential communication to a member of the clergy [*Evid Code § 1031*].



Cross Reference:

Clergy-penitent privilege, see *DeMeo, California Deposition and Discovery Practice*, § 32.03 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

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2.21 Sexual Assault Counselor-Victim Privilege.

2.21[1] Sexual Assault Victim Holds Privilege. A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by any of the following [*Evid Code § 1035.8*]:

- The holder of the privilege;
- A person who is authorized to claim the privilege by the holder; or
- The person who was the sexual assault counselor at the time of the confidential communication.

Exception:

The privilege may not be claimed by the sexual assault counselor if there is no holder of the privilege in existence or if the counselor is instructed by an authorized person to permit disclosure [*Evid Code § 1035.8(c)*].

The holder of the privilege is the victim of the sexual assault, unless the victim has a guardian or conservator, or unless the victim is dead, in which case the holder is the personal representative [*Evid Code § 1035.6*].

2.21[2] Definitions. "Victim" means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault [*Evid Code § 1035*].

"Sexual assault counselor" has a lengthy definition that can be found in *Evid Code § 1035.2*.

The definition of "confidential communication" for purposes of this privilege can be found in *Evid Code § 1035.4*.

The definition of "sexual assault" for purposes of this privilege can be found in *Evid Code § 1036.2*.

**Cross Reference:**

Discussion of sexual assault counselor-victim privilege, see *DeMeo, California Deposition and Discovery Practice*, § 32.01 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview



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1-2 MB Practice Guide: CA Civil Discovery 2.22

2.22 Domestic Violence Counselor-Victim Privilege.

2.22[1] Domestic Violence Victim Holds Privilege. A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a domestic violence counselor in any proceeding specified in *Evid Code § 901* if the privilege is claimed by either the holder of the privilege, a person authorized by the holder to claim the privilege, or the person who was the domestic violence counselor at the time of the communication, unless there is no holder in existence or if the counselor is instructed to permit disclosure [*Evid Code § 1037.5*].

The holder of the privilege is the victim, or, if the victim has a guardian or conservator, the guardian or conservator, unless the guardian or conservator is accused of perpetrating domestic violence against the victim [*Evid Code § 1037.4*].

2.22[2] Definitions. The "victim" is any person who suffers domestic violence [*Evid Code § 1037*]. Domestic violence is defined in *Evid Code § 1037.7*.

"Domestic violence counselor" is defined in *Evid Code § 1037.1*.

"Confidential communication" is defined in *Evid Code § 1037.2*.



Cross Reference:

Discussion of domestic violence counselor-victim privilege, see *DeMeo, California Deposition and Discovery Practice*, § 32.02 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview



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1-2 MB Practice Guide: CA Civil Discovery 2.22A

2.22A Human Trafficking Victim-Caseworker Privilege

2.22A[1] Trafficking Victim, Agent or Caseworker May Claim Privilege. A trafficking victim, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker if the privilege is claimed by any of the following [*Evid Code § 1038(a)*]:

- The victim.
- A person who is authorized to claim the privilege by the victim.
- The human trafficking caseworker at the time of the confidential communication.

○ However, the caseworker may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The human trafficking caseworker who received or made a communication subject to the privilege must claim the privilege whenever the caseworker is present when disclosure of the communication is sought.

2.22A[2] Caseworker Must Inform Trafficking Victim of Limitations on Confidentiality. A human trafficking caseworker must inform the victim of any applicable limitations on confidentiality of communications between the victim and the caseworker. This information may be given orally [*Evid Code § 1038(b)*].

2.22A[3] Exceptions to Confidentiality

2.22A[3][a] Court May Compel Disclosure for Facts and Circumstances Involving Crime Against Victim Which Is Subject to Criminal Action. The court may compel disclosure of information received by a human trafficking caseworker that constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim and that is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship,

and the counseling services [*Evid Code* § 1038.1(a)].

The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator [*Evid Code* § 1038.1(a)].

2.22A[3][b] Court May Order Disclosure In Chambers. The court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and those other persons that the person authorized to claim the privilege consents to have present [*Evid Code* § 1038.1(b)].

2.22A[4] Definitions. "Victim" means any person who is a "trafficking victim" as defined in *Pen Code* § 236.1 [*Evid Code* § 1038.2(a)].

"Human trafficking caseworker" is defined in *Evid Code* § 1038.2(b).

A "confidential communication" is information transmitted between the victim and the caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the human trafficking counselor is consulted. It includes all information regarding the facts and circumstances involving all incidences of human trafficking [*Evid Code* § 1038.2(c)].

The "holder of the privilege" is the victim when he or she has no guardian or conservator, or a guardian or conservator of the victim when the victim has a guardian or conservator [*Evid Code* § 1038.2(d)].



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2.23 Privilege for Official Information.

2.23[1] "Official Information" Defined. Official information means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made [*Evid Code § 1040(a)*].

2.23[2] Privilege May Be Absolute or Conditional.

2.23[2][a] Absolute Privilege When Disclosure Forbidden by Act of Congress or California Statute. A public entity has an absolute privilege to refuse to disclose official information, and to prevent another from disclosing official information, if [*Evid Code § 1040(b)(1)*]:

- The privilege is claimed by a person authorized by the public entity to do so.
- Disclosure is either forbidden by an act of Congress or by a California statute.

Examples:

Criminal defendant was not entitled to discover records of Commission on Judicial Performance regarding complaints against judge because those records were absolutely privileged [*Commission on Judicial Performance v. Superior Court* (2007) 156 CA4th 617, 622-623, 67 CR3d 434] .

2.23[2][b] Conditional Privilege When Disclosure of Official Information Is Against Public Interest. A public entity has a conditional privilege to refuse to disclose official information, and to prevent another from disclosing official information, if [*Evid Code § 1040(b)(2)*]:

- The privilege is claimed by a person authorized by the public entity to do so.
- Disclosure of the information is against the public interest because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice.

Examples:

■ A hospital that was denied designation as a regional trauma center wished to discover documents connected with the review process. The court held that the raw data examined by the review committee was discoverable, but the notes and memoranda of their deliberations were not [*County of San Diego v. Superior Court* (1986) 176 CA3d 1009, 1025-1027, 222 CR 484].

■ A discharged police officer sued the County for allegedly releasing false information to other potential employers. The court held that the officer's legitimate need for the County's reports on him outweighed the need for confidentiality under the official information privilege [*County of Riverside v. Superior Court* (2000) 86 CA4th 211, 216-217, 103 CR2d 62].

■ After auditing a real estate broker's files, the Department of Real Estate (DRE) accused him of fraud in connection with two mortgages. The broker sought production of DRE's audit manuals. The court held that the manuals need not be produced because their disclosure would compromise the DRE's ability to conduct investigations, and the DRE's auditing methods were not relevant to the broker's defense on the fraud charges [*Suarez v. Office of Admin. Hearings* (2004) 123 CA4th 1191, 1195].

2.23[3] Conditional Privilege May Be Waived. The conditional privilege may be waived when any person authorized to claim the privilege consented to the disclosure of the information in the proceeding [*Evid Code* § 1040(b)(2)].



Cross Reference:

Official information privilege, see DeMeo, *California Deposition and Discovery Practice*, §§ 26.01-26.04 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral
OverviewEvidencePrivilegesGovernment PrivilegesWaiver



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2.24 Trade Secrets.

2.24[1] Owner of Trade Secret May Claim Privilege. An owner of a trade secret, or his or her agent or employee, may claim the trade secret privilege and refuse to disclose a trade secret and/or prevent another from disclosing it [*Evid Code § 1060*].

Exception:

The trade secret privilege does not apply when allowance of the privilege will tend to conceal fraud or otherwise work injustice [*Evid Code § 1060*; see *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 CA4th 1384, 1393, 9 CR2d 709].

2.24[2] Definitions. For purposes of the trade secret privilege, a "trade secret" is information, including a formula, pattern, compilation, program, device, method, technique, or process that [*CC § 3426.1(d)*; *Pen Code § 499c(a)(9)*; see *Evid Code § 1060(a)(1)*]:

- Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

2.24[3] Party Claiming Privilege Has Burden. The party claiming the trade secret privilege has the burden of establishing that the trade secret exists. If the party meets this burden, then the party seeking discovery of the trade secret must make a prima facie, particularized showing that the information sought is relevant and necessary to proof of, or defense against, a material element of one or more causes of action presented in the case and that it is reasonable to conclude that the information is essential to a fair resolution of the lawsuit. It is then up to the trial court to balance the interests of both sides and consider a protective order for the discovery sought [*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 CA4th 1384, 1393, 9 CR2d 709 ; see *Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 C4th 1, 16, 89 CR3d 455 (plaintiff did not meet its burden of demonstrating that the identity of defendant's sources was necessary to an element of a pending cause of action, and the trial court did not abuse its discretion in denying motion to compel)].

► **Cross Reference:**

Discussion of protective orders, see *Ch. 1, Strategy and Planning, 1.15*.

2.24[4] Trade Secret Privilege Can Be Waived. The holder of a trade secret privilege can waive the privilege. For example, the holder might fail to claim the privilege in response to a demand for production of documents. Even if the holder does waive the privilege, he or she may still seek a protective order to set terms and conditions on the disclosure of trade secrets [*CCP* § 2031.060 (protective orders); *Stadish v. Superior Court* (1999) 71 CA4th 1130, 1144, 84 CR2d 350].

► **Cross Reference:**

Protective orders, see *Ch. 1, Strategy and Planning, 1.15*.

2.24[5] Trade Secret Privilege in Specific Types of Actions. *Evid Code* §§ 1061, 1062 govern the procedures for asserting the trade secret privilege in criminal proceedings. Actions for misappropriation of trade secrets are governed by *CC* § 3426-3426.11.

► **Cross Reference:**

Discussion of trade secret privilege, see *DeMeo, California Deposition and Discovery Practice*, § 32.05 (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesTrade SecretsElementsEvidencePrivilegesTrade SecretsScopeEvidencePrivilegesTrade SecretsWaiver



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2.25 CHECKLIST: Attorney Work Product Protection.

☐ Determine whether information/material sought by opposing party is attorney work product:

☐ Material prepared in anticipation of litigation by attorney or attorney's agent.

Authority:

CCP § 2018.010 et seq.

Discussion:

See 2.28, 2.29

☐ Material prepared by expert that reflects attorney's mental processes.

Exception:

Protection is lost when expert witness is designated to testify at trial.

Authority:

CCP § 2034.210(c); Williamson v. Superior Court (1978) 21 C3d 829, 834-835, 148 CR 39, 582 P2d 126; National Steel Prods. Co. v. Superior Court (1985) 164 CA3d 476, 488-492, 210 CR 535

Discussion:

See 2.30

☐ Determine whether protection is absolute or qualified:

☐ Absolute protection for writings reflecting attorney's impressions, conclusions, opinions, theories, or legal research.

☐ Qualified protection for any other material or information prepared in anticipation of litigation. Not discoverable unless denial of discovery will:

☐ Unfairly prejudice the party seeking discovery in preparing claim or defense; or

☐ Result in injustice.

Authority:

CCP § 2018.030

Discussion:

See 2.27

☐ Verify work product protection is applicable in action at issue. Protection does not apply in:

☐ Action between client and attorney if work product is relevant to issue of breach by attorney.

☐ State Bar disciplinary action, under certain circumstances.

Authority:

CCP §§ 2018.070, 2018.080

Discussion:

See 2.31[2]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview



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IV. ATTORNEY WORK PRODUCT PROTECTION

1-2 MB Practice Guide: CA Civil Discovery 2.26

2.26 Options and Strategies When Material to Be Discovered May Be Protected Work Product.

All discovery requests and demands received should be examined for work product issues, whether interrogatories, demands for production, requests for admissions, or questions asked during deposition. If the privilege is not timely asserted, the privilege is waived.

In cases in which there is a large universe of materials and the attorney cannot determine definitively whether all documents are privileged, the safer course is to assert the attorney-client and work-product privileges, identify all privileged documents on a privilege log, and produce all nonprivileged documents known at the time. Additional later-discovered documents may subsequently be added to the privilege log and/or produced, whichever is appropriate.

A party seeking discovery confronted with an objection based on attorney work product may request that a privilege log be produced, if this has not been done, or may consider a motion to compel if the parties cannot resolve the dispute.

► **Cross References:**

Discussion of privilege logs, see *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.20[4][b].

Forms of memoranda supporting and opposing motions to compel discovery based on claims of work product, see *California Points and Authorities, Ch. 81, Discovery: Privileges and Other Discovery Limitations*, § 81.200 *et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview



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2.27 Attorney Work Product Protection May Be Absolute or Qualified.

2.27[1] Protection Is Absolute for Attorney's Written Impressions or Legal Research. Any writing that reflects an attorney's impressions, conclusions, opinions, theories, or legal research is not discoverable under any circumstances [CCP § 2018.030(a)]. Material need not be in the attorney's possession to enjoy the absolute protection. For example, the protection still applies if the material was transmitted to a client in confidence [*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 CA3d 1240, 1253, 245 CR 682].

2.27[2] Protection for Other Work Product Is Qualified. Other than writings subject to absolute work product protection under CCP § 2018.030(a), attorney work product is subject to a qualified protection. It is not discoverable unless the court determines that the denial of discovery will unfairly prejudice the party seeking discovery in preparing a claim or defense or that denial will result in injustice [CCP § 2018.030(b)].

The party claiming the qualified work product protection has the initial burden of establishing that the information is protected, but the party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice that party's claim or defense [*Fellows v. Superior Court* (1980) 108 CA3d 55, 67, 166 CR 274].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersWork ProductOpinion Work ProductCivil ProcedureDiscoveryPrivileged MattersWork ProductScope



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2.28 Work Product Includes Materials Prepared in Anticipation of Litigation.

2.28[1] Work Product Is Not Expressly Defined by Statute. Work product subject to qualified protection under *CCP § 2018.030(b)* is not defined by statute. Courts determine what constitutes work product on a case-by-case basis. Work product is material that is derivative in character; it is material compiled by the attorney in preparation of the case--not ultimate facts [*In re Jeanette H. (1990) 225 CA3d 25, 32, 275 CR 9*].

Examples:

- Diagrams prepared for trial, audit reports, appraisals, and expert opinions developed as a result of trial preparations are attorney work product [*Williamson v. Superior Court (1978) 21 C3d 829, 834, 148 CR 39, 582 P2d 126*].
- A paralegal's notes taken, at an attorney's direction, at a strategy session with attorneys and experts, and then edited by the attorney to add his own thoughts and comments, were absolutely protected work product [*Rico v. Mitsubishi Motors Corp. (2007) 42 C4th 807, 815*].
- Information compiled by an attorney regarding staffing ratios at a nursing facility is work product entitled to absolute protection [*Carehouse Convalescent Hospital v. Superior Court (2006) 143 CA4th 1558, 1565, 50 CR3d 129*].
- A list of potential witnesses interviewed is subject to a qualified privilege, and interview notes are subject to an absolute privilege [*Nacht & Lewis Architects, Inc. v. Superior Court (1996) 47 CA4th 214, 217-218, 54 CR2d 575* (overturning order to compel answer to interrogatory that would have entailed compilation of list); see *Rodriguez v. McDonnell Douglas Corp. (1978) 87 CA3d 626, 647-648, 151 CR 399* (witness statements are not protected, but when intertwined with attorney's protected impressions, conclusions, opinions, legal research or theories, entirety of notes will be protected)]. (Note that as of June 2010, the California Supreme Court has granted review in *Coito v. Superior Court (2010) 182 CA4th 758, 106 CR3d 342* , rev. granted 2010 Cal. LEXIS 5133 (Cal. June 9, 2010) , in

which the court of appeal had held that witness statements were not protected as work product, creating a split of authority with *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 54 CR2d 575 .)

- A list of nonexpert trial witnesses is considered work product (qualified privilege) [*In re Jeanette H.* (1990) 225 CA3d 25, 34-37, 275 CR 9 (list not subject to discovery, but court can require exchange of lists shortly before trial)].

- A list of documents on which a party intends to rely and the expected testimony of witnesses are protected by the absolute work product privilege [*Snyder v. Superior Court* (2007) 157 CA4th 1530, 1536, 69 CR3d 600 (holding invalid Los Angeles Superior Court General Order 29, which required a plaintiff in an asbestos action to file a case report disclosing this information within eight months after filing suit)].

- A list of potential witnesses who have provided independently prepared statements to counsel would not constitute work product [*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 217-218, 54 CR2d 575 ; see *Tien v. Superior Court* (2006) 139 CA4th 528, 536, 43 CR3d 121 (in putative class action lawsuit alleging wage and hour violations, names and contact information of class members who contacted employees' counsel in response to neutral letter sent to persons whose names and addresses were provided by employer did not constitute work product; employees' counsel was merely the passive recipient of telephone calls)].

2.28[2] Work Product Is Not Limited to Materials Prepared in Anticipation of Litigation. Unlike the federal work product doctrine, which protects only documents "prepared in anticipation of litigation or for trial" [*Fed R Civ P* 26(b)(3)], under California law, documents prepared by an attorney while acting in a nonlitigation capacity also can be protected as work product [*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 CA4th 1453, 1461 (attorney's response to auditor's inquiry was protected as work product even though response was not created to assist in litigation); *County of Los Angeles v. Superior Court* (2000) 82 CA4th 819, 833, 98 CR2d 564].

2.28[3] Transmitting Information or Items to Attorney Does Not Automatically Make Them Work Product. Information regarding events provable at trial or the identity and location of physical evidence is not considered work product simply because it has been transmitted to the attorney [*City of Long Beach v. Superior Court* (1976) 64 CA3d 65, 72, 134 CR 468].

2.28[4] Work Which Can Be Performed by Non-Attorney Is Not Protected As Attorney Work Product. Documents created by an attorney while performing duties that can be performed by non-attorneys are not attorney work product [*2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 CA4th 1377, 1399-1401 , *overruled on other grounds*, *Costco Wholesale Corp. v. Los Angeles County Superior Court* (2009) 47 C4th 725, 101 CR3d 718, 219 P3d 736 (documents created by claims adjusters who are also licensed attorneys are protected only if they reflect legal work, not if they contain only factual matters concerning a claims investigation); *Watt Indus., Inc. v. Superior Court* (1981) 115 CA3d 802, 805, 171 CR 503 (attorney's notes are not protected when attorney merely acts as business agent for client)].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureDiscoveryPrivileged MattersWork ProductScope



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2.29 Material Developed by Paralegal or Investigator May Be Protected.

When a paralegal or investigator is working as an attorney's agent, the agent's observations concerning a witness are entitled to work product protection [see *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647-648, 151 CR 399 ; *Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 815 (paralegal's notes of strategy session, made at attorney's direction, then edited by attorney to add his own thoughts and comments, were absolutely protected work product)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.30 Material Developed by Experts May Be Protected.

2.30[1] Advisory Services Conditionally Protected. When expert services are developed as a result of an attorney's initiative in preparing for trial, they are subject to the conditional work product protection [*Williamson v. Superior Court* (1978) 21 C3d 829, 834, 148 CR 39, 582 P2d 126 ; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 CA2d 527, 531, 51 CR 511].

Advisory services are those that are rendered by the expert but that are reflective of the attorney's mental processes, such as preparation of pleadings and cross examination of opposing expert witnesses [see *National Steel Prods. Co. v. Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535].

2.30[2] Services That Qualify Person As Expert Not Protected If Expert Will Be Giving Opinion As Witness. Any expert services that help to qualify the expert as a trial witness, such as reports prepared by the expert, are discoverable once it becomes reasonably certain that the expert will give a professional opinion as a witness on a material matter in dispute [*Williamson v. Superior Court* (1978) 21 C3d 829, 834-835, 148 CR 39, 582 P2d 126 ; see also CCP § 2034.010 et seq. (providing for exchange of expert information)].



Trap:

Once an expert is disclosed as a trial expert, all communications between the attorney and the expert are discoverable. A common mistake made by attorneys is to commit to writing, and send to an expert, information and discussions which the attorney assumes will remain privileged. An opponent's use of communications between an attorney and an expert can be devastating at trial.



Strategic Point:

A party may withdraw an expert at any time prior to the expert's deposition; in that case, work product protection is revived with respect to the expert's knowledge or opinion previously made discoverable [*Williamson v. Superior Court* (1978) 21 C3d 829, 835, 148 CR 39, 582 P2d 126 ; *County of Los Angeles v. Superior Court* (1990) 222 CA3d 647, 656, 271 CR 698].



Cross Reference:

Discussion of expert witness discovery, see Ch. 13, Exchanging Expert Witness Information.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersWork ProductScope



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2.31 Types of Actions in Which Work Product Protection Limited.

2.31[1] Actions Between Client and Attorney. The attorney work product protection does not exist in an action between an attorney and a client if the work product is relevant to an issue of breach by the attorney of a duty to his or her client arising out of the attorney-client relationship [*CCP § 2018.080*].

2.31[2] State Bar Disciplinary Investigations. The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the attorney; this discovery is subject to client approval and a protective order to ensure the confidentiality of the work product. Client approval is deemed to have been obtained whenever a client has filed a complaint against the attorney [*CCP § 2018.070*].

2.31[3] Official Inquiries Regarding Attorney's Knowing Participation in Crime or Fraud. There is no general crime-fraud exception allowing discovery of work product. However, when an attorney is suspected of knowingly participating in a crime or fraud, there is no work product protection in any official investigation by a law enforcement agency, proceeding, or action brought by a prosecutor in the name of the State of California, if the attorney's services were sought or obtained to enable anyone to commit or plan to commit a crime or fraud [*CCP § 2018.050*; see also *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 CA3d 1240, 1249-1251, 1253-1260, 245 CR 682 (no general crime/fraud exception to work product protection; case decided under former version of CCP § 2018 that did not have "official inquiry" exception)].

An attorney may request an in camera hearing to determine claims of privilege regarding materials seized in a criminal investigation [see *CCP § 2018.060*; *People v. Superior Court (Laff)* (2001) 25 C4th 703, 709, 23 P3d 563].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.31A Work Product Protection May Be Waived.

2.31A[1] Work Product Protection May Be Waived In the Same Ways That the Attorney-Client Privilege May Be Waived. Although there is no statute governing waiver of work product protection, courts have followed the same principles applicable to waiver of the attorney-client privilege. Work product protection may be waived by (1) the attorney's disclosure or consent to disclosure to someone other than the client who has no interest in maintaining the confidentiality of the work product, (2) failure to assert work product protection, (3) tendering certain issues, or (4) conduct inconsistent with claiming the privilege [*McKesson HBOC, Inc. v. Superior Court* (2004) 115 CA4th 1229, 1238-1239 ; *Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 891 ; *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 C4th 201, 214, 91 CR2d 716, 990 P2d 591].



Warning:

California does not recognize a joint defense privilege, and sharing confidential documents with a co-party who is not aligned with your client in the litigation, or who does not have a similar stake in the outcome of the litigation, may waive work product protection [*McKesson HBOC, Inc. v. Superior Court* (2004) 115 CA4th 1229, 1239-1240 (target of government investigation waived work product protection when it shared documents with the government pursuant to confidentiality agreement, because independent of the confidentiality agreement, the government had no interest in keeping the information confidential)].

Examples:

- Appellant attorney retained by two trustees of inter vivos trust waived right to claim work product privilege with respect to successor trustee because appellant attorney disclosed the documents to another attorney who was an agent of one, if not both, predecessor trustees; thus, appellant attorney effectively disclosed the documents to the predecessor trustees, which waived the privilege with regard to both predecessor trustee and successor trustees [*Eddy v. Fields* (2004) 121 CA4th 1543, 1549-1550].

- An attorney representing a corporation did not waive the work product privilege when he disclosed confidential information during an interview with a prospective attorney for the corporation's controlling shareholders, even though the controlling shareholders ultimately did not retain that attorney [*Pound v. DeMera DeMera Cameron* (2005) 135 CA4th 70].

- An attorney's response to an auditor inquiry letter regarding pending litigation did not waive the work product privilege [*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 CA4th 1453, 1460-1462].

- When confidential communications are voluntarily disclosed to independent auditors, "confidentiality ... is neither expected nor preserved" [*United States v. El Paso Co.* (5th Cir. 1982) 682 F2d 530, 540-541].

- The United States Supreme Court explained that there is no accountant-client privilege because independent accountants owe "ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This public watchdog function demands that the accountant[s] maintain total independence from the client at all times and requires complete fidelity to the public trust" [*United States v. Arthur Young & Co.* (1984) 465 US 805, 817-819].

Cross Reference:

Waiver of attorney-client privilege, see 2.14.

2.31A[2] Inadvertent Disclosure Does Not Waive Automatically Work Product Privilege. If privileged material is accidentally disclosed, for example when an attorney erroneously includes documents that were not intended to be among those produced to opponent, work product protection may not be waived [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 810]. The court must take into account the subjective intent of the privilege holder and the relevant surrounding circumstances in order to decide whether the privilege is waived [*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 652-653, 82 CR2d 799].



Warning:

When an attorney receives materials that obviously appear to be another attorney's work product, and it is reasonably apparent that they were included through inadvertence, the attorney should refrain from examining them any more than is essential to ascertain whether they are subject to work product protection. The attorney then must immediately notify the sender. The parties should resolve the situation by agreement or with court assistance, if necessary. An attorney who violates this rule by using the protected information faces possible disqualification [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 819-820 ; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 656-657, 82 CR2d 799].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureDiscoveryPrivileged MattersWork ProductWaivers



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Chapter 2 Scope of Discovery
IV. ATTORNEY WORK PRODUCT PROTECTION

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2.32 Right to Claim Work Product Protection Generally Belongs to Attorney.

2.32[1] Rule Protects Attorney's Labor. The attorney may claim or waive work product protection, because the protection is based on the policy of preserving the attorney's rights to prepare for trial [*Lohman v. Superior Court* (1978) 81 CA3d 90, 100-101, 146 CR 171 ; CCP § 2018.020 (codification of policy)]. An attorney may assert a claim of work product even if the documents are in the possession of someone else, provided there has been no waiver [*Oxy Res. Cal. LLC v. Superior Court* (2004) 115 CA4th 874, 901].

► **Cross Reference:**

Waiver of work product protection, see 2.31A.

2.32[2] Litigant In Pro Per Has Standing. A litigant acting in propria persona has the right to assert the work product protection [*Dowden v. Superior Court* (1999) 73 CA4th 126, 136, 86 CR2d 180].

2.32[3] Client May Claim Privilege on Behalf of Attorney. A client may claim the work product protection on behalf of his or her attorney [*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 CA3d 1240, 1258, 245 CR 682 ; *Mack v. Superior Court* (1968) 259 CA2d 7, 10, 66 CR 280].

2.32[4] Attorney May Assert Work Product Privilege Against Client or Former Client. Because the attorney is the holder of the work product privilege, documents protected by the work product privilege need not be disclosed even to the client in some cases [*Metro-Goldwyn-Mayer v. Superior Court* (1994) 25 CA4th 242, 247, 30 CR2d 371 ; *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 CA3d 264, 278, 218 CR 205].

Exception:

There is no work product protection in an action between an attorney and a client (or former client) if the work product is relevant to an issue of breach by the attorney of a duty to the client [CCP § 2018.080].

► **Cross Reference:**

Action between attorney and client regarding breach of duty, see 2.31[1].

**Warning:**

Courts have recognized that this rule is in tension with the ethical requirement that a terminated attorney promptly turn over a client's files to the client or new counsel [*Cal Rules Prof Conduct, Rule 3-700(D)*; *Eddy v. Fields* (2004) 121 CA4th 1543, 1548-1549 ; *Metro-Goldwyn-Mayer v. Superior Court* (1994) 25 CA4th 242, 246-247, 30 CR2d 371].

Exception:

Even assuming that an attorney has the right not to disclose his or her work product to a client, the attorney cannot share work product with one client but withhold it from another [see *Eddy v. Fields* (2004) 121 CA4th 1543, 1549-1550 (attorney who disclosed documents to second attorney, who represented first attorney's former clients, effectively disclosed documents to clients, and could not withhold same documents from party succeeding clients as trustee); *Metro-Goldwyn-Mayer v. Superior Court* (1994) 25 CA4th 242, 248-249, 30 CR2d 371 (attorney who disclosed work product to one former client waived right to claim work product as to other former client)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.33 CHECKLIST: Constitutional Privacy Protections.

☐ Determine whether information sought to be discovered falls within privacy zone established by case law for:

☐ Associational affairs;

Authority:

Cal Const, art I, § 1; Britt v. Superior Court (1978) 20 C3d 844, 852-856, 143 CR 695, 574 P2d 766

☐ Financial affairs;

Authority:

Cal Const, art I, § 1; Schnabel v. Superior Court (1993) 5 C4th 704, 712, 21 CR2d 200, 854 P2d 1117 ; Valley Bank of Nev. v. Superior Court (1975) 15 C3d 652, 656-658, 125 CR 553, 542 P2d 977

☐ Medical history;

Authority:

Cal Const, art I, § 1; Heda v. Superior Court (1990) 225 CA3d 525, 529-530, 275 CR 136

☐ Personnel files;

Authority:

Cal Const, art I, § 1; El Dorado Savings & Loan Assn. v. Superior Court (1987) 190 CA3d 342, 345-346, 235 CR 303

☐ Sexual relations;

Authority:

Cal Const, art I, § 1; Vinson v. Superior Court (1987) 43 C3d 833, 841-842, 239 CR 292, 740 P2d 404

☐ Consultation with counsel.

Authority:

Cal Const, art I, § 1; Tien v. Superior Court (2006) 139 CA4th 528, 540-541, 43 CR3d 121

Discussion:

See 2.35

☐ Determine whether need for privacy outweighs court's interest in facilitating ascertainment of truth.

Authority:

Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 CA4th 235, 253-255, 100 CR2d 725

Discussion:

See 2.36

☐ Verify privacy privilege has not been waived.

Authority:

Evid Code § 912; Heda v. Superior Court (1990) 225 CA3d 525, 530, 275 CR 136

Discussion:

See 2.37

Legal Topics:

For related research and practice materials, see the following legal topics:

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2.34 Privacy "Privilege" Based on Constitutional Protections.

The privacy privilege is implied from the right to privacy guaranteed by *Cal Const art I, § 1* [*Vinson v. Superior Court* (1987) 43 C3d 833, 841-842, 239 CR 292, 740 P2d 404 ; *Britt v. Superior Court* (1978) 20 C3d 844, 852-856, 143 CR 695, 574 P2d 766]. A plaintiff alleging a violation of the constitutional right to privacy must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) conduct by the defendant constituting a serious invasion of the privacy interest [*Hill v. National Collegiate Athletic Assn.* (1994) 7 C4th 1, 39-40, 26 CR2d 834, 865 P2d 633] .

Matters that fall within the "zone of privacy" established by the California Constitution and case law are protected absent a compelling state interest [*Britt v. Superior Court* (1978) 20 C3d 844, 864-865, 143 CR 695, 574 P2d 766 ; *Morales v. Superior Court* (1979) 99 CA3d 283, 287, 160 CR 194].



Cross Reference:

Forms of memoranda supporting and opposing motions to compel discovery based on claims of right to privacy, see *California Points and Authorities*, § 81.240 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.35 Matters That Fall in "Zone of Privacy" Are Protected by Privacy Privilege.

Matters that have been held to fall within the "zone of privacy" include associational affairs, personal financial affairs, medical history, employment personnel records, and sexual relations.

Example--Associational Affairs:

A defendant airport was not allowed discovery of plaintiff's political activities relating to airport [*Britt v. Superior Court* (1978) 20 C3d 844, 852-856, 143 CR 695, 574 P2d 766].

Example--Personal Financial Affairs:

Schnabel v. Superior Court (1993) 5 C4th 704, 712, 21 CR2d 200, 854 P2d 1117 (allowing discovery of closely held corporation's business records and tax returns by shareholder's spouse in marital dissolution proceeding, but withholding payroll tax information identifying third persons); *Valley Bank of Nev. v. Superior Court* (1975) 15 C3d 652, 656-658, 125 CR 553, 542 P2d 977 (bank must make reasonable attempt to notify customer before disclosing confidential information to afford customer opportunity to object); *Fortunato v. Superior Court* (2003) 114 CA4th 475, 480-481 (recognizing bank customer's right to privacy in tax returns, checks, statements and other account information); *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 CA4th 579, 595, 40 CR3d 446 (even assuming non-party law firm had protectible financial privacy rights, those rights did not preclude discovery of financial and insurance information that was relevant to essential issues regarding collectibility of a judgment against that law firm).

Examples--Medical History:

Ombudsman Services of Northern California v. Superior Court (2007) 154 CA4th 1233, 1250-1251, 65 CR3d 456 (plaintiffs in elder abuse case were not entitled to discover records of ombudsman's investigations of a specific long-term care facility); *Bearman v. Superior Court* (2004) 117 CA4th 463, 468-471 (Medical Board failed to show good cause to subpoena patient's medical records as part of investigation into whether patient's physician improperly recommended the use of medicinal marijuana); *Heda v. Superior Court* (1990) 225 CA3d 525, 529, 275 CR 136 (plaintiff not allowed to discover defendant's medical records needed to support a motion for trial preference based on defendant's ill health).

Example--Personnel Files:

Petitioner, a current employee, granted privacy protection of his personnel file in response to production demand by plaintiff-former employees. The court held that although relevant to the issues in the case, less intrusive means were available to plaintiffs. [*El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 CA3d 342, 345346, 235 CR 303].

Example--Sexual Relations:

Sexual harassment plaintiff entitled to privacy protection of her sexual history [*Vinson v. Superior Court* (1987) 43 C3d 833, 841-842, 239 CR 292, 740 P2d 404].

Example--Consultation With Counsel:

In an action alleging wage and hour violations, the privacy rights of class members who contacted plaintiffs' counsel outweighed the employer's interest in learning their identity. The employer had no compelling need for the information because it knew the identity of all class members and could contact them independently [*Tien v. Superior Court* (2006) 139 CA4th 528, 540-541, 43 CR3d 121] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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2.36 Privacy Interest Balanced With State Interest in Disclosure.

In determining if a matter falling within an individual's zone of privacy should be disclosed, the court will generally balance the state's interest in facilitating ascertainment of the truth against the person's privacy interest [*John B. v. Superior Court* (2006) 38 C4th 1177, 1199, 45 CR3d 316, 137 P3d 153 ; *Save Open Space Santa Monica Mountains v. Superior Court* (2001) 84 CA4th 235, 253-255, 100 CR2d 725]. An invasion of a privacy interest may be justified if it substantially furthers one or more legitimate competing or countervailing privacy or non-privacy interests [*In re Christopher M.* (2005) 127 CA4th 684, 695].

If the court decides that disclosure of the information should be compelled, the disclosure must be precise and narrowly drawn to ensure maximum protection of the privacy right [*Save Open Space Santa Monica Mountains v. Superior Court* (2001) 84 CA4th 235, 252-253, 100 CR2d 725 ; *Fults v. Superior Court* (1979) 88 CA3d 899, 904-905, 152 CR 210].

Examples:

- In a marital dissolution action, the wife opposed the husband's request for joint custody, claiming the husband suffered from a seizure disorder that made it unsafe for their son to be left alone with him. She sought production of the husband's medical records and he objected, claiming among other things that the records were protected by his right to privacy. The court held that although medical records fell within the scope of the right to privacy, that right was outweighed by the state's compelling interest in promoting the best interests of the child. Thus, discovery of the husband's medical records was appropriate, but because the subpoena sought more information than was necessary to protect the child's best interests, the court narrowed the scope of documents that could be discovered. In addition, to protect the husband's privacy, the court instructed the trial court to consider reviewing the documents in camera and to consider issuing a protective order limiting the dissemination of the private medical records [*Manela v. Superior Court* (2009) 177 CA4th 1139, 1150-1152, 99 CR3d 736] .

- In a case brought by a wife against her husband for knowingly or negligently infecting her with HIV, the wife sought discovery into the husband's sexual history and his awareness of his HIV infection. After balancing the wife's right to discover relevant evidence against the husband's right to privacy, the

Supreme Court concluded that the wife was entitled to discovery that might lead to evidence that the husband was aware of his HIV status. In light of the husband's negative HIV test shortly after they married, however, the Court limited discovery into the husband's sexual conduct during the six-month period of possible infection prior to the test [*John B. v. Superior Court* (2006) 38 C4th 1177, 1199-1201, 45 CR3d 316, 137 P3d 153] .

- In a consumer class action brought on behalf of purchasers of allegedly defective DVD players, plaintiffs sought the names and contact information of customers who had complained about the DVD player. The California Supreme Court held that the trial court acted within its discretion in permitting disclosure of a customer's information unless, following proper notice, the customer registered a written objection [*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 C4th 360, 374-375, 53 CR3d 513, 150 P3d 198 ; see also *Lee v. Dynamex, Inc.* (2008) 166 CA4th 1325, 1338, 83 CR3d 241 (in putative employee class action, trial court abused its discretion by denying putative class representative's motion to compel disclosure of identity of potential class members from employer) *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 CA4th 554, 562, 57 CR3d 197 (approving opt-out notice for potential class members in wage and hour class action); *Experian Information Solutions, Inc. v. Superior Court* (2006) 138 CA4th 122, 133-135, 41 CR3d 219 (after class certification was denied, plaintiff could contact only those former class members who gave written consent to contact by plaintiff's counsel); *Best Buy Stores, L.P. v. Superior Court* (2006) 137 CA4th 772, 778, 40 CR3d 575 (letter to potential class action representatives must state that recipients are free to ignore the letter and must require written authorization before the recipient's identity is disclosed to plaintiff's counsel)].

- In a case alleging wage and hour violations, an order restricting the disclosure of potential witnesses' contact information through the use of an opt-in letter exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion [*Puerto v. Superior Court* (2008) 158 CA4th 1242, 1258, 70 CR3d 701] ; see also *Crab Addison, Inc. v. Superior Court* (2008) 169 CAth 958, 974-975, 87 CR3d 400 (although employees had signed forms indicating they did not want their contact information disclosed, when they signed forms they were unaware of class action litigation to enforce their statutory wage and overtime rights; plaintiffs could obtain their contact information using an opt-out notice).

- In an age discrimination class action filed by television writers, the writers served subpoenas on the Writers Guild of America, seeking data on Writers Guild members from which they could prepare a statistical analysis to support their claims of age discrimination. In response to a privacy notice sent to 47,000 Writers Guild members, approximately 7,700 members filed objections. The trial court sustained the objections in their entirety, but the Court of Appeal granted the writers' writ petition, finding that the trial court erred in its purported balancing of the privacy rights of the objectors and the countervailing interests of the litigants and the state by failing to analyze the types of information requested, failing to consider the state's interest in preventing discrimination, and erroneously concluding the writers could proceed with a statistical analysis without information from the objectors [*Alch v. Superior Court* (2008) 165 CA4th 1412, 1427, 82 CR3d 470] .

- In a delinquency case against a juvenile, the trial court approved conditions of probation requiring that all records relating to the juvenile's medical and psychological treatment be made available to the court and the probation officer upon request. The appellate court held that invasion of the juvenile's privacy interest in his medical and psychological treatment records was justified by the state's legitimate countervailing interest in (1) protecting the public against the juvenile's violent and antisocial conduct and (2) determining whether he was fully complying with conditions of his probation and whether treatment was succeeding [*In re Christopher M.* (2005) 127 CA4th 684, 695].

■ In a discrimination action brought by a nurse against her employer, the defendant was not required to produce personnel records for other nurses employed by the defendant. The court held that the balance between the privacy interests of the nurses (who had objected to disclosure of their records) and plaintiff's need for the information was appropriately struck by the defendant's provision of interrogatory answers listing the type and number of disciplinary acts regarding nurses identified by race but not by name [*Perez v. County of Santa Clara* (2003) 111 CA4th 671, 678].

■ An appellate court held that the need for discovery on a motion for attorney's fees and expenses outweighed the privacy interests of donors to a nonprofit organization's litigation fund. The state's interest was to ensure that attorney's fees were not awarded unless the statutory requirements of CCP § 1021.5 were met, and the court needed the donor information to realistically assess the needs of the attorney's fees applicant and to ensure that county taxpayers were not paying unwarranted attorney's fees awards [*Save Open Space Santa Monica Mountains v. Superior Court* (2001) 84 CA4th 235, 252-254, 100 CR2d 725].

■ An appellate court protected the names, addresses, and telephone numbers of participants in the anti-abortion movement based on the participants' freedom of association and residential privacy rights. The court held that the state's interest in this case was weak; the party advocating disclosure failed to demonstrate any real need for the information [*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 CA4th 347, 367, 99 CR2d 627].

■ In a case in which plaintiff alleged he was molested while a member of Boy Scouts, plaintiff requested a list of individuals who had previously been determined to be unfit to serve as volunteers. This information was unrelated to the action at issue. The trial court conducted an in camera review of the records and determined the records were not relevant to any issue in the lawsuit, and were therefore protected by constitutional privacy provisions [*Juarez v. Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 384-385, 391-392, 97 CR2d 12].

■ In an action on behalf of a child with a congenital birth defect against a sperm bank, the court found the state's interest in obtaining the information about the donor outweighed the donor's privacy rights. The court ordered the donor's deposition to proceed subject to a protective order that would protect the confidentiality of the donor [*Johnson v. Superior Court* (2000) 80 CA4th 1050, 1067-1072, 95 CR2d 864].

■ In a civil rights action against a club alleged to have racially discriminatory membership practices, the court held disclosure of the names and business addresses of the applicants who had been rejected for membership was appropriate. However, the court stated that before disclosure was made, the applicants should be informed that their identities were sought and should be permitted to petition the court for protective orders if they sought anonymity [*Olympic Club v. Superior Court* (1991) 229 CA3d 358, 364, 282 CR 1].

■ In plaintiff's lawsuit against her employer, the court refused to compel disclosure of plaintiffs' co-workers' statements about her made during sessions with employer's ombudsman. Plaintiff's right to ascertain the truth about her claim that she had been treated unfairly was outweighed by the privacy rights of the co-workers participating in the confidential sessions [*Garstang v. Superior Court* (1995) 39 CA4th 4th 526, 533-534].

■ In the case of employee personnel files, courts have held that parties should seek a less intrusive means of discovery than producing the whole file. An in camera inspection of the file is also a possibility in this type of situation [*El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 CA3d 342,

345-346, 235 CR 303].

Legal Topics:

For related research and practice materials, see the following legal topics:

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2.37 Waiver of Privacy Protection Narrowly Construed.

Courts consider the standards of *Evid Code* § 912 pertaining to waiver of privileges in determining whether an individual has waived privacy rights [see *Heda v. Superior Court* (1990) 225 CA3d 525, 530, 275 CR 136 ; see also *Urbaniak v. Newton* (1991) 226 CA3d 1128, 1135-1136, 1139-1141, 277 CR 354].

The scope of the waiver of a person's privacy rights is to be narrowly construed so that the waiver encompasses only discovery directly relevant to a plaintiff's claim [*Vinson v. Superior Court* (1987) 43 C3d 833, 841-842, 239 CR 292, 740 P2d 404].

Examples:

- In a case in which an actress sued for pregnancy discrimination, she was found to have waived her right of privacy concerning her psychological condition only as it related to termination of her employment contract. In addition, defendants had to demonstrate a compelling public interest in obtaining information relating to her pregnancy [*Tylo v. Superior Court* (1997) 55 CA4th 1379, 1386-1390, 64 CR2d 731].

- In a case in which plaintiff filed a lawsuit as a result of an automobile accident, plaintiff's privacy interest in her psychotherapy records was not waived because she limited the damages claimed for pain and suffering to those sustained in the automobile accident that was the subject of the lawsuit. The court held that mere speculation by a defendant that the records might contain something relevant is not enough to overcome the privacy protection [*Davis v. Superior Court* (1992) 7 CA4th 1008, 1013, 1017-1018, 9 CR2d 331 (records of psychotherapy pertained to substance abuse; they remained protected)].



Cross Reference:

Standards for evaluating waiver under *Evid Code* § 912, see 2.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Civil Procedure](#)[Discovery](#)[Privileged Matters](#)[General Overview](#)[Civil Rights Law](#)[Privacy Rights](#)[General Overview](#)



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2.38 Party Can Assert Privacy Rights of Non-Litigants in Certain Situations.

A party who receives a discovery demand impacting the privacy rights of a third party may assert that party's privacy rights [*Tien v. Superior Court* (2006) 139 CA4th 528, 539, 43 CR3d 121 (plaintiffs' counsel asserted privacy rights of class members who contacted them); *Bearman v. Superior Court* (2004) 117 CA4th 463, 468-469 (physician asserted patient's privacy right in medical records); *Denari v. Superior Court* (1989) 215 CA3d 1488, 1498-1499, 264 CR 261 (county asserted privacy rights of arrestees); see *Valley Bank of Nev. v. Superior Court* (1975) 15 C3d 652, 655, 125 CR 553, 542 P2d 977 (bank asserted privacy rights of customers)].

As with other privacy considerations, the court should balance the need to obtain the discovery with the third party's privacy rights [*Schnabel v. Superior Court* (1993) 5 C4th 704, 712, 21 CR2d 200, 854 P2d 1117]. Before making that determination, the court should give the third party notice and an opportunity to object to disclosure [*Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1520-1521].

► **Cross Reference:**

Balancing privacy interest with interest in disclosure, see 2.36.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2.39 CHECKLIST: Consumer and Employee Protections.

☐ If issuing subpoena for "personal records" of a consumer, serve consumer with copies of all of the following documents 10 days prior to the date of production called for in subpoena for production of the records and five days prior to the service of the documents on the custodian of records:

- ☐ The subpoena duces tecum.
- ☐ Affidavit supporting issuance of subpoena, if any.
- ☐ Statutory notice to consumer that records about consumer are being sought from the witness named on the subpoena.

☐ Serve consumer with mandatory Judicial Council Form SUBP-025 to provide notice to the consumer.

Authority:

CCP § 1985.3

Discussion:

See 2.40[1]; Ch. 6, Oral Depositions in California, 6.11[3], 6.17[8], 6.18[9]

Form:

See 6.67

- ☐ Proof of service of subpoena.

☐ Prior to production of consumer's personal records:

- ☐ Serve witness with proof of personal service or service by mail attesting to compliance with procedures for subpoenaing consumers' personal records; or
- ☐ Furnish witness written authorization to release records, signed by consumer or consumer's attorney of record.

Authority:

CCP § 1985.3(c)

Discussion:

See 2.40[1][a], [d], [e]

☐ If party, witness, consumer or employee receiving subpoena or copy believes discovery demand is unreasonable, move for a protective order.

- ☐ Protective order can be based on privacy grounds.

Authority:

CCP §§ 1987.1, 1985.6

Discussion:

See 2.40[3], 2.41

Legal Topics:

For related research and practice materials, see the following legal topics:

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2.40 Statutory Provisions Protect Subpoenaed Consumer Records.

2.40[1] Consumer Is Entitled to Copy of Subpoena and Supporting Papers.

2.40[1][a] Subpoenaing Party Must Serve Papers on Consumer. When a consumer's personal records are sought with a subpoena duces tecum, the subpoenaing party must serve copies of all of the following on the consumer [CCP § 1985.3(b)]:

- The subpoena duces tecum.
- The affidavit, if any, supporting issuance of the subpoena.
- Notice to the consumer that records about the consumer are being sought from witness named on subpoena. If a notice of taking of deposition is also served, the notice of taking of deposition may be combined with the notice to the consumer in a single document [see CCP 1985.3(e); Judicial Council Form SUBP-025 (mandatory)].
- Proof of service of the subpoena [see CCP 1985.3(c)(1)].

➡ Cross Reference:

Detailed discussion of subpoenas and their requirements and timelines, see California Forms of Pleading and Practice, Ch. 193, Discovery: Depositions; Ch. 535, Subpoena (Matthew Bender).

2.40[1][b] Contents of Notice to Consumer Are Prescribed by Statute. The notice to the consumer must be in a typeface designed to call attention to the notice, and must indicate all of the following [see CCP 1985.3(e)]:

- That records about the consumer are being sought from the witness named on the subpoena.
- That if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection as provided in CCP § 1985.3(g)

prior to the date specified for production on the subpoena.

- That if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy.

Cross Reference:

Discussion of protective orders, see 2.40[3]

2.40[1][c] Use of Judicial Council Form Is Mandatory. Notice must be given by utilizing Judicial Council Form SUBP-025 [Judicial Council Form SUBP-025; *Cal Rules Ct, Rule 1.31*].

Cross Reference:

Judicial Council Form SUBP-025, see *Ch. 6, Oral Depositions in California*, 6.67.

2.40[1][d] Serve on Consumer Personally or in Manner of Law and Motion Papers. The documents must be personally served on the consumer, or at the consumer's last known address, or in accordance with the general provisions governing filing and service of papers in *CCP §§ 1010-1020* [*CCP § 1985.3(b)(1)*].

If the consumer is a party to the action, service may also be made on the consumer's attorney of record [*CCP § 1985.3(b)(1)*].

If the consumer is a minor, service must be made on the minor's parent, guardian, or similar fiduciary. If no such person can be located with reasonable diligence, service may be made on [*CCP § 1985.3(b)(1)*]:

- Any person who has the care or control of the minor, or resides with the minor, or is the minor's employer; and
- The minor if the minor is at least 12 years old.



Timing:

The consumer must be served:

- Not less than 10 days prior to the date for production specified in the subpoena duces tecum [*CCP § 1985.3(b)(2)*].
- At least five days prior to service on the custodian of the records [*CCP § 1985.3(b)(3)*].

If service is made by mail, the time for service is extended by the additional time periods provided by *CCP § 1013* [*CCP § 1985.3(b)(2), (3)*].

Cross Reference:

For discussion of service of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.08

2.40[1][e] Subpoenaing Party Must Provide Proof of Compliance to Witness. Before the records are produced, the subpoenaing party must [*CCP § 1985.3(c)*]:

- Serve on the witness a proof of personal service or service by mail attesting to compliance with the procedures discussed in 2.40[1][d]; or

- Furnish the witness a written authorization to release the records signed by the consumer or the consumer's attorney of record.

2.40[2] When Statutory Protections Apply.

2.40[2][a] Personal Records Defined. "Personal records" means the original, or any copy of books, documents, other writings, or electronic data pertaining to a consumer and which are maintained by any witness. A "witness" may be a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, credit union, and other various entities as defined in the statute [CCP § 1985.3(a)(1)].

2.40[2][b] Consumer Defined. "Consumer" means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary [CCP § 1985.3(a)(2)].

2.40[3] Consumer or Party May Make Motion to Modify or to Quash Subpoena If Discovery Demand Is Unreasonable. The party, witness or consumer may move for a protective order or take other action to protect the party, witness, or consumer from unreasonable or oppressive demands, including unreasonable violations of the right to privacy [CCP §§ 1985.3(g), 1987.1].



Timing:

Notice of the motion must be given to the witness and deposition officer at least five days before production [CCP § 1985.3(g)].



Warning--Moving Party:

The failure to give notice to the deposition officer does not invalidate the motion to quash or modify the subpoena, but the deposition officer may raise the failure to give notice to the deposition officer as an affirmative defense in any action for liability for improper release of records [CCP § 1985.3(g)].



Cross Reference:

Discussion of protective orders, see *Ch. 1, Strategy and Planning, 1.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pretrial Matters Subpoenas Civil Rights Law Privacy Rights General Overview



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1-2 MB Practice Guide: CA Civil Discovery 2.41

2.41 Statutory Provisions Protect Employee Records.

2.41[1] Employee Records Can Be Protected Under Consumer Protection Statutes. Employment records, defined as books, documents, or any other writing or electronic data pertaining to the employment of any employee maintained by his or her current or former employer or labor organization, are protected in the same manner as consumer records [*CCP § 1985.6(a)(3)*].

An employee or former employee of a witness subject to a subpoena duces tecum, or who is or has been represented by a labor organization subject to a subpoena duces tecum, may move for an order quashing a subpoena entirely, modifying it, or directing compliance with it upon specified terms or conditions, including protective orders. In addition, a court may make any other order that may be appropriate to protect the employee from unreasonable or oppressive demands, including unreasonable violations of the employee's right of privacy [*CCP §§ 1985.6(a)(2), 1987.1*].

➤ **Cross References:**

Protections afforded to consumer records, see 2.40.

Discussion and forms relating to employment records, see California Forms of Pleading and Practice, Ch. 535, Subpoena (Matthew Bender).

2.41[2] Personnel Records of Peace Officers Are Protected From Disclosure. Peace officer and custodial officer personnel records are confidential and may not be disclosed in any criminal or civil proceeding prosecuted in state court except according to special discovery procedures [*Pen Code § 832.7*]. The party seeking discovery must file a written motion supported by an affidavit showing good cause for disclosure and give written notice to the governmental agency with custody and control of the records. If the court determines on the basis of the affidavits that the party seeking disclosure has shown good cause for disclosure of information contained in a peace officer's personnel file, the court then must conduct an in camera review of the requested personnel records and may disclose only those documents meeting the statutory definition of relevance [*Evid Code §§ 1043, 1046; Warrick v. Superior Court (2005) 35 Cal4th 1011, 1027-1028, 29 CR3d 2, 112 P3d 2*].

Only the types of information enumerated in *Pen Code* § 832.8 are protected from disclosure under *Pen Code* § 832.7 [*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 C4th 278, 293, 299, 64 CR3d 661, 165 P3d 462 (officers' names, employing departments, and dates of employment are not "personal data" within meaning of *Pen Code* § 832.8(a) and therefore are not protected from disclosure); see *International Federation of Professional & Technical Engineers Local 21, AFL-CIO v. Superior Court* (2007) 42 C4th 319, 346, 64 CR3d 693, 165 P3d 488 (peace officer names and salaries are not protected under *Pen Code* § 832.7)].

Example:

A publisher filed Public Records Act requests for documents relating to a deputy sheriff's administrative appeal of his termination. The county civil service commission withheld most of its records, including the deputy's name, asserting disclosure exemptions under *Gov Code* § 6254(c), (k). The California Supreme Court held that the commission properly withheld the records because they were protected under *Pen Code* § 832.7(a) [*Copley Press, Inc. v. Superior Court* (2006) 39 C4th 1272, 1279, 48 CR3d 183, 141 P3d 288] .

Exception:

Pen Code § 832.7 and *Evid Code* § 1043 are not binding on federal courts, and parties to litigation prosecuted in federal court may not be required to comply with the special discovery procedures for obtaining peace officer personnel files [*Jackson v. County of Sacramento* (1997) 175 FRD 653] .



Cross Reference:

Confidentiality of peace officer personnel records, see *California Forms of Pleading and Practice*, Ch. 470C, § 470C.14[9] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil Rights LawPrivacy RightsGeneral Overview



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VII. MISCELLANEOUS PROTECTIONS FROM DISCOVERY

1-2 MB Practice Guide: CA Civil Discovery 2.42

2.42 CHECKLIST: Miscellaneous Protections From Discovery.

☐ When propounding or responding to discovery, check to determine whether any of the following privileges or protections apply:

☐ If newsperson is party to the case and wishes to withhold disclosure of unpublished information and/or sources, determine if qualified privilege applies:

☐ Consider nature of litigation;

☐ Consider degree of relevance;

☐ Consider whether party seeking discovery has exhausted other sources of obtaining the information;

☐ Consider public importance of confidentiality and risk of harm to the source if the information is disclosed.

Authority:

US Const, amend I; Cal Const, art I, § 2(a); Mitchell v. Superior Court (1984) 37 C3d 268, 274, 279, 283-284, 208 CR 152, 690 P2d 625

Discussion:

See 2.43

☐ If tax return information is sought by a party:

☐ Determine if the information is protected:

- ☐ Federal and state tax returns;
- ☐ Estate tax returns;
- ☐ W-2 Forms;
- ☐ Corporate income tax returns;
- ☐ Employment taxes;
- ☐ Sales taxes.

Authority:

Wilson v. Superior Court (1976) 63 CA3d 825, 828, 134 CR 130 ; various case law and statutes as discussed in 2.44[1]

Discussion:

See 2.44

☐ Make certain an exception to tax information privilege does not apply:

- ☐ Waiver of privilege;
- ☐ Public policy outweighs privilege;
- ☐ Proceedings involving child or spousal support;
- ☐ Marital dissolution proceedings.

Authority:

Fam Code § 3552 (support proceedings); *Schnabel v. Superior Court* (1993) 5 C4th 704, 722-723, 21 CR2d 200, 854 P2d 1117 (marital dissolution proceedings); *Crest Catering Co. v. Superior Court* (1965) 62 C2d 274, 278, 42 CR 110, 398 P2d 150 (owner's intentional relinquishment); *Miller v. Superior Court* (1977) 71 CA3d 145, 149, 139 CR 521 (paramount public policy defeated privacy interest); *Wilson v. Superior Court* (1976) 63 CA3d 825, 830, 134 CR 130 (waived because of nature of lawsuit)

Discussion:

See 2.44[2]

☐ If settlement or mediation information is sought:

☐ Settlement offers or negotiation information not discoverable unless relevant or reasonably

calculated to lead to discovery of admissible evidence.

Authority:

Evid Code § 1152; Covell v. Superior Court (1984) 159 CA3d 39, 42-43, 205 CR 371

Discussion:

See 2.45[1]

- ☐ Evidence of anything said or written during a mediation is not subject to discovery.

Authority:

Evid Code § 1119(a), (b)

Discussion:

See 2.45[2]

- ☐ If discovery is sought from medical committee, determine whether that committee's proceedings and/or records enjoy protection from discovery.

Authority:

Evid Code §§ 1157, 1157.5-1157.7; B&P Code § 805; H&S Code § 1370

Discussion:

See 2.47

- ☐ If discovery sought will identify subject of AIDS testing, the information is privileged.

Authority:

H&S Code § 120975

Discussion:

See 2.48

- ☐ If public agency is a party to litigation, any records created specifically for litigation purposes are not discoverable under Public Records Act.

Authority:

Gov Code § 6254(b)

Discussion:

See 2.49[1]

- ☐ If a legislative body is in closed session, minutes books are not subject to inspection under the Public Records Act.

Authority:

Gov Code § 54957.2; County of Los Angeles v. Superior Court (2005) 130 CA4th 1099, 1105-1106

Discussion:

See 2.49[2]

- ☐ Evidence regarding the mental processes of legislators is not discoverable.

Authority:

County of Los Angeles v. Superior Court (1975) 13 C3d 721, 726-728, 119 CR 631, 532 P2d 495

Discussion:

2.49[3]

- ☐ A bank may not produce Suspicious Activity Reports nor disclose whether they have been prepared or filed.

Authority:

12 CFR § 21.11(a), (k)

Discussion:

See 2.50

- ☐ Providers of electronic communication services, *i.e.*, Google, may not disclose the contents of those communications.

Authority:

18 USC § 2701-2712; *O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1442-1447, 44 CR3d 72

Discussion:

2.51

- ☐ A libel plaintiff must make a prima facie case in order to discover the identity of an anonymous internet poster.

Authority:

Krinsky v. Doe 6 (2008) 159 CA4th 1154, 1164-1165, 72 CR3d 231

Discussion:

2.51

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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VII. MISCELLANEOUS PROTECTIONS FROM DISCOVERY

1-2 MB Practice Guide: CA Civil Discovery 2.43

2.43 Newspaper Reporter Has Qualified Privilege to Protect Sources.

2.43[1] Privilege Arises From Constitutional Provisions. A publisher, editor, reporter, or other person connected with or employed by a newspaper, magazine, or other periodical publication has a qualified privilege under the constitutional freedom of press provisions to withhold disclosure of the identity of confidential sources and of unpublished information supplied by those sources [*US Const, amend I; Cal Const, art I, § 2(a); Mitchell v. Superior Court (1984) 37 C3d 268, 274, 279, 283-284, 208 CR 152, 690 P2d 625* ; see also *Anti-Defamation League of B'nai B'rith v. Superior Court (1998) 67 CA4th 1072, 1083-1084, 79 CR2d 597* ; *KSDO v. Superior Court (1982) 136 CA3d 375, 384-386, 186 CR 211*].

The qualified privilege applies to publishers of online news magazine web sites [*O'Grady v. Superior Court (2006) 139 CA4th 1423, 1460-1466, 44 CR3d 72*] .

► **Cross Reference:**

Forms of memoranda supporting and opposing motion to compel discovery, see *California Points and Authorities, Ch. 81, Discovery: Privileges and Other Discovery Limitations, §§ 81.279, 81.293* (Matthew Bender).

2.43[2] Factors to Consider As to Whether Privilege Applies.

2.43[2][a] Nature of the Litigation. The nature of the litigation can be an important factor for evaluating the propriety of disclosing information. For example, it is generally appropriate when the newsperson is a defendant in a defamation action [*Mitchell v. Superior Court (1984) 37 C3d 268, 274, 279-280, 208 CR 152, 690 P2d 625*]. By contrast, the newsperson's status as a nonparty weighs against disclosure [*O'Grady v. Superior Court (2006) 139 CA4th 1423, 1468-1470, 44 CR3d 72*] .

2.43[2][b] Degree of Relevance. The degree of relevance must be evaluated; disclosure of information should only be compelled if it goes to the heart of plaintiff's claim [*Mitchell v. Superior Court (1984) 37 C3d 268, 280-282, 208 CR 152, 690 P2d 625*].

2.43[2][c] Alternative Forms of Obtaining Information. If the party seeking discovery of the information has

exhausted all other sources, disclosure is more likely to be allowed [*Mitchell v. Superior Court* (1984) 37 C3d 268, 282, 208 CR 152, 690 P2d 625 ; see *O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1475, 44 CR3d 72 (computer manufacturer's failure to demonstrate that it could not obtain information from any source other than publisher of web site was dispositive factor against disclosure)].

2.43[2][d] Balancing of Interests. The court must weigh the relative importance of the public interest in promoting protection of news reporters' confidentiality and the risk of harm to the source if the information is disclosed [*Mitchell v. Superior Court* (1984) 37 C3d 268, 274, 282-284, 208 CR 152, 690 P2d 625].

Distinguish:

Newspersons also enjoy immunity from contempt proceedings under the "shield law" of *Evid Code* § 1070 when they refuse to answer questions concerning information sources or unpublished information [*Evid Code* § 1070]. The qualified privilege is generally relevant when the newsperson is a party to the case. The immunity from contempt applies when the newsperson is a nonparty.



Cross Reference:

Newsperson's immunity from contempt, see *California Forms of Pleading and Practice*, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.123 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesJournalist's PrivilegeScope



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1-2 MB Practice Guide: CA Civil Discovery 2.44

2.44 Privilege Protecting Tax Return Information.

2.44[1] Privilege Protects Various Types of Tax Information. Courts have interpreted certain statutes as providing a privilege for individuals and various entities not to disclose tax returns or the information they contain [*Wilson v. Superior Court* (1976) 63 CA3d 825, 828].

The privilege has been held to apply to the following:

- Federal and state income taxes [see *Webb v. Standard Oil Co.* (1957) 49 C2d 509, 513-514, 319 P2d 621 ; see also R&T Code §§ 19542-19566].
- Estate tax returns [see *Deary v. Superior Court* (2001) 87 CA4th 1072, 1077-1078, 105 CR2d 132].
- W-2 Forms [*Brown v. Superior Court* (1977) 71 CA3d 141, 142-144, 139 CR 327].
- Corporate income taxes [*Schnabel v. Superior Court* (1993) 5 C4th 704, 718-723, 21 CR2d 200, 854 P2d 1117 ; *Aday v. Superior Court* (1961) 55 C2d 789, 796-797, 13 CR 415, 362 P2d 47 ; see also R&T Code §§ 19542-19566].
- Employment taxes [UI Code §§ 1094, 2111; *Schnabel v. Superior Court* (1993) 5 C4th 704, 718-723, 21 CR2d 200, 854 P2d 1117 ; *Crest Catering Co. v. Superior Court* (1965) 62 C2d 274, 276-277, 42 CR 110, 398 P2d 150].
- Sales taxes [R&T Code §§ 7056-7056.5; *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 C3d 1, 6-7, 123 CR 283, 538 P2d 739].

Distinguish:

The privilege does not apply to foreign tax returns [*Firestone v. Hoffman* (2006) 140 CA4th 1408, 1419-1420, 45 CR3d 534] .

➤ **Cross References:**

Privilege for tax returns, see *DeMeo, California Deposition and Discovery Practice*, § 26.10 (Matthew Bender).

Forms of memoranda supporting and opposing motions to compel discovery, see *California Points and Authorities*, Ch. 81, *Discovery: Privileges and Other Discovery Limitations*, § 81.180 et seq. (Matthew Bender).

2.44[2] Privilege Is Inapplicable in Certain Situations. The tax information privilege is inapplicable in the following situations:

- When the holder of the privilege has intentionally relinquished it [*Crest Catering Co. v. Superior Court* (1965) 62 C2d 274, 278, 42 CR 110, 398 P2d 150].

Distinguish:

Because banks routinely require tax returns as part of a loan application, submitting tax returns for this purpose is not a voluntary relinquishment of the tax information privilege [*Fortunato v. Superior Court* (2003) 114 CA4th 475, 481-482].

- When the privilege has been waived due to the nature of the lawsuit [*Wilson v. Superior Court* (1976) 63 CA3d 825, 830, 134 CR 130].

- When a public policy greater than that of confidentiality of tax returns is involved [*Miller v. Superior Court* (1977) 71 CA3d 145, 149, 139 CR 521 (proceedings to enforce child support obligations)].

Distinguish:

Public policy favoring discovery in civil litigation is not in itself sufficiently compelling to overcome confidentiality of tax returns [*Fortunato v. Superior Court* (2003) 114 CA4th 475, 481-483].

- In proceedings involving child or spousal support [*Fam Code* § 3552].
- In marital dissolution proceedings [*Schnabel v. Superior Court* (1993) 5 C4th 704, 722-723, 21 CR2d 200, 854 P2d 1117 (spouse entitled to discovery of other spouse's tax records, including corporate tax returns of close corporation in which other spouse has an interest)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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1-2 MB Practice Guide: CA Civil Discovery 2.45

2.45 Protections for Settlement and Mediation Information.

2.45[1] Settlement Information Is Discoverable When Relevant. Settlement offers or negotiations are subject to discovery if they are relevant to the subject matter of the pending action and reasonably calculated to lead to the discovery of admissible evidence [*Covell v. Superior Court* (1984) 159 CA3d 39, 42-43, 205 CR 371 ; *see also* *Shade Foods, Inc. v. Innovative Prod. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 915, 93 CR2d 364].

Distinguish:

As a general rule, settlement offers or negotiations are not admissible in evidence at trial to prove liability [*see Evid Code § 1152(a)*].

Example:

In an asbestos exposure action, the defendant sought production of documents submitted by the plaintiff to bankruptcy trusts in support of claims for asbestos-related injuries. The trial court upheld plaintiff's refusal to produce the documents on the ground they were inadmissible settlement documents. The Court of Appeal reversed, noting that evidence which is not admissible may be discoverable [*Volkswagen of America, Inc. v. Superior Court* (2006) 139 CA4th 1481, 1490, 43 CR3d 723] . However, because the documents were inadmissible to prove or disprove liability, the Court ruled, the documents were discoverable only if the defendant could articulate another basis for admissibility or for reasonably believing the records may lead to the discovery of admissible evidence [*Volkswagen of America, Inc. v. Superior Court* (2006) 139 CA4th 1481, 1496, 43 CR3d 723] .

➡ **Cross References:**

Admissibility of insurance information, *see* 2.08[1].

Inadmissibility of settlement offers or negotiations under *Evid Code § 1152*, *see California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.68[4][b] (Matthew Bender).

2.45[2] Content of Mediation Discussions Is Not Discoverable. Evidence of anything said, or of any admission made, in the course of a mediation is inadmissible. It is also not subject to discovery, and disclosure of the evidence may not be compelled [*Evid Code § 1119(a)*]. All communications, negotiations, and settlement discussions by and

between participants or mediators in the mediation are confidential [*Evid Code* § 1119(c)].

No writing, as defined in *Evid Code* § 250, that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation is admissible or subject to discovery, and its disclosure may not be compelled [*Evid Code* § 1119(b); *Rojas v. Superior Court* (2004) 33 C4th 407, 416].

Distinguish:

Terminated employee's hearing before employer's termination review board was not a mediation, and therefore statements made during that hearing were not protected from disclosure under *Evid Code* § 1119 [*Saeta v. Superior Court* (2004) 117 CA4th 261, 269-272].

Exceptions:

- Mediation communications may be disclosed if all mediation participants agree to the disclosure [*Evid Code* § 1122(a)(1); see *Doe 1 v. Superior Court* (2005) 132 CA4th 1160, 1168-1170 (in sexual abuse case, church was prohibited from disclosing documents it prepared for mediation because accused priests, who did not agree to disclosure, were participants in mediation regardless of whether they were parties)].

- Mediation communications may be disclosed if they are prepared by or on behalf of fewer than all the mediation participants, those participants agree to the disclosure, and the communication does not disclose anything said or done or any admission made in the course of the mediation [*Evid Code* § 1122(a)(2)].

- A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by *Evid Code* § 1115 et seq. if the agreement is signed by the settling parties and any of the following conditions are satisfied [see *Stewart v. Preston Pipeline Inc.* (2005) 134 CA4th 1565 (signature by settling party's attorney is sufficient)]:

- ☐ The agreement provides that it is admissible or subject to disclosure, or words to that effect [*Evid Code* § 1123(a)].
- ☐ The agreement provides that it is enforceable or binding or words to that effect [*Evid Code* § 1123(b)].
- ☐ All parties to the agreement expressly agree in writing, or orally in accordance with *Evid Code* § 1118, to its disclosure [*Evid Code* § 1123(c)].
- ☐ The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute [*Evid Code* § 1123(d)].

Evidence otherwise admissible and subject to discovery cannot be made inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation [*Evid Code* § 1120(a); *Rojas v. Superior Court* (2004) 33 C4th 407, 416-423 (photographs, videotapes, witness statements, and raw test data from physical samples collected are protected under *Evid Code* § 1119)]. However, a document prepared specifically for use in mediation and containing otherwise discoverable facts will be protected by the privilege, even if the discoverable facts in the document are not

protected by the privilege [*Rojas v. Superior Court* (2004) 33 C4th 407].

Evid Code § 1122 prohibits the disclosure of any admission made during a mediation, even if disclosure is urged by the party who made the admission [*Doe 1 v. Superior Court* (2005) 132 CA4th 1160, 1168].

There is no "good cause" exception to these protections [*Rojas v. Superior Court* (2004) 33 C4th 407, 423, 93 P3d 260]. Nor are there exceptions based on the equitable doctrines of estoppel or waiver [*Simmons v. Ghaderi* (2008) 44 C4th 570, 577, 80 CR3d 83, 187 P3d 934]. A party cannot impliedly waive mediation confidentiality through the party's litigation conduct [*Simmons v. Ghaderi* (2008) 44 C4th 570, 585-588, 80 CR3d 83, 187 P3d 934 (party could invoke mediation confidentiality to exclude evidence despite having earlier submitted evidence of events that had occurred during mediation)].

Examples:

- In a legal malpractice action, the client alleged that his lawyers had breached their fiduciary duties by submitting an unauthorized settlement demand in the underlying personal injury lawsuit. The client learned of the demand from a confidential mediation brief submitted in the personal injury lawsuit. The Court of Appeal held that all mediation briefs were protected from disclosure, as were emails between lawyers sent the day before the mediation that quoted from a mediation brief. In contrast, an oral communication by one of the lawyers purportedly lowering the plaintiff's settlement demand was not protected by mediation confidentiality, because the lawyers had not met their burden of proving the communication was linked to the mediation [*Wimsatt v. Superior Court* (2007) 152 CA4th 137, 142, 160, 61 CR3d 200].

- At the start of a mediation, three siblings involved in a dispute over the distribution of trust assets signed a mediation and confidentiality agreement that provided that mediation communications would remain confidential, "except as may be necessary to enforce any agreements resulting from the [mediation]." During the mediation session, a chart was prepared that allocated trust assets among the three siblings. Each sibling signed and dated the top of the chart in the column with his or her initial, and initialed each entry in that column. The trial court held that the mediation and confidentiality agreement did not satisfy *Evid Code* § 1123(c) because it was executed before the parties allegedly entered into a settlement agreement (the chart). The Court of Appeal disagreed, holding that nothing in *Evid Code* § 1123(c) required that the agreement regarding disclosure be made at or after the time of the settlement, and the agreement was admissible [*Estate of Thottam* (2008) 165 CA4th 1331, 1339, 81 CR3d 856].

- A settlement agreement that was signed by some but not all of the parties named in the agreement did not satisfy the requirements of *Evid Code* § 1123 and was inadmissible [*Rael v. Davis* (2008) 166 CA4th 1608, 1620, 83 CR3d 745].



Cross Reference:

Confidentiality rules applicable to mediation, see *California Forms of Pleading and Practice*, § 31.13 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceCompromise & Settlement Negotiations



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1-2 MB Practice Guide: CA Civil Discovery 2.46

2.46 Medical Records Are Protected Under Health Insurance Portability and Accountability Act of 1996.

2.46[1] Disclosure of Health Information Is Restricted. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") includes provisions to protect the confidentiality of health information. The HIPAA regulations present additional requirements that must be satisfied to discover medical records (or any other records that may contain health information) [see 42 USC § 1320d-2; 45 CFR §§ 160.101-160.572, 45 CFR §§ 164.102-164.534].

HIPAA restricts the disclosure of broadly defined health information by health plans, health care clearinghouses, and health care providers ("covered entities") [see 45 CFR §§ 160.103, 164.502]. Generally, disclosure in the course of discovery will require one of the following [see 45 CFR §§ 164.508, 164.512(e)]:

- Authorization by the person who is the subject of the records;
- A court order; or
- Satisfactory assurance from the party seeking the information to the holder of the records that:
 - ☐ The party has made reasonable efforts to inform the person who is the subject of the records of the request to give the person an opportunity to object; or
 - ☐ The party has made reasonable efforts to secure a qualified protective order restricting use or disclosure of the information to the litigation for which it was requested and requiring return or destruction of the information at the end of the litigation.

The regulations do not appear to include any exception with respect to discovery of health information relating to a personal-injury or wrongful-death plaintiff. Indeed, there is not even an exception to the general rule on requiring authorization allowing the covered entity to use the information in its own defense if the person whose information is at issue brings an action against the covered entity [see 45 CFR § 164.508(a)(1)]. However, in the case of psychotherapy notes, an exception does allow the covered entity to use or disclose the notes to defend itself in an action brought by the

individual [see 45 CFR § 164.508(a)(2)(i)(C)].

2.46[2] Regulations Include Detailed Requirements for Authorization. An authorization must meet specific criteria. It must contain [see 45 CFR § 164.508(c)]:

- A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
- The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
- The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
- A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- An expiration date or event that relates to the individual or the purpose of the use or disclosure.
- The individual's signature and date. If the authorization is signed by a personal representative of the individual, a description of the representative's authority to act for the individual must also be provided.
- A statement adequate to put the person on notice of his or her right to revoke the authorization in writing, and the exceptions to the right to revoke and a description of how the individual may revoke the authorization.
- A statement adequate to put the person on notice of the ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization.
- A statement adequate to put the person on notice of the possibility that information disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by the HIPAA regulations.

The authorization must be written in plain language [see 45 CFR § 164.508(c)].



Warning:

Check with the health care entity in possession of the information before attempting to draft an authorization or work out an authorization with the opposing party. The health care entity may prefer or insist that an authorization be on its own form.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Business Administration & Organization Patient Confidentiality Health Insurance Portability & Accountability Act



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2.47 Protections for Proceedings and Records of Medical Staff Committees.

2.47[1] Hospital Committees. The proceedings and records of organized committees of medical, dental, veterinary, and other types of hospital staff that have the responsibility of evaluation and improvement of quality of care in the hospital are not subject to discovery [*Evid Code § 1157(a)*].

2.47[2] State or Local Review Committees. The proceedings and records of review committees of state or local societies or associations dedicated to evaluating or improving the quality of medical, dental and other types of care are not subject to discovery [*Evid Code § 1157(a)*].

2.47[3] Peer Review Bodies. There is a prohibition on discovery of the proceedings and records of a peer review body as defined in *B&P Code § 805* [*Evid Code § 1157(a)*].

2.47[4] Nonprofit Medical Care Foundations. The prohibition on discovery in *Evid Code § 1157(a)* extends to the proceedings and records of an organized committee of any nonprofit medical care foundation or professional standards review organization which is organized in a manner that makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care [*Evid Code § 1157.5*].

2.47[5] Local Government Agency Committees. The prohibition on discovery in *Evid Code § 1157(a)* extends to the proceedings and records of any committee established by a local government agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services [*Evid Code § 1157.7*].

2.47[6] Committees Established to Evaluate County Mental Health Care. The prohibition on discovery in *Evid Code § 1157(a)* extends to the proceedings and records of a committee established under *W&I Code §§ 4070* and *5624* having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities [*Evid Code § 1157.6*; see *County of Los Angeles v. Superior Court* (2006) 139 CA4th 8, 10, 42 CR3d 390 (documents generated by a quality assurance committee for a county's jail mental health services agency were protected from discovery under *Evid Code § 1157.6*)].

2.47[7] Health Care Plan Committees. There is a prohibition on discovery of the proceedings and records of a health care service plan committee or nonprofit hospital service plan committee operating under *H&S Code §§*

1340-1399.818 that reviews the quality of care, performance of medical personnel, utilization of services, and costs [H&S Code § 1370].



Cross Reference:

Discussion of the limits on discovery of medical staff committees, see *California Forms of Pleading and Practice*, Ch. 295, *Hospitals*, § 295.23 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Business Administration & Organization Peer Review Organizations



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2.48 Information Identifying Subject of AIDS Test Is Privileged.

No person will be compelled in any state, county, city, or other local, civil, criminal, administrative, legislative, or other proceeding to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to AIDS [*H&S Code* § 120975].

This statute is to be strictly construed to protect individual privacy [*see, e.g., Irwin Mem'l Blood Bank v. Superior Court* (1991) 229 CA3d 151, 157, 279 CR 911 (decided under predecessor statute, H&S Code former § 199.20)].

Exception:

H&S Code §§ 1603.1, 1603.3 and 121022 contain exceptions to the general privilege rule for situations involving the testing of donated blood.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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2.49 Protections for Proceedings and Records of Government Bodies.

2.49[1] Public Agencies Have Privilege Not to Disclose Records Pertaining to Pending Litigation. Generally, state public records are subject to public disclosure under the Public Records Act [*Gov Code* §§ 6250-6270]. However, when a public agency is a party to pending litigation, the agency need not disclose records related to the litigation [*Gov Code* § 6254(b)]. The privilege applies only to records created specifically for the purpose of litigation [*71 Ops Cal Atty Gen* (1988) 235, 238-239], and once the litigation is concluded, the privilege does not apply [*City of Los Angeles v. Superior Court* (1996) 41 CA4th 1083, 1087, 49 CR2d 35].

When sought by persons or entities not party to the pending litigation, a public agency may refuse to disclose litigation documents, including correspondence with opposing counsel and parties, that the parties do not intend to be revealed outside the litigation [*Board of Trustees of Cal. State Univ. v. Superior Court* (2005) 132 CA4th 889, 900]. Deposition transcripts are not covered by the pending litigation exemption because they are available to the public under CCP § 2025.570 [*Board of Trustees of Cal. State Univ. v. Superior Court* (2005) 132 CA4th 889, 901-902].

➡ **Cross Reference:**

Exemptions from disclosure under Public Records Act, see *California Forms of Pleading and Practice*, Ch. 470C, *Public Records Act*, § 470C.13 (Matthew Bender).

2.49[2] Legislative Bodies Need Not Disclose Minutes of Closed Sessions. When a legislative body meets in closed session, the minute book is confidential and is not a public record subject to inspection under the Public Records Act [*Gov Code* § 54957.2; see *County of Los Angeles v. Superior Court* (2005) 130 CA4th 1099, 1105-1106].

Exception:

In actions brought under California's open meeting law (the Brown Act) in which the plaintiff alleges a local legislative body has violated the open meeting provisions of the Brown Act during the closed session, the court may conduct an in camera review of the legislative body's minutes to determine if a violation has occurred [*Gov Code* §§ 54957.2(a), 54960(c)].

2.49[3] Evidence Regarding Mental Processes of Legislators Is Not Discoverable. Because the validity of a legislative act does not depend on the subjective motivation of its drafters, evidence that relates to the mental processes

of individual legislators is irrelevant and not discoverable [*County of Los Angeles v. Superior Court* (1975) 13 C3d 721, 726-728, 119 CR 631, 532 P2d 495 ; *Sutter's Place Inc. v. Superior Court* (2008) 161 CA4th 1370, 1383, 75 CR3d 9 (disclosure of documents presented to or considered by city council in connection with enactment of ordinance regulating card rooms would violate mental processes principle); *Nadler v. Schwarzenegger* (2006) 137 CA4th 1327, 1336-1337, 41 CR3d 92 (challengers of reapportionment legislation were not entitled to depose legislative staff member on legislators' subjective motivations)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information Freedom of Information Defenses & Exemptions General Overview



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2.50 Banks Have Privilege Not to Disclose Suspicious Activity Reports.

Banks are prohibited from producing suspicious activity reports ("SARs"), which banks are required to file with the federal government whenever they detect a known or suspected violation of federal law or a suspicious transaction related to money laundering [12 CFR § 21.11(a), (k)]. Banks are also prohibited from providing information that would disclose whether a SAR has been prepared or filed [12 CFR § 21.11(k)].

The SAR privilege extends to documents prepared by a bank for the purpose of investigating or drafting a possible SAR because those documents may reveal the contents of a SAR and disclose whether a SAR has been prepared or filed [*Union Bank of Cal. v. Superior Court* (2005) 130 CA4th 378, 391, 394]. The SAR privilege does not protect factual documents, prepared in the ordinary course of business, that give rise to suspicious conduct [*Cotton v. Privatebank & Trust Co.* (ND Ill 2002) 235 F Supp2d 809, 815].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral Overview



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2.51 Protections for Electronic Communications and Internet Anonymity.

2.51[1] E-mail Contents Are Protected From Disclosure. The Stored Communications Act [18 USC § 2701-2712] provides that, subject to certain conditions and exceptions, a person or entity providing an electronic communication service to the public may not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service [18 USC § 2702(a)(1)]. Similarly, but subject to certain additional conditions, a person or entity providing remote computing service to the public may not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service [18 USC § 2702(a)(2)].

Example:

A computer hardware and software manufacturer brought an action alleging that unknown persons caused the wrongful publication in an online news magazine of the manufacturer's secret plans to release a new device. The trial court granted the manufacturer authority to issue civil subpoenas to the publishers of the web sites where the information appeared and to the e-mail service provider for one of the publishers. Noting that the Stored Communications Act makes no exception for civil discovery, the Court of Appeal concluded that the subpoenas seeking to compel the e-mail service provider to disclose the contents of emails stored on their facilities was unenforceable under the Act [*O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1442-1447, 44 CR3d 72].

2.51[2] Anonymity of Internet Speech Is Protected. When a plaintiff in a libel action seeks to discover the identity of an anonymous internet poster responsible for the allegedly libelous comments, the plaintiff must make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity [*Krinsky v. Doe 6* (2008) 159 CA4th 1154, 1164-1165, 72 CR3d 231 (statements on financial message board attacking corporate officers were crude, satirical hyperbole rather than actionable assertions of fact; therefore subpoena to message board host seeking to discover identity of posters should have been quashed)].

In an action arising from the moving party's exercise of free speech rights on the internet, when a subpoena has been served on any internet service provider, or on the provider of any other interactive computer service, if the moving party prevails, the court is required to award reasonable expenses, including reasonable attorney's fees, incurred in making the motion for an order to quash or modify a subpoena for personally identifying information from a California court for

use in an action pending in another state, territory, or district of the United States, or in a foreign nation, unless the respondent makes a prima facie showing of a cause of action [*CCP* § 1987.2(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Privacy Rights Electronic Communications



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Chapter 3 Sanctions

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§ 3.syn Synopsis to Chapter 3: Sanctions

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3.08[2][d] Party Deponent Who Fails to Attend, Testify, or Produce Is Subject to Mandatory Monetary Sanction Requested by Any Attending Party.

3.08[2][e] Party Deponent Who Disobeys Order to Compel Attendance, Testimony, or Production Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction.

3.08[2][f] Unsuccessful Party in Motion to Compel Answer or Production Is Subject to Mandatory Monetary Sanction.

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3.21 Order on Motion for Imposition of Issue, Evidence or Terminating Sanction, and Monetary Sanction.

3.22 Order to Show Cause Re Contempt and Supporting Declaration.



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Chapter 3 Sanctions
I. STRATEGY

1-3 MB Practice Guide: CA Civil Discovery 3.01

3.01 Scope.

This chapter covers:

- Objectives and strategies regarding sanctions [see 3.02].
- Requesting sanctions for misuse of discovery process [see 3.03-3.12].
- Statutory grounds for discovery sanctions [see 3.06, 3.07].
- Sanctions for particular discovery procedures [see 3.08, 3.09].
- Types of sanctions [see 3.10].
- Motion for order imposing sanctions [see 3.11; Forms: see 3.19-3.21].
- Order to show cause for contempt [see 3.12; Form: see 3.22].
- Strategies for opposing sanctions [see 3.13, 3.14].
- Obtaining relief from dismissal or default sanction [see 3.15-3.18].

Core Statute:

CCP § 2023.010-2023.040

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions
I. STRATEGY

1-3 MB Practice Guide: CA Civil Discovery 3.02

3.02 Objective and Strategy.

The purpose of discovery sanctions--whether monetary, evidence-or issue-preclusion, or terminating--is to protect the legitimate interests of the party entitled to but denied discovery [see, e.g., *Hartbrodt v. Burke* (1996) 42 CA4th 168, 175, 49 CR2d 562 ; CCP § 2023.030]. A party seeks discovery sanctions against a party, person, or attorney involved in the case not to punish or cause a forfeiture, but to prevent discovery abuse and to correct the problem presented [*McGinty v. Superior Court* (1994) 26 CA4th 204, 210, 31 CR2d 292].

Strategic Point:



Note that the award of a monetary sanction against either the moving or responding party is itself considered to be a judgment enforceable by writ of execution. Too often, a party will return to court on some type of motion to compel when the original monetary award has not been paid. The minute order of the court in which the original monetary sanction was issued suffices to permit execution for collection.

Judge's Perspective:

Counsel would be well advised to be circumspect in their discovery requests. The days of broad-range discovery invoking virtually every discovery device in order to burden an opponent are not looked upon kindly by the courts. Conversely, the courts likewise frown upon boiler-plate objections, and there is a real risk of having legitimate objections overruled simply because general and boiler-plate objections create the appearance of evasion and game-playing.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 192, Discovery: Sanctions for Discovery Misuse (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 42, Sanctions for Misuse of Discovery Process (Matthew Bender).

Discovery sanctions in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 25, Motions to Compel and Discovery Sanctions.



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.03

3.03 CHECKLIST: Requesting Imposition of Sanctions.

☐ Consider resolving the matter informally:

☐ Consider requesting an extension of time before bringing a motion to compel to allow time to schedule additional meetings with the opposing party and any other appropriate activity, e.g., oral depositions, if:

☐ The deadline for filing a motion to compel discovery is imminent; and

☐ You believe a further attempt at an informal resolution is worthwhile.

Discussion:

See 3.04

☐ If the matter is not resolved informally and the opposing party has misused the discovery process, determine all possible grounds for sanctions.

Authority:

CCP § 2023.010

Discussion:

See 3.06-3.08

☐ Determine which sanctions apply to the opposing party's conduct.

Authority:

CCP § 2023.030

Discussion:

See 3.10

- ☐ Bring a motion for monetary, issue, evidence, and/or terminating sanctions.

☐ If you are bringing a motion to compel discovery, you should usually request sanctions in the same motion, either cumulatively or alternatively, especially if the offending party has a history of trying to frustrate your client's right to discovery.

Discussion:

See *Ch. 4, Law and Motion Procedure*, 4.10

Forms:

See 3.19, 3.20

☐ Consider requesting both lesser and harsher sanctions in the alternative. For example, if the offending party's conduct has been extreme and/or repeated, consider requesting an evidence sanction either striking its pleadings or a terminating sanction, but alternatively request a lesser sanction, such as a monetary sanction against the appropriate attorney or party.

☐ Prepare motion papers.

☐ Prepare proposed order.

Authority:

CCP § 2023.040

Discussion:

See 3.11

Form:

See 3.21

- ☐ If appropriate, prepare declaration and order to show cause re contempt.

☐ Effect personal service of declaration and order to show cause re contempt on alleged contemner unless he or she is avoiding service, in which case his or her attorney may be served.

Authority:

CCP §§ 1015, 1211, 1212, 2015.5, 2023.030(e); Kroneberger v. Superior Court (1961)
196 CA2d 206, 210, 16 CR 339

Discussion:

See 3.12

Form:

See 3.22

Legal Topics:

For related research and practice materials, see the following legal topics:

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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.04

3.04 Objectives and Strategies for Parties.

3.04[1] Resolution of the Underlying Dispute Will Obviate Need to Seek Sanctions. Attempting to resolve a discovery dispute short of seeking sanctions is a useful alternative if it appears that the opposing party will cooperate.



Strategic Point:

Documenting all efforts to resolve the matter informally may support a request for sanctions in the future, if necessary. If opposing counsel is unreasonably refusing reasonable requests, documents reflecting opposing counsel's position will support later motions for sanctions. Documenting the informal efforts may also assist in defending against having sanctions imposed on you. Your goal, however, should be to obtain discovery, not to attempt to obtain sanctions. Vituperative correspondence only serves to encourage a like response and dismay the court.



Warning:

In corresponding with opposing counsel to attempt informal resolution, especially when using "instant" communication devices such as fax machines, take care to keep the tone of the communication professional and polite. An unprofessional communication may become evidence of the sender's failure to meet discovery requirements [see, e.g., *Leko v. Cornerstone Bldg. Inspection Serv. (2001) 86 CA4th 1109, 1123, 103 CR2d 858* (attorney ordered to pay sanctions based on failure to attempt informal resolution of deposition dispute and resulting unnecessary motion to compel, as evidenced by his rude and insulting fax to opposing attorney, whose responses were professional and conciliatory)].

Judge's Perspective:

Courts will always encourage litigants to work out their discovery disputes rather than proceed with motions to compel. More and more trial judges are hearing their own discovery motions as opposed to outside references. The benefit in having the trial judge handle the discovery dispute is that there generally exists a greater intolerance of discovery game playing with the sitting judge than with a referee. Greater involvement of the trial judge with discovery is likely to reduce discovery impasses.

In the complex litigation court in Los Angeles County no outside discovery references of any nature are made. The judges sitting in complex litigation control not only the extent of discovery, but also hear, if necessary, all the discovery motions. The result is very few discovery motions and virtually no requests for sanctions of any nature. A purely anecdotal finding is that the more the sitting judge becomes involved in discovery, the less the judge needs to become involved. The advice for both bench officers and counsel is to aggressively engage discovery problems early on to defuse problems down the road.

Trial judges do look to see what efforts counsel have taken to resolve the dispute in question. However, it should be noted that some judges put too much emphasis on a meet-and-confer, while others view an impasse as an opportunity to send a message with respect to future discovery disputes. Judges in the latter category tend to find that meet-and-confer attempts simply result in the writing of self-serving vituperative letters that not only resolve nothing, but instigate further disputes. Swift intervention and preventive solutions go a long way toward thwarting further disputes. Specifically, for depositions, ask the trial judge if the deposition can be conducted in the judge's jury room, with the judge available for oral rulings on objections. For interrogatories, ask the judge to either preclude the use of further interrogatories or severely limit the number that can be propounded. A number of alternatives to discovery disputes now exist that do not require the use of monetary sanctions. However, if monetary sanctions appear to be the only way to control the situation, the trial judge should not be bashful in awarding them.

3.04[2] Opposing Party's Refusal to Resolve Matter Informally Is Basis for Award of Sanctions. Failing to confer in the required manner in a good-faith attempt to informally resolve a discovery dispute may subject the recalcitrant party to sanctions, if the statute governing a particular discovery motion requires such a good-faith attempt [see, e.g., *CCP* § 2023.020; see also *Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 1123, 103 CR2d 858].

The court may award sanctions against a party who fails to reach agreement during meet and confer, and then does not oppose the subsequent discovery motion [*Cal Rules of Ct, Rule 3.1348*].



Strategic Point:

If a pattern develops in which a party forces the filing of motions but does not oppose them, consider seeking the costs of all those motions as a sanction.



Cross Reference:

Discussion of meet and confer, see 3.06[9].



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II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.05

3.05 Purpose of Discovery Sanctions Is to Protect Party Denied Discovery, Not to Punish Adverse Party.

3.05[1] Sanction Should Protect Party Denied Discovery. The purpose of discovery sanctions is to protect the legitimate interests of the party denied, but entitled to, discovery [see *Hartbrodt v. Burke* (1996) 42 CA4th 168, 175, 49 CR2d 562 (terminating sanction); but see *Newland v. Superior Court* (1995) 40 CA4th 608, 615, 47 CR2d 24 (terminating sanction improper punishment for nonpayment of monetary sanction)]. The available discovery sanctions act as a deterrent effect on abuses [see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 17, 74 CR2d 248, 954 P2d 511 (against party); *Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 482, 84 CR2d 852, 976 P2d 223 (limitations against nonparty)]. A discovery sanction may not place the party seeking discovery in a better position than it would have been if the discovery had been provided and it was favorable [*Rail Servs. of Am. v. State Comp. Ins. Fund* (2003) 110 CA4th 323, 332 (terminating sanction for entire case would not be proper when refusal to comply with discovery order related to only one cause of action); *Deyo v. Kilbourne* (1978) 84 CA3d 771, 793, 149 CR 499].

3.05[2] Court Should Not Impose Sanction As Punishment. The court may not impose discovery sanctions that are designed not to accomplish the objects of discovery, but rather to impose punishment [*Vallbona v. Springer* (1996) 43 CA4th 1525, 1545, 51 CR2d 311].

3.05[3] Monetary Sanction Simply Reimburses Harmed Party for Reasonable Expenses. The purpose of the monetary sanction for discovery abuse is to reimburse the wronged party for reasonable expenses, including attorney's fees [see CCP § 2023.030(a)].

➡ Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

3.05[4] Sanction Ordinarily Is Awarded Only to Propounding Party. A court will award sanctions only to the party who propounded the discovery that triggered the sanctions, and not to a co-party who merely joins in the propounding party's motion for sanctions [*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 301, 57 CR3d 18 (affirming dismissal of plaintiff's complaint against propounding party but reversing as to co-party); *Townsend v. Superior Court* (1998) 61 CA4th 1431, 1433, 72 CR2d 333 (parties who are not the discovery proponents, but simply join in a motion requesting discovery sanctions, are not entitled to be awarded sanctions)].

Exception:

Sanctions may be awarded to a nonpropounding co-party who shows it suffered a detriment as the result of the sanctioned party's misuse of the discovery process, or when the discovery interests of the co-party and the propounding party are so closely aligned that it would be a useless duplication of effort for both parties to pursue the same discovery and invoke the same remedies against an opposing party [*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 301, 57 CR3d 18 ; see *Calvert Fire Ins. Co. v. Cropper* (1983) 141 CA3d 901, 905, 190 CR 593 (dismissing complaint against propounding party and co-party whose interests were "identical")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.06

3.06 Statutory Grounds for Discovery Misuse Sanctions.

3.06[1] Persisting, Over Objection, in Attempting to Obtain Impermissible Discovery. It is a misuse of the discovery process to persist, over objection and without substantial justification, in an attempt to obtain information or materials beyond the scope of permissible discovery [CCP § 2023.010(a)].

Examples:

- The court denied plaintiff's request for an order compelling discovery of the defendants' checking account records. Plaintiff then served a subpoena duces tecum on the defendants' bank seeking the same records. The defendants moved to quash the subpoena and the court granted the motion, reiterating at the hearing that plaintiff was not entitled to those documents. Once again, plaintiff tried to subpoena the same records from defendants' bank. The court granted defendants' motion to quash and awarded sanctions, finding that the subpoena violated the court's previous two orders [*Espinoza v. Classic Pizza, Inc.* (2003) 114 CA4th 968, 975-976].

- After a railroad employee filed an action against his employer under the Federal Employers' Liability Act, the employer attempted to obtain medical information from the employee outside of discovery and directed him to attend a disciplinary hearing regarding his refusal to provide the information. Although the employee's counsel objected to the employer's ex parte demands for medical information and made every effort to secure the employer's agreement to postpone the disciplinary hearing until the court heard his motion for injunctive relief, the employer gave equivocal responses while failing to agree to the requested postponement, forcing counsel to seek a temporary restraining order. The Court of Appeal found that the trial court properly awarded sanctions against the employer [*Pratt v. Union Pacific Railroad Co.* (2008) 168 CA4th 165, 183-184, 85 CR3d 321] .

3.06[2] Failing to Comply With Discovery Procedures. It is a misuse of the discovery process to use a discovery method in a manner that does not comply with its specified procedures [CCP § 2023.010(b)].

3.06[3] Causing Annoyance, Embarrassment, Oppression, or Undue Burden and Expense. It is a misuse of

the discovery process to employ a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense [CCP § 2023.010(c)].

Example:

The attorney for defendants named in a cross-complaint who had scheduled depositions of other parties, learned shortly before the scheduled date that the attorney representing the other parties had inadvertently failed to calendar the depositions. The other attorney quickly offered by fax to reschedule the deposition, but the deposing attorney threatened to, and did file an order to compel the depositions, also sending a rude and sarcastic fax. The court awarded monetary sanctions, based upon evidence which included the offensive fax, for the opposing party's expenses regarding the motion to compel [*Leko v. Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 1123, 103 CR2d 858].

3.06[4] Failing to Respond to Authorized Discovery. It is a misuse of the discovery process to fail to respond or to submit to an authorized method of discovery [CCP § 2023.010(d); see, e.g., *Vallbona v. Springer* (1996) 43 CA4th 1525, 1545, 51 CR2d 311].

Example:

After both parties had stipulated to continue the trial date so that plaintiff could complete and provide its audit report, plaintiff continued to delay providing defendant with the report, while also advising defendant that it could provide only a summary, rather than the entire audit with supporting documentation. Eventually the court granted the defendant's motion for evidentiary sanctions with respect to the audit report [*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 33, 9 CR2d 396 , superseded on resulting summary judgment issue by amendments to CCP § 437c].

3.06[5] Making Meritless Objections. It is a misuse of the discovery process to make, without substantial justification, meritless objection to discovery [CCP § 2023.010(e)].

3.06[6] Making Evasive Response. It is a misuse of the discovery process to make an evasive response to discovery [CCP § 2023.010(f)].

A response can be evasive even if the responding party does not intentionally conceal evidence [*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 CA4th 1093, 1103, 78 CR3d 200 (sanctioned party was evasive when it tendered discovery responses that submitted no meaningful information, claiming that information would be developed by future discovery, repeatedly ignored meet and confer letters, continued to parrot the same answers after two orders compelling it to give further responses, and propounded no discovery of its own until faced with a motion for terminating sanctions)].

Examples:

Ample evidence supported referee's determination that plaintiffs deliberately misconstrued interrogatory requesting description of "all economic damages you claim to have sustained" and provided an answer using a definition narrower than that provided by statute [*Clement v. Alegre* (2009) 177 CA4th 1277, 1286-1287, 99 CR3d 791].

3.06[7] Disobeying Discovery Order. It is a misuse of the discovery process to disobey a court order to provide discovery [CCP § 2023.010(g)].

Examples:

- Disobeying a court order to reenact an accident at a videotaped deposition may constitute a misuse of the discovery process under *CCP § 2023.010(g)* [see *Emerson Elec. Co. v. Superior Court* (1997) 16 CA4th 1101, 1112, 68 CR2d 883, 946 P2d 841 (citing former *CCP § 2023(b)(1)-(4)* (now *CCP § 2023.030*)].

- In a sex discrimination case, during a three-month period, the plaintiff filed motions to compel discovery and for sanctions. After granting some of the motions, the court suspended discovery pending a possible settlement. After settlement efforts failed, the plaintiff's attorney advised the defendant that he expected it to comply with the outstanding discovery deadline, which it again failed to do. The plaintiff moved for issue and evidentiary sanctions, and alternatively, a terminating sanction for abuse of the discovery process. The court ordered the answer stricken, resulting in a default judgment against the defendant and awarded plaintiff \$30,000 in monetary sanctions for discovery abuse [*Walker v. San Francisco Hous. Auth.* (2002) 100 CA4th 685, 690, 122 CR2d 758].

3.06[8] Making or Opposing Unwarranted Motion to Compel or Limit Discovery. It is a misuse of the discovery process to make or oppose, unsuccessfully and without substantial justification, a motion to compel or to limit discovery [*CCP § 2023.010(h)*].

3.06[9] Failing to Confer Adequately Regarding Informal Resolution.

3.06[9][a] Party Must Make Reasonable and Good-Faith Attempt to Resolve Dispute Informally to Avoid Sanctions. Misuses of the discovery process include failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good-faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made [*CCP § 2023.010(i)*].

The level of effort at informal resolution that satisfies the "reasonable and good-faith attempt" standard depends on the circumstances of the case [see *Stewart v. Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1016, 105 CR2d 115 ; *Obregon v. Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62].

Notwithstanding the outcome of the particular discovery motion, the court must impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*CCP § 2023.020*; see *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 294, 57 CR3d 18].

Judge's Perspective--Documenting Meet and Confer Efforts:

Take care when making a record of your meet and confer efforts with opposing counsel. Letters containing personal attacks or advocating extreme positions will not be viewed favorably by the judge and can distract the court from the merits of the motion. Before sending a meet and confer letter, counsel should consider how the court will view the letter if attached to a declaration filed in support or in opposition to a discovery motion. Communications with opposing counsel, if courteous and professional in tone and to the point, stand a much better chance of receiving the judge's consideration and suggest that counsel is acting reasonably and in good faith to resolve a discovery dispute.

 Cross Reference:

Discussion of monetary sanction for discovery abuses, see 3.10[2].

3.06[9][b] Adequacy of Resolution Attempt May Depend on Complexity of the Case. Whether the parties have adequately attempted to reach an informal resolution may depend on the complexity of the case. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d

62].

3.06[9][c] Adequacy of Resolution Attempt May Depend on History of the Litigation. The adequacy of the attempt to reach an informal resolution may depend on the history of the case, the interactions between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success, and other similar, relevant factors [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62].

3.06[9][d] Adequacy of Resolution Attempt May Depend on Nature of Underlying Discovery Requests. Whether the parties have adequately attempted to reach an informal resolution may depend on the nature of the underlying discovery requests. For example, the issue of reasonableness of the requests may be relevant to the issue of the requesting party's good faith in attempting to reach an informal resolution.

Example:

When the plaintiff propounded interrogatories that were grossly overbroad on their face, the court concluded that they were not reasonably related to a legitimate discovery need and drew an inference of an intent to harass and improperly burden the defendant. Further, when the defendant understandably objected, the plaintiff's only response was a single, brief letter, sent late in the relevant time period. In denying the motion to compel, the court found that the plaintiff failed to act reasonably and in good faith in attempting informal resolution [*Obregon v. Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62 (vacating denial of plaintiff's motion to compel, however, and ordering trial court to impose a different, yet appropriate, sanction for plaintiff's failure to attempt resolution)].

3.06[9][e] Adequacy of Resolution Attempt May Depend on Whether Party Faced With an Objection Merely Debates the Objection. A requesting party who meets an objection merely by immediately debating the propriety of the objection does not satisfy the requirement of making a good-faith attempt to resolve a discovery dispute informally [see *Townsend v. Superior Court* (1998) 61 CA4th 1431, 1433, 72 CR2d 333].



Strategic Point--Party Avoiding Imposition of Sanctions:

When faced with an imminent deadline to file a motion to compel following an unsuccessful attempt at informal resolution, consider seeking an extension of time to file the motion. This will give the parties additional time to reach a resolution and support a later assertion that a party made a sufficient attempt to resolve the dispute informally [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 430, 79 CR2d 62].



Warning:

If the discovery is needed for an anticipated motion for summary judgment or summary adjudication, be very cautious in extending time deadlines. Under the current fast track deadlines and the new lengthy period for notice of a summary judgment motion under *CCP* § 437c, there may not be sufficient time if extensions are given.

3.06[10] Statutory Grounds Are Not Exclusive.

3.06[10][a] Misuses of Discovery Process Not Limited to Statutory List. Misuses of the discovery process include, but are not limited to, the examples expressly set out in the Discovery Act [see *CCP* § 2023.010]. Moreover, the power to impose sanctions under the Discovery Act supplements, but does not supplant, a court's inherent power to deal with litigation abuse [*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 CA4th 736, 763, 66 CR3d 268 (trial court has inherent power to dismiss action as terminating sanction against plaintiff who hired an investigator to steal documents from defendant's facilities and altered the documents to mislead the court)].

3.06[10][b] Representing Suspended Corporation During Discovery Proceedings May Constitute Misuse of Discovery Process. Representing a corporate client during ongoing discovery proceedings when the corporation is suspended, may constitute discovery abuse under CCP § 2023.030 [see *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 CA4th 553, 562-563, 102 CR2d 350 (attorney acted in bad faith when, although suspecting corporate client disabled from litigation, concealed information and continued to litigate vigorously; interpreting *Corp Code* §§ 1502, 2205(b), governing suspension for failure to file required statement)].



Strategic Point:

It is often possible for a corporation that has been suspended for nonpayment of taxes, to obtain relief from suspension, sometimes without the necessity of immediate full payment of arrearages [see discussion of procedure, California Forms of Pleading and Practice, Ch. 160, Corporations: Capacity (Matthew Bender)].

3.06[10][c] Serving Deposition Subpoena on Nonparty Prior to Serving Complaint May Constitute Misuse of Discovery Process. Serving a deposition subpoena on a nonparty prior to serving the complaint on any defendant may constitute discovery abuse under CCP § 2023.030 [see *California Shellfish, Inc. v. United Shellfish Co.* (1997) 56 CA4th 16, 25-26, 64 CR2d 797].

3.06[10][d] Spoliation and Destruction of Evidence May Constitute Misuse of Discovery Process. Destroying evidence in response to a discovery request after litigation has commenced is a misuse of discovery within the meaning of CCP § 2023.030, as is destruction in anticipation of a discovery request [see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 (rejecting tort cause of action for first-party intentional spoliation of evidence in favor of existing remedies (citing former CCP § 2023(a)(4), (6), (b) (now CCP §§ 2023.010, 2023.030))].

Examples:

- In a breach of contract case, plaintiffs' incorporation of a forged contract in their complaint, refusal to allow the completion of a principal's deposition after the forgery came to light, and destruction of evidence resulted in terminating sanctions against them [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 496-499, 89 CR2d 353].

- In a legal malpractice action, the plaintiff obtained 26 boxes of his client files from the defendant and then fell behind in payments to the storage facility where he kept the files, resulting in the files' destruction. The Court of Appeal held that the trial court acted within its discretion in dismissing plaintiff's action as a discovery sanction; the trial court found that the destruction of the files was intentional and inferred that this was done to destroy evidence potentially favorable to the defendant [*Williams v. Russ* (2008) 167 CA4th 1215, 1224, 84 CR3d 813].

Exception:

Most of the sanctions obtainable under CCP § 2023.030 cannot be used against a *third-party* spoliator because they are available only against a party to the underlying lawsuit [see *Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 482-485, 84 CR2d 852, 976 P2d 223 (citing former CCP § 2023(b)(2)-(4) (now CCP § 2023.030(b)-(d))) (issue, evidence, and terminating sanctions available only against party)]. Only monetary and contempt discovery sanctions are available against a third-party spoliator, and these are further restricted by the limitation of former CCP § 2023(a) (now CCP § 2023.030) to "conduct that is a misuse of the discovery process." Monetary and contempt sanctions may be imposed against persons who flout the discovery process by suppressing or destroying evidence [see

Temple Cmty. Hosp. v. Superior Court (1999) 20 C4th 464, 482-482, 84 CR2d 852, 976 P2d 223].

**Cross References:**

Discussion of monetary sanction for discovery abuses, see 3.10[2].

Discussion of contempt sanctions, see 3.10[6].

Discussion of spoliation of evidence, see *Ch. 14, Preservation of Evidence*, 14.14 -14.17.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

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3.07 Some Courts May Require That Party's Conduct Be Willful.

3.07[1] No Willfulness Requirement in Statute. *CCP § 2023.030* does not, by its terms, require that the misuse of the discovery process be willful [see *Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474 (referring specifically to former *CCP § 2023(b)(1)* (now *CCP § 2023.030(a)*))].

Judge's Perspective:

A tricky area for counsel is determining and formulating the relief to be requested in the motion to compel. If there has not been a history of discovery impasses with respect to the information sought and counsel believes that the motion is substantially justified, monetary sanctions might be appropriate. However, if the information sought has been the subject of numerous hearings and prior orders, counsel may wish to pursue terminating, evidentiary, or issue-preclusion sanctions. Naturally, a greater degree of sanction will result in greater scrutiny of the conduct giving rise to the sanction. Accordingly, trial courts will examine whether the objections have been brought with substantial justification, whether there has been misuse of the discovery process, and finally, the degree of willfulness involved. While all of these tests are well and good, it generally boils down to the facts and circumstances surrounding the impasse itself. In other words, judges know it when they see it.

It is important for counsel to keep in mind the following:

1. Do not overreach in the relief requested;
2. Do not demand that the court grant the requested relief (specifically, do not draw the court into your level of frustration);
3. Outline in detail the type of relief requested by connecting it to the discovery sought (in other words, do not simply ask for a blanket evidentiary or issue preclusion sanction without providing the specifics of how the order is to be actually worded);
4. If requesting a terminating sanction, be mindful that the effect will be that of a default prove-up, so be

sure to comply with default judgment procedures [see, e.g., *Greenup v. Rodman* (1986) 42 C3d 822, 830, 231 CR 220, 726 P2d 1295 (due process required providing defendants with statement of damages when terminating sanction motion noticed and served)].

Distinguish:

Former CCP § 2034(d) (repealed Stats. 1986, ch. 1334, § 1) required that a misuse of the discovery process be willful before sanctions could be imposed. Former CCP § 2034(d), by its terms, applied to "willfully" failing to comply with discovery [see *Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474 (construing former CCP § 2023(b)(1) (now CCP § 2023.030(a)) to not require willfulness)].



Strategic Point--Party Seeking Sanctions:

Although willfulness is not required for the imposition of sanctions, conduct warranting the more serious sanctions, e.g., evidence and terminating sanctions, will most likely involve more than mere negligence or oversight. The party seeking sanctions should document all relevant conduct supporting serious sanctions, regardless of whether the conduct is specifically described as willful. Moreover, deliberate or willful conduct may overcome the opposing party's assertion of "substantial justification" in circumstances in which substantial justification would ordinarily defeat the imposition of sanctions [see CCP §§ 2023.010, 2023.030(a)].



Strategic Point--Party Avoiding Imposition of Sanctions:

Although willfulness is not required for the imposition of sanctions, the party subject to the imposition of sanctions should be prepared to show that his or her conduct was not intentional, deliberate, or willful. These issues affect whether the conduct is sanctionable in the first instance, and if so, whether lesser or harsher sanctions are appropriate. Moreover, the absence of willfulness or deliberateness may help to establish "substantial justification" in circumstances in which the showing of substantial justification would defeat the imposition of sanctions [see CCP §§ 2023.010, 2023.030(a)].

3.07[2] First Appellate District Court of Appeal Does Not Require Willfulness for Imposition of Sanctions.

The Court of Appeal for the First Appellate District has held that a discovery abuse need not be willful to be sanctionable [*Clement v. Alegre* (2009) 177 CA4th 1277, 1286, 99 CR3d 791 (First Appellate District, Div. 2) ; see CCP § 2023.010 et seq.].

3.07[3] Fourth Appellate District Court of Appeal Requires Willfulness Before Imposing Discovery Sanctions. The Court of Appeal for the Fourth Appellate District requires a willfulness element for the imposition of discovery sanctions. That court has stated that only two facts are absolutely prerequisite to imposition of the sanction [see *Vallbona v. Springer* (1996) 43 CA4th 1525, 1545, 51 CR2d 311 (citing *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 36, 9 CR2d 396 (Second Appellate District, Div. 1) , superseded on resulting summary judgment issue by amendments to CCP § 437c)]:

- There must be a failure to comply.
- The failure must be *willful*.

However, the Fourth Appellate District may be open to reconsidering the willfulness requirement. In *Reedy v. Bussell* [*Reedy v. Bussell* (2007) 148 CA4th 1272, 1291, 56 CR3d 216 (Fourth Appellate District, Div. 3)] , the Court of Appeal, citing *Ghanooni v. Super Shuttle* [*Ghanooni v. Super Shuttle* (1993) 20 CA4th 256, 260, 24 CR2d 501 (Second Appellate District, Div. 7)] , stated that "willfulness is no longer a requirement for the imposition of discovery

sanctions." The statement was dicta, however, because the court concluded that the sanctioned party had acted willfully in the case before it.



Strategic Point:

Although the language of *Vallbona* (and others) is general in referring to a willfulness requirement for "discovery sanctions," the case involved the imposition of issue and evidentiary sanctions against the defendant, thereby essentially eviscerating the defense. If this holding is limited to the context of the case, the element of willfulness would apply specifically to the more serious sanctions [see *Maldonado v. Superior Court* (2002)94 CA4th 1390, 1399, 115 CR2d 137 (Second Appellate District, Div. 4; imposition of serious sanctions even in absence of violation of court order)].



Strategic Point--Party Seeking Sanctions:

If you are seeking a serious sanction, such as an evidentiary or terminating sanction, you will probably be describing extreme conduct that can be considered willful, and should emphasize that point. If you seek lesser sanctions, e.g., a monetary sanction under CCP § 2023.030(a), but are not asserting that the party subject to sanctions acted in a particularly willful manner, consider distinguishing the cases cited above on the grounds that: (1) they refer to a case decided under a superseded statute that required willfulness (i.e., *Calvert Fire Ins. Co. v. Cropper* (1983) 141 CA3d 901, 904, 190 CR 593 and former CCP § 2034(d)), and (2) they involved more serious sanctions than those you are seeking.

3.07[4] Second Appellate District Court of Appeal Rulings Apparently Depend on Seriousness of Sanctions Requested.

3.07[4][a] Willfulness Requirement for Serious Sanctions. The Court of Appeal for the Second Appellate District has in some cases held that serious sanctions, such as terminating and evidence sanctions, will be imposed only for willful misuse of the discovery. For example, terminating sanctions have specifically been held to be an abuse of discretion absent willful violation of the procedural rule [*Security Pacific Nat'l Bank v. Bradley* (1992) 4 CA4th 89, 98, 5 CR2d 220]. Willfulness has been expressly or impliedly required by the Court of Appeal for the Second Appellate District for imposition of the following types of sanctions:

- Evidence sanction [see *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 36, 9 CR2d 396 (Second Appellate District, Div. 1) , superseded on resulting summary judgment issue by amendments to CCP § 437c].
- Order striking pleadings [see *Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1617-1622, 26 CR2d 786 (Second Appellate District, Div. 1; order striking answer led to default judgment)].
- Terminating sanction [see *Lang v. Hochman* (2000) 77 CA4th 1225, 1247, 92 CR2d 322 (Second Appellate District, Div. 3; party's "lack of diligence" in failing to obey discovery order was "willful, tactical, egregious, and inexcusable"); *R.S.Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 495-497, 89 CR2d 353 (Second Appellate District, Div. 4) ; *Security Pacific Nat'l Bank v. Bradley* (1992) 4 CA4th 89, 98, 5 CR2d 220 (Second Appellate District, Div. 7)].

3.07[4][b] No Willfulness Requirement for Monetary Sanctions. The Court of Appeal for the Second Appellate District has stated: "It is no longer required that the misuse of the discovery process be willful" [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 260, 24 CR2d 501 (Second Appellate District, Div. 7)]. Specifically, CCP § 2023.030(a) (providing for monetary sanctions) "does not, by its terms, require that the misuse of the discovery

process be willful" [*Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474 (Second Appellate District, Div. 1) ; cf. former CCP § 2034(d)(1)].

**Cross Reference:**

Discussion of willfulness requirement, see DeMeo, *California Deposition and Discovery Practice*, § 42.10 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMisconduct



105 of 184 DOCUMENTS

Matthew Bender (R) Practice Guide: California Civil Discovery
Kiesel, Matthai, Seabolt, Grillo

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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.08

3.08 Sanctions in Particular Discovery Procedures Authorizing Sanctions.

3.08[1] Nonparty Deponent Who Disobeys Deposition Subpoena Is Subject to Contempt, Statutory Penalties, and Monetary Sanctions.

3.08[1][a] Nonparty Deponent Who Disobeys Deposition Subpoena Is Subject to Contempt Sanction. A nonparty deponent who disobeys a deposition subpoena in any manner described in *CCP § 2020.220(c)* may be punished for contempt under *CCP § 2023.010 et seq.* without the necessity of a prior court order directing compliance by the witness [*CCP § 2020.240*].

The following conduct constitutes disobedience of a deposition subpoena [*see CCP § 2020.220*]:

- The deponent's refusal to be sworn;
- The deponent's refusal to answer any question;
- The deponent's refusal to produce specified items;
- The deponent's refusal to permit inspection or photocopying, if the subpoena so specifies; and
- The deponent's refusal to permit specified testing and sampling of the items produced.

3.08[1][b] Nonparty Deponent Who Disobeys Deposition Subpoena Is Subject to Statutory Penalty and Payment of Damages. A nonparty deponent who disobeys a deposition subpoena is subject to the statutory penalty and the payment of damages set forth in *CCP § 1992* [*CCP § 2020.240*].

A person who fails to appear pursuant to a subpoena or court order forfeits to the party aggrieved the sum of \$500 and all damages caused by the person's failure to appear [*see CCP § 1992*].

Example:

Trial court acted properly in imposing monetary sanctions against nonparty who promised to deliver

subpoenaed documents, but then refused to do so, relying on typographical error in subpoena [*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 CA4th 1342, 1350-1351].

◆ Cross References:

Discussion of contempt sanction under *CCP* § 2023.010 *et seq.*, see 3.10[6].

Discussions of deposition subpoena, see DeMeo, California Deposition and Discovery Practice, Ch. 53, Deposition of Nonparty (Matthew Bender).

3.08[2] Oral Depositions.

3.08[2][a] Party That Notices Deposition but Fails to Proceed Is Subject to Mandatory Monetary Sanction.

If the party giving notice of a deposition fails to attend or proceed with the deposition, the court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against that party, or the attorney for that party, or both, and in favor of any party attending in person or by attorney [*CCP* § 2025.430].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2025.430]. Sanctions would not, for example, be appropriate if the party that noticed the deposition gave timely notice that the deposition would not be taken as noticed [see *Rosen v. Superior Court* (1966) 244 CA2d 586, 595, 53 CR 347 (sanctions were proper when notice of cancellation was not given)].

3.08[2][b] Party That Notices Deposition Is Subject to Mandatory Monetary Sanction for Failing to Serve Deposition Subpoena. If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* The sanction may be against the noticing party, or the attorney for that party, or both, and in favor of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken [*CCP* § 2025.440(a)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2025.440(a)].

3.08[2][c] Party Deponent Compelled to Attend, Testify, or Produce Is Subject to Mandatory Monetary Sanction. If a motion to compel compliance with a deposition notice is granted, the court must impose a monetary sanction under *CCP* § 2023.010 *et seq.* against the deponent or the party with whom the deponent is affiliated [*CCP* § 2025.450(c)(1)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2025.450(c)(1)].

3.08[2][d] Party Deponent Who Fails to Attend, Testify, or Produce Is Subject to Mandatory Monetary Sanction Requested by Any Attending Party. A party deponent who fails to attend, testify at, or produce requested documents for inspection at a deposition is subject to a mandatory monetary sanction if any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken [*CCP* § 2025.450(c)(2); *CCP* § 2023.010 *et seq.*].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2025.450(c)(2)].

3.08[2][e] Party Deponent Who Disobeys Order to Compel Attendance, Testimony, or Production Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party deponent or party-affiliated deponent fails to obey an order compelling attendance, testimony, and production, the court may order the imposition of an issue sanction, evidence sanction, or terminating sanction under CCP § 2023.010 *et seq.* against that party deponent or against the party with whom the party deponent is affiliated [CCP § 2025.450(d)].

In lieu of or in addition to an issue, evidence, or terminating sanction, the court may impose a monetary sanction under CCP § 2023.010 *et seq.* against that deponent or against the party with whom that party deponent is affiliated and in favor of any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to that order [CCP § 2025.450(d)].

3.08[2][f] Unsuccessful Party in Motion to Compel Answer or Production Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under CCP § 2025.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production of documents or things [CCP § 2025.480(f)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2025.480(f)].

**Strategic Point--Party Seeking Sanctions:**

A request for a sanction must be made at the appropriate time. For example, a request for a monetary sanction under former CCP § 2025(o) [now see CCP § 2025.480] must be made in conjunction with the motion to compel [see, e.g., *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398-1399, 115 CR2d 137 (rejecting request for mandatory monetary sanction made during oral argument in proceeding for writ of mandate in which court of appeal directed trial court to grant plaintiff's motion to compel answers to deposition questions and to conduct further proceedings on issue of whether monetary sanction should be imposed)].

3.08[2][g] Deponent Who Disobeys Order to Compel Answer or Production Is Subject to Monetary, Issue, Evidence, or Terminating Sanction and Contempt. A deponent's failure to obey an order to compel an answer or production, entered under CCP § 2025.480, may be considered a contempt of court [CCP § 2025.480(g)].

In addition, if the disobedient deponent is a party to the action or an officer, director, managing agent, or employee of a party, the court may make those orders that are just against the disobedient party, or against the party with whom the disobedient deponent is affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under CCP § 2023.010 *et seq.* [CCP § 2025.480(g); see *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398-1399, 115 CR2d 137 (these sanctions inappropriate when trial court denied motion to compel; appellate court issued writ of mandate directing trial court to grant motion)].

In lieu of or in addition to this sanction, the court may impose a monetary sanction under CCP § 2023.010 *et seq.* against that party deponent or against any party with whom the deponent is affiliated [CCP § 2025.480(g)].

 Cross References:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[4].

Discussion of terminating sanctions, see 3.10[5].

Discussion of contempt sanctions, see 3.10[6].

Discussion of oral depositions, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California.

3.08[3] Deposition by Written Questions.**3.08[3][a] Unsuccessful Party in Motion to Sustain Objection Is Subject to Mandatory Monetary Sanction.**

The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to sustain an objection in a deposition by written questions [*CCP § 2028.040(c)*].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2028.040(c)*].

3.08[3][b] Unsuccessful Party in Motion to Overrule Objection Is Subject to Mandatory Monetary Sanction.

The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to overrule an objection in a deposition by written questions [*CCP § 2028.050(c)*].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2028.050(c)*].

 Cross References:

Discussion of monetary sanctions, see 3.10[2].

Discussion of depositions by written questions, see Ch. 8, Depositions on Written Questions.

3.08[4] Interrogatories.**3.08[4][a] Unsuccessful Party in Motion to Compel Response Is Subject to Mandatory Monetary Sanction.**

The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories [*CCP § 2030.290(c)*].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2030.290(c)*].

3.08[4][b] Party That Disobeys Order Compelling Answer Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling answers to interrogatories, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction, under *CCP § 2023.010 et seq.* [*CCP § 2030.290(c)*].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP § 2023.010 et seq.* [*CCP § 2030.290(c)*; see *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 CA4th 390, 411-412, 55 CR3d 751].

3.08[4][c] Unsuccessful Party in Motion to Compel Further Response Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories [*CCP § 2030.300(d)*]. The court may impose monetary sanctions against a party who unsuccessfully opposes a motion to compel further responses even if there has been no previous order compelling further responses [*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 294, 57 CR3d 18] .

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2030.300(d)*].

Example:

A plaintiff who unsuccessfully brought a motion to compel further responses to interrogatories may properly have been subject to monetary sanctions; but the defendant's request for the harsher sanction (denial of further discovery) was deemed inappropriate. The trial court denied the motion to compel on the ground that the plaintiff had failed to make a sufficient effort to resolve the dispute informally. The appellate court stated, "When appropriate, the party whose efforts were found wanting may be assessed with monetary sanctions" [*Obregon v. Superior Court* (1998) 67 CA4th 424, 434-435, 79 CR2d 62].

3.08[4][d] Party That Disobeys Order Compelling Further Response Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling further response to interrogatories, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP § 2023.010 et seq.* [*CCP § 2030.300(e)*].

Distinguish:

A court is not authorized to impose an evidence sanction based on the mere failure to supplement a response promptly when no order compelling further answers has been sought or entered [*Biles v. Exxon Mobil Corp.* (2004) 124 CA4th 1315, 1327]. However, if a party who repeatedly fails to respond to discovery despite court orders and monetary sanctions, the trial court may properly impose terminating sanctions after the party violated a stipulation requiring it to provide overdue interrogatory responses; the stipulation was tantamount to the court order required by *CCP § 2030.300(e)* [*Mileikowsky v. Tenet Healthsystem* (2005) 128 CA4th 262, 278-280].

Courts are not authorized to impose an evidence sanction for incomplete and evasive answers in the absence of a violation of an order compelling further answers [*Saxena v. Goffney* (2008) 159 CA4th 316, 333-334, 71 CR3d 469 (court erred in excluding witness testimony, but error was harmless.)].

In lieu of or in addition to these sanctions, the court may impose a monetary sanction under *CCP § 2023.010 et seq.* [*CCP § 2030.300(d)*].

Exception--No Prerequisite Motion If Misconduct Itself Precludes Motion:

If the deceptive conduct of the noncompliant party makes it impossible to appreciate that responses are incomplete and warrant a motion to compel further responses, monetary sanctions may be recovered without a motion to compel [*Sherman v. Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 1157-1158, 79 CR2d 641 (only three of 20 relevant documents produced, with false denial of existence of others)].

3.08[4][e] Unsuccessful Party in Motion for Protective Order Is Subject to Mandatory Monetary Sanction.

The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order regarding interrogatories [*CCP* § 2030.090(d)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust [*CCP* § 2030.090(d)].



Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[4].

Discussion of terminating sanctions, see 3.10[5].

Discussion of contempt sanction, see 3.10[6].

Discussion of interrogatories, see Ch. 9, Interrogatories.

3.08[5] Inspection of Documents, Tangible Things, Land, or Other Property.

3.08[5][a] Unsuccessful Party in Motion to Compel Response to Inspection Demand Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to an inspection demand [*CCP* § 2031.300(c)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust [*CCP* § 2031.300(c)].



Timing:

While normally it is advisable to file a motion for sanctions concurrently with the motion to compel responses (or the opposition to a motion to compel responses), the motion for sanctions may be filed at a later time [*London v. Dri-Honing Corp.* (2004) 117 CA4th 999, 1007-1008].

3.08[5][b] Party That Disobeys Order Compelling Response Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling a response to an inspection demand, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2031.300(c)].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.010 *et seq.* [*CCP*

§ 2031.300(c)].

Exceptions--Prior Order May Not Be Necessary:

- When a prior order compelling a response would have been futile, courts have imposed evidence sanctions without such an order [*see, e.g., Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 CA4th 27, 35-36, 9 CR2d 396, superseded on summary judgment issue by amendments to CCP § 437c (order to comply would have been futile because plaintiffs conceded they were unable to provide the promised items of discovery); *Pate v. Channel Lumber Co.* (1997) 51 CA4th 1447, 1456, 59 CR2d 919 (after plaintiffs served defendant with three separate requests for production of documents and received repeated assurances from defendant that all documents had been produced, plaintiffs were not required to move to compel further responses before court could impose evidence sanction)].

- In another case, the court held that a stipulation signed by both parties setting a deadline for providing overdue responses was tantamount to the court order compelling responses required by CCP § 2031.300(c) [*Mileikowsky v. Tenet Healthsystem* (2005) 128 CA4th 262, 278-280 (trial court did not err in granting terminating sanctions even though stipulation was never signed by court or filed)].

- A prior court order is not necessary for the imposition of issue and evidence sanctions against a party who has engaged in a pattern of willful discovery abuse that caused the unavailability of evidence [*Karlsson v. Ford Motor Co.* (2006) 140 CA4th 1202, 1215, 45 CR3d 265] .

Example:

In a fraud case against a doctor who misrepresented that he anticipated FDA approval of his laser surgery technique and that the technique was used in Europe, plaintiffs unsuccessfully requested the production of documents pertaining to the defendant's laser equipment, including documentation regarding use of the procedure in Europe and defendant's purported FDA application. Plaintiffs later served defendants with notices to produce such documents at trial. At his deposition, defendant stated that he no longer possessed FDA applications, believing them to have been stolen, and declined to produce the other documents without giving a reason. Following defendant's testimony at trial concerning the requested documents, some of which he then claimed to have had and some of which he claimed had been stolen, plaintiffs sought issue sanctions. The court imposed an issue sanction in the form of admissions, and evidence sanctions prohibiting the defense from introducing any documents regarding any FDA application for the laser technique. The appellate court stated: "Requiring plaintiffs here to seek a formal order to compel defendants to comply with discovery would have been ... futile since [defendant] had claimed the requested documents were stolen. Further, the evidence sanction actually imposed was not punitive but instead reflected the court's attempt to "tailor" the sanction to the harm caused by the withheld discovery Imposition of a lesser sanction here would have permitted defendants to benefit from their withholding of discovery by forcing plaintiffs to proceed to trial without the benefit of the bargained-for evidence" [*Vallbona v. Springer* (1996) 43 CA4th 1525, 1544-1546, 51 CR2d 311 (construing former CCP § 2031(k), redesignated as CCP § 2031.300)].

Distinguish:

The trial court erred in imposing evidence and issue sanctions against a defendant for failing to produce video recordings and destroying them after receiving an inspection demand for them. Although plaintiffs had demanded that the defendant produce the video recordings, the defendant never agreed to produce them and did not fail to comply with any agreement or representation to the court, let alone do so

willfully. In addition, plaintiffs waived any right to compel an inspection of the recordings by failing to timely move to compel a further response to the inspection demand [*New Albertsons, Inc. v. Superior Court* (2008) 168 CA4th 1403, 1427-1428, 86 CR3d 457 ; see *Lee v. Lee* (2009) 175 CA4th 1553, 1559, 97 CR3d 516 (trial court did not abuse its discretion when it refused to impose an evidence sanction; no court order was violated, and there was no evidence that the responding party willfully failed to comply with discovery request)].

3.08[5][c] Unsuccessful Party in Motion to Compel Further Response to Inspection Demand Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand [*CCP* § 2031.310(h)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2031.310(h)].

3.08[5][d] Party That Disobeys Order Compelling Further Response Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2031.310(i)].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.010 [*CCP* § 2031.310(i)].

3.08[5][e] Unsuccessful Party in Motion to Compel Compliance With Inspection Demand Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with an inspection demand [*CCP* § 2031.320(b)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2031.320(b)].

3.08[5][f] Party That Disobeys Order Compelling Inspection Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2031.320(c)].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2031.320(c)].



Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[4].

Discussion of terminating sanctions, see 3.10[5].

Discussion of contempt sanction, see 3.10[6].

Discussion of inspection demands, see Ch. 10, Inspection of Documents, Tangible Things, and Land.

3.08[6] Physical and Mental Examinations.

3.08[6][a] Unsuccessful Party in Motion to Compel Response and Compliance With Demand for Physical Examination Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination [*CCP* § 2032.240(c)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2032.240(c)].

Example--No Substantial Justification:

In a case for personal injuries, plaintiff refused to comply with defendants' demand to submit to x-rays of certain parts of her body, even though she complained of pain in those areas. The court found that she had failed to provide substantial justification for her refusal to submit to x-rays, because there was no evidence to support her purported aversion to x-rays, her own physician agreed with the need for them, and she had agreed to x-rays if taken by him. Therefore, the imposition of monetary sanctions against her were upheld [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 259-261, 24 CR2d 501].

3.08[6][b] Plaintiff Who Disobeys Order Compelling Response and Compliance With Demand for Physical Examination Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a plaintiff fails to obey an order compelling response and compliance with a demand for a physical examination, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.240(d)].

In lieu of or in addition to that sanction the court may impose a monetary sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.240(d)].

3.08[6][c] Party That Fails to Submit to Required Examination Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party required by *CCP* § 2032.210 *et seq.* or § 2032.310 *et seq.* to submit to a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.410].

In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.410].

3.08[6][d] Party That Fails to Produce Another for Examination Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party required by *CCP* § 2032.210 *et seq.* or 2032.310 *et seq.* to produce another for a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.420].

Exception:

The sanction will not be imposed if the party failing to comply demonstrates an inability to produce that

person for examination [CCP § 2032.420].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP § 2023.010 et seq.* [CCP § 2032.420].

3.08[6][e] Unsuccessful Party in Motion to Compel Delivery of Medical Reports Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports pursuant to *CCP § 2032.620(a)* [CCP § 2032.620(b)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2032.620(b)].

3.08[6][f] Party That Disobeys Order Compelling Delivery of Medical Reports Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling delivery of demanded medical reports pursuant to *CCP § 2032.620(a)*, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP § 2023.010 et seq.* [CCP § 2032.620(c)].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP § 2023.010* [CCP § 2032.620(c)].

The court shall exclude at trial the testimony of any examiner whose report has not been provided by a party [CCP § 2032.620(c)].

3.08[6][g] Unsuccessful Party in Motion to Compel Delivery of Additional Medical Reports Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of additional medical reports. [CCP § 2032.650(b)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2032.650(b)].

3.08[6][h] Party That Disobeys Order Compelling Delivery of Medical Reports Is Subject to Issue, Evidence, or Terminating Sanction and Monetary Sanction. If a party fails to obey an order compelling delivery of additional medical reports pursuant to *CCP § 2032.650*, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP § 2023.010 et seq.* [CCP § 2032.650(c)].

In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP § 2023.010* [CCP § 2032.650(c)].

The court shall exclude at trial the testimony of any health care practitioner whose report has not been provided by a party ordered to do so by the court [CCP § 2032.650(c)].



Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[5].

Discussion of terminating sanctions, see 3.10[5].

Discussion of contempt sanctions, see 3.10[6].

Discussion of physical and mental examinations, see Ch. 11, Physical and Mental Examinations.

3.08[7] Requests for Admissions.

3.08[7][a] Unsuccessful Party in Motion for Protective Order Regarding Requests for Admissions Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order pursuant to *CCP* § 2033.080(a) [*CCP* § 2033.080(d)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2033.080(d)].

3.08[7][b] Party Whose Failure to Serve Timely Response Necessitates Motion Is Subject to Mandatory Monetary Sanction. The court must impose a monetary sanction under *CCP* § 2023.010 et seq. against the party or attorney, or both, whose failure to serve a timely response to requests for admissions necessitates a motion for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted [*CCP* § 2033.280(c); see, e.g., *Wilcox v. Birtwhistle* (1999) 21 C4th 973, 980, 90 CR2d 260, 987 P2d 727].

3.08[7][c] Unsuccessful Party in Motion to Compel Further Response Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 et seq. against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to requests for admissions [*CCP* § 2033.290(d)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2033.290(d)].

3.08[7][d] Party That Disobeys Order Compelling Further Response Is Subject to Having Requests Be Deemed Admitted and Monetary Sanction. If a party fails to obey an order compelling further response to requests for admissions, the court may order that the matters involved in the requests be deemed admitted [*CCP* § 2033.290(e)].

In lieu of or in addition to this order, the court may impose a monetary sanction under *CCP* § 2023.010 et seq. [*CCP* § 2033.290(e)].



Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[4].

Discussion of terminating sanctions, see 3.10[5].

Discussion of requests for admissions, see Ch. 12, Requests for Admissions.

3.08[8] Exchange of Expert Witness Lists.

3.08[8][a] Unsuccessful Party in Motion for Protective Order Is Subject to Mandatory Monetary Sanction.

The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order pursuant to *CCP* § 2034.250(a) [*CCP* § 2034.250(d)].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2034.250(d)].

3.08[8][b] Party That Fails to Comply With Expert Witness Disclosure Is Subject to Mandatory Exclusion Sanction. Except as provided in *CCP* §§ 2034.310, 2034.610 *et seq.*, and 2034.710 *et seq.*, on objection of any party who has made a complete and timely compliance with *CCP* § 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following [*CCP* § 2034.300]:

- List that witness as an expert under *CCP* § 2034.260 [*CCP* § 2034.300(a)];
- Submit an expert witness declaration [*CCP* § 2034.300(b)], i.e., a declaration that fully complies with the content requirements of *CCP* § 2034.260(c) [*Bonds v. Roy* (1999) 20 C4th 140, 145-146, 83 CR2d 289, 973 P2d 66];

Unreasonable Diligence:

CCP § 2034.300 provides an exclusion sanction for any failure to comply with the expert witness declaration requirements of *CCP* § 2034.260(c) [see *Bonds v. Roy* (1999) 20 C4th 140, 147-148, 83 CR2d 289, 973 P2d 66].

The exclusion sanction of *CCP* § 2034.300 applies when a party unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of *CCP* § 2034.260(c), including the requirement that the declaration contain "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give" under *CCP* § 2034.260(c)(2). This encompasses situations in which a party has submitted an expert witness declaration, but the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial [*Bonds v. Roy* (1999) 20 C4th 140, 148-149, 83 CR2d 289, 973 P2d 66].

- Produce reports and writings of expert witnesses under *CCP* § 2034.270;
- Make that expert available for a deposition under *CCP* § 2034.410.

Monetary sanctions are not authorized for disclosing for the first time during the trial a theory that the expert did not disclose in the expert witness declaration [*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 CA4th 887, 905-906, 91 CR3d 617] .

3.08[8][c] Unsuccessful Party in Motion to Augment or Amend Expert Witness Information Is Subject to

Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information pursuant to *CCP* § 2034.610(a) [*CCP* § 2034.630].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2034.630].

3.08[8][d] Denial of Motion to Amend Expert Witness List Results in Exclusion of New Evidence. If a motion to amend an expert witness declaration to add a new area of testimony is denied under *CCP* § 2034.610, the testimony is excluded under *CCP* § 2034.300 [*see Bonds v. Roy* (1999) 20 C4th 140, 146-147, 83 CR2d 289, 973 P2d 66 (request to expand scope of expert's testimony treated as implicit motion to amend)].

3.08[8][e] Unsuccessful Party in Motion to Submit Tardy Expert Witness Information Is Subject to Mandatory Monetary Sanction. The court shall impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information pursuant to *CCP* § 2034.710 [*CCP* § 2034.730].

Exception:

The sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2034.730].



Cross Reference:

Discussion of monetary sanctions, see 3.10[2].

Discussion of issue sanctions, see 3.10[3].

Discussion of evidence sanctions, see 3.10[4].

Discussion of terminating sanctions, see 3.10[5].

Discussion of exchange of information concerning expert witnesses, see Ch. 13, Exchanging Expert Witness Information.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Matthew Bender (R) Practice Guide: California Civil Discovery
Kiesel, Matthai, Seabolt, Grillo

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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.09

3.09 Sanctions Available on Motion to Compel Even in Absence of Opposition.

The court may award sanctions under the Discovery Act in favor of a party that files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

Distinguish--Failure to Appear at Hearing:

The failure to file a written opposition or to appear at a hearing, or the voluntary provision of discovery, is not deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMisconductCivil
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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

1-3 MB Practice Guide: CA Civil Discovery 3.10

3.10 Types of Sanctions Available.

3.10[1] Notice and Opportunity to Be Heard Are Prerequisite to Imposition of Statutory Sanction. To the extent authorized by the section governing any particular discovery method or any other provision of the Discovery Act, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose certain sanctions against anyone engaging in conduct that is a misuse of the discovery process [CCP § 2023.030; see CCP §§ 2016.010-2036.050 (Discovery Act of 2005)].

Sanctions may not be imposed ex parte; written notice in accordance with CCP § 1005 is required [*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 296, 57 CR3d 18] .

3.10[2] Monetary Sanction.

3.10[2][a] Parties and Attorneys Misusing Discovery Process Are Subject to Payment of Reasonable Expenses. The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [CCP § 2023.030(a); see, e.g., *Walker v. San Francisco Hous. Auth.* (2002) 100 CA4th 685, 688, 122 CR2d 758 (monetary sanction awarded against defendant housing authority and attorney with primary responsibility for the case); *Lang v. Hochman* (2000) 77 CA4th 1225, 1230, 92 CR2d 322 (plaintiff filed motion for terminating, evidence, issue, and monetary sanctions against defendant and counsel)].



Trap:

To obtain sanctions against an attorney, the notice of motion must so state. Otherwise sanctions will only be available against the party [*Blumenthal v. Superior Court* (1980) 103 CA3d 317, 318, 320, 163 CR 39].

Prerequisite:

Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding that the attorney advised the misconduct [CCP § 2023.030(a); *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261,

24 CR2d 501 (citing *Corns v. Miller* (1986) 181 CA3d 195, 200, 226 CR 247 (construing similar language in former CCP § 2034(b)(2)(D))).

Reasonable Diligence:

In a personal injury case in which the plaintiff refused to submit to x-rays of parts of her body that were allegedly injured by the defendant, monetary sanctions to compensate the defense for its motion to compel compliance with a demand for a physical examination (CCP § 2032.240) were properly awarded against the plaintiff, but not her attorney. Declarations and letters showed that plaintiff's counsel had attempted to convince her to submit to the requested x-rays and that counsel had made substantial efforts to try to reach some compromise. Plaintiff's counsel's opposition to the motion to compel x-rays did not give rise to an inference that they advised disobedience in the first instance; they were simply doing their job as advocates to try to protect their client from sanctions [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 259-261, 24 CR2d 501]. A monetary award against the plaintiff was upheld based on defendants' fees and costs for the motion to compel. However, the additional monetary award based solely on plaintiff's failure to cooperate with defendants' discovery was error [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 262, 24 CR2d 501].

Unreasonable Diligence:

An attorney representing a suspended corporate client in litigation, including during the discovery process, was subject to monetary sanctions [see *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 CA4th 553, 562-564, 102 CR2d 350 (interpreting Corp Code §§ 1502, 2205(b) (suspension for failure to file required statement))].

3.10[2][b] Parties and Attorneys That Unsuccessfully Assert Misuse of Process Are Subject to Payment of Reasonable Expenses. The court may impose a monetary sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both [CCP § 2023.030(a)].

3.10[2][c] Sanction Is Mandatory Absent Substantial Justification. If a monetary sanction is authorized by any provision of the Discovery Act, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2023.030(a); see *London v. Dri-Honing Corp.* (2004) 117 CA4th 999, 1006, 1009-1010 ; *California Shellfish, Inc. v. United Shellfish Co.* (1997) 56 CA4th 16, 25-26, 64 CR2d 797].

Distinguish:

Under *prior* law, the court could impose a monetary sanction only if it made a specific finding that there was no "substantial justification" [see *California Shellfish, Inc. v. United Shellfish Co.* (1997) 56 CA4th 16, 25, 64 CR2d 797].

3.10[2][d] Attorney Litigating in Propria Persona May Recover Expenses but Not Fees As Sanction.

Monetary discovery sanctions based on compensation for time and effort expended as a result of an adversary's misuse of the discovery process may not be awarded to an attorney litigating in propria persona [*Argaman v. Ratan* (1999) 73 CA4th 1173, 1179-1180, 86 CR2d 917 (involving former CCP § 2030(l) (now CCP § 2030.300))].

Pro se litigants may nevertheless be awarded monetary discovery sanctions in the amount of those reasonable expenses *actually incurred*, including photocopying, computer-assisted legal research, and other identifiable and allocable costs [see *Kravitz v. Superior Court* (2001) 91 CA4th 1015, 1020-1021, 111 CR2d 385 ; *Argaman v. Ratan* (1999) 73 CA4th 1173, 1180, 86 CR2d 917].

3.10[2][e] Party Represented by Pro Bono Attorney May Recover Fees and Costs As Monetary Sanction. An indigent litigant represented by an attorney free of charge may recover the reasonable value of the attorney's services as

a monetary sanction for misuse of the discovery process even though no fees are actually incurred [*Do v. Superior Court* (2003) 109 CA4th 1210, 1218, 135 CR2d 855].

3.10[3] Issue Sanction.

3.10[3][a] Court May Order That Facts Are Established. The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in support of the claim of the party adversely affected by the misuse of the discovery process [CCP § 2023.030(b)].

Examples:

- In a personal injury action brought by an injured passenger against an auto manufacturer, the auto manufacturer acted in bad faith when it failed to produce for deposition an appropriate witness on the topic of seat belt warnings, provided inadequate and incomplete information regarding three-point restraint system prototypes, and failed to disclose the existence of relevant documents. The court imposed an issue sanction, ordering that the plaintiff was entitled to a jury instruction that, (1) his lap belt did not provide adequate protection and (2) the manufacturer failed to warn the plaintiff of the dangerous condition [*Karlsson v. Ford Motor Co.* (2006) 140 CA4th 1202, 1218-1219, 45 CR3d 265] .

- In a child support action, where the father failed to answer interrogatories or produce tax returns and other financial documents necessary to determine his income, the court imposed an issue sanction declaring the father's income to be \$40,000 per month, as stated in the father's loan application [*In re Marriage of Chakko* (2004) 115 CA4th 104, 108-109] .

- The court imposed an issue sanction for defendant's misuse of the discovery process, directing plaintiffs' counsel to reduce to writing the defendant's judicial admissions of various facts. The court later used the resulting document as a special jury instruction on defendant's factual admissions [see *Vallbona v. Springer* (1996) 43 CA4th 1525, 1547-1548, 51 CR2d 311] .

Distinguish:

The trial court abused its discretion in imposing evidence and issue sanctions against a defendant for failing to produce video recordings and destroying them after receiving an inspection demand for them. Although plaintiffs had demanded that the defendant produce the video recordings, the defendant objected and never agreed to produce them. In addition, plaintiffs waived any right to compel an inspection of the recordings by failing to timely move to compel a further response to the inspection demand. Absent a timely motion challenging defendant's objections to the inspection demand and an order compelling discovery, the defendant had no obligation to produce the recordings [*New Albertsons, Inc. v. Superior Court* (2008) 168 CA4th 1403, 1434, 86 CR3d 457] .

Cross Reference:

Discussion of imposition of issue sanctions in absence of prior court order, see 3.08[5][b].

3.10[3][b] Court May Prevent Support of or Opposition to a Claim or Defense. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses [CCP § 2023.030(b)].

Example:

In a case involving a testamentary trust in which the plaintiff beneficiary filed objections to the trustee's third accounting, the plaintiff refused to comply with discovery relating to her knowledge of certain prior

proceedings. The court therefore entered an issue sanction that all of her objections to the trustee's third accounting were without merit [*Wells Fargo Bank v. DiLeonardo* (1994) 22 CA4th 873, 878-879, 28 CR2d 16].

3.10[4] Evidence Sanction: Court May Preclude Admission of Evidence. The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence [CCP § 2023.030(c); see *Juarez v. Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 389-390, 97 CR2d 12].

Examples:

- In a fraud case against a doctor who misrepresented that he anticipated FDA approval of his laser surgery technique and that the technique was used in Europe, plaintiffs unsuccessfully requested the production of documents pertaining to the defendant's laser equipment, including documentation that the procedure was used in Europe, and material regarding defendant's purported FDA application. Plaintiffs later served defendants with notices to produce various such documents at trial. At his deposition, defendant stated that he no longer possessed FDA applications, believing them to have been stolen, and declined to produce the other documents without giving a reason. At trial, defendant testified about the requested documents, some of which he claimed he now had and some of which he claimed had been stolen. In addition to issue sanctions requested by the plaintiff, the court imposed evidence sanctions prohibiting the defense from introducing any documents regarding any FDA application for the laser technique. The court stated that imposition of a lesser sanction would have permitted defendant to benefit from his withholding of discovery by forcing plaintiffs to proceed to trial without the benefit of the bargained-for evidence [*Vallbona v. Springer* (1996) 43 CA4th 1525, 1544-1546, 51 CR2d 311 (construing former CCP § 2031(k), now see CCP § 2031.300)].

- During discovery, the defendant repeatedly assured the plaintiffs that all documents on a particular issue had been produced. At trial, after the plaintiffs rested their case, the defendant tried to introduce previously undisclosed documents on that issue. The trial court issued an evidence sanction precluding the defendant from introducing any documents not obtained by the plaintiffs during discovery. The court of appeal found no abuse of discretion, agreeing with the trial court that because the defendant's deliberate attempt to thwart discovery was not discovered until trial, no other sanction would have served any useful purpose [*Pate v. Channel Lumber Co.* (1997) 51 CA4th 1447, 1454, 59 CR2d 919] .

- In a personal injury action brought by an injured passenger against an auto manufacturer, the auto manufacturer acted in bad faith when it failed to produce for deposition an appropriate witness on the topic of seat belt warnings, provided inadequate and incomplete information regarding three-point restraint system prototypes, and failed to disclose the existence of relevant documents. The court imposed evidence sanctions precluding the manufacturer from introducing (1) evidence that it warned the plaintiff that its two-point lap belt was or was not a dangerous condition and (2) evidence that the manufacturer was unaware of its failure to warn [*Karlsson v. Ford Motor Co.* (2006) 140 CA4th 1202, 1218-1219, 45 CR3d 265] .

Distinguish:

The mere failure to supplement or amend an interrogatory answer that was truthful when originally served is not a misuse of the discovery process and does not justify an evidence sanction [*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 CA4th 327, 356-358, 44 CR3d 426 (court erred in excluding testimony of later-discovered witnesses)].

3.10[5] Terminating Sanction.

3.10[5][a] Court May Strike Pleadings. The court may impose a terminating sanction by an order striking out the pleadings or parts of the pleadings of any party engaging in conduct that is a misuse of the discovery process [CCP § 2023.030(d)(1)].

Examples:

- The court granted a terminating sanction striking the answer and entering default judgment in favor of the plaintiff for defendants' failure to obey an order to respond to requests for admissions and an order to answer interrogatories. The court noted the defendants' continued "gamesmanship" and likened obtaining discovery from them to "pulling teeth." The appellate court described that remark as "one of the great judicial understatements of all time" [*Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1615-1616, 26 CR2d 786].

- The court granted a terminating sanction, striking defendants' cross-complaints and answer and ordering defendants' default entered, after defendants repeatedly failed to comply with discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161].

- The court struck the defendant's answer and cross-complaint after the defendant tendered discovery responses that submitted no meaningful information and claimed throughout that information would be developed by future discovery, even though the case had been active for 16 months. The defendant also repeatedly ignored meet and confer letters, continued to parrot the same answers after two orders compelling it to give further responses, and propounded no discovery of its own until faced with a motion for terminating sanctions [*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 CA4th 1093, 1102-1103, 78 CR3d 200].

3.10[5][b] Court May Stay Further Proceedings. The court may impose a terminating sanction by an order staying further proceedings by a party engaging in conduct that is a misuse of the discovery process until an order for discovery is obeyed [CCP § 2023.030(d)(2)].

3.10[5][c] Court May Dismiss Action. The court may impose a terminating sanction by an order dismissing the action, or any part of the action, of a party engaging in conduct that is a misuse of the discovery process [CCP § 2023.030(d)(3)]. The trial court has the inherent power to dismiss an action in response to a plaintiff's deliberate and egregious misconduct. Violation of a court order is not a prerequisite to the court's exercise of its inherent power to dismiss [*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 CA4th 736, 763-764, 66 CR3d 268].

Examples:

- The court dismissed a legal malpractice action after the plaintiff obtained 26 boxes of his client files from the defendant and then fell behind in payments to the storage facility where he kept the files, resulting in the files' destruction. The trial court found that the destruction of the files was intentional and inferred that this was done to destroy evidence potentially favorable to the defendant [*Williams v. Russ* (2008) 167 CA4th 1215, 1224, 84 CR3d 813].

- The trial court had the inherent power to dismiss an action in response to plaintiff's deliberate and egregious misconduct, which included hiring an investigator to steal documents from defendant's facilities and altering the documents to mislead the court [*Stephen Slesinger, Inc. v. Walt Disney Co.*

(2007) 155 CA4th 736, 763-764, 66 CR3d 268] .

- The court did not abuse its discretion in dismissing plaintiff's complaint after plaintiff refused to testify at his first deposition, disrupted and unilaterally terminated his second deposition, violated the trial court's order to appear for a third deposition, and violated an order to provide verified supplemental answers to interrogatories. In addition, plaintiff unsuccessfully made or opposed five discovery motions, failed to timely respond to interrogatories and then filed untimely objections, and failed to meet and confer with opposing counsel regarding compliance with discovery requests [*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 297, 57 CR3d 18] .

- The court acted within its discretion in dismissing plaintiffs' case after plaintiffs failed to respond to discovery requests, disregarded the court's discovery orders, and ignored opposing counsel's attempts to meet and confer [*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 CA4th 1058] .

- In an underinsured motorist arbitration, when the plaintiff refused to sign authorizations for release of her medical records to defendant, even after ordered by the court to do so, the court acted within its discretion in dismissing plaintiff's case [*Miranda v. 21st Century Ins. Co.* (2004) 117 CA4th 913, 928-929] .

- Because plaintiffs had incorporated a forged contract in their complaint, had refused to allow the completion of a principal's deposition after the forgery came to light, and had destroyed pertinent inculpatory evidence, the trial court imposed terminating sanctions in the form of dismissal for misuse of discovery and violations of court orders [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 487-488, 495-499, 89 CR2d 353] .

- The terminating sanction of dismissal of the complaint may be imposed for refusal to comply with an order of production made pursuant to former CCP § 2031 (now see CCP § 2031.010 *et seq.*), even if plaintiff's refusal is based on the privilege against self-incrimination [*Hartbrodt v. Burke* (1996) 42 CA4th 168, 173-175, 49 CR2d 562 (plaintiff who was a defendant in pending criminal wire-fraud prosecution and refused to produce tape recordings of communications with defendant in contract/tort action, subject to terminating sanction for refusal)] .

- In a bad-faith insurance case, the dismissal sanction was proper based on plaintiffs' course of conduct, including obstruction of discovery, failure to honor their stipulation to comply, and culminating in their defiance of a court order. Not only did they fail to respond to discovery, they also failed to oppose respondent's motion to compel or to file any opposition to defendant's motion to dismiss [*Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 CA3d 481, 485-491, 282 CR 530] .

3.10[5][d] Court May Enter Default Judgment. The court may impose a terminating sanction by an order rendering a judgment by default against that party engaging in conduct that is a misuse of the discovery process [CCP § 2023.030(d)(4)].

Examples:

- In a business case, the trial court imposed terminating sanctions and entered a \$22 million default judgment after defendants failed to comply with *three* discovery orders pertaining to document production. The trial court struck the answer, entered defendants' default, and dismissed their cross-complaint and their complaint in a related case. Noting it had first considered the totality of the

circumstances, the court found the shared misconduct of defendants and their attorney to have been willful and intentional violations of the discovery laws and prior discovery orders [*Lang v. Hochman* (2000) 77 CA4th 1225, 1241-1247, 92 CR2d 322].

- The court granted a terminating sanction, striking the answer and entering default judgment, for failure to obey an order to respond to requests for admissions and an order to answer interrogatories. The court noted the defendants' continued "gamesmanship" and likened obtaining discovery from them to "pulling teeth," with the appellate court describing that remark as "one of the great judicial understatements of all time" [*Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1616, 26 CR2d 786].

- The court granted a terminating sanction, striking defendants' cross-complaints and answer and ordering defendants' default entered, after defendants repeatedly failed to comply with discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161].

- The trial court properly granted default judgments following imposition of terminating sanctions against parties who failed to either produce documents or provide proper written answers to discovery, refused to complete a deposition as ordered by the court, and attempted to take several additional depositions during a recess in trial while misrepresenting their nature [*Reedy v. Bussell* (2007) 148 CA4th 1272, 1292-1293, 56 CR3d 216].

- In an action for unpaid attorney fees, terminating sanctions were fully justified against defendants who failed to comply with orders to respond to interrogatories and production demands and failed to pay monetary sanctions [*Steven M. Garber & Associates v. Eskandarian* (2007) 150 CA4th 813, 820, 59 CR3d 1].

- In a breach of warranty case brought by an automobile purchaser against the manufacturer, the trial court abused its discretion by not imposing terminating sanctions during trial against the defendant manufacturer who had violated four discovery orders or directives, had been irresponsible at best in preventing destruction of e-mails, had not fully permitted data mining of e-mails as previously ordered, and had failed to produce documents it should have produced months earlier [*Doppes v. Bentley Motors, Inc.* (2009) 174 CA4th 967, 993-994, 94 CR3d 802].

3.10[5][e] Terminating Sanctions Are Drastic and for Use Only If Lesser Sanctions Are Inappropriate.

Terminating sanctions are to be used sparingly and only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 496, 89 CR2d 353 ; see *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 CA4th 736, 740, 66 CR3d 268 (when plaintiff's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial, trial court has inherent power to impose a terminating sanction)]. A discovery sanction may not place the party seeking discovery in a better position than it would have been if the discovery had been provided and it was favorable [*Rail Servs. of Am. v. State Comp. Ins. Fund* (2003) 110 CA4th 323, 332 (terminating sanction for entire case would not be proper when refusal to comply with discovery order related to only one cause of action); *Deyo v. Kilbourne* (1978) 84 CA3d 771, 793, 149 CR 499].

The sanctioned party's history as a repeat offender is significant in deciding whether to impose terminating sanctions [*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 CA4th 1093, 1106, 78 CR3d 200 (given defendant's months-long lack of cooperation in providing straightforward information, witnesses and documents to support its claims of malfeasance, the trial court could reasonably conclude that the ultimate sanction was appropriate); see *Doppes v. Bentley Motors, Inc.* (2009) 174 CA4th 967, 993-994, 94 CR3d 802 (trial court abused its discretion by not

imposing terminating sanction during trial against defendant that previously had violated four discovery orders or directives; despite monetary and issue sanctions, defendant still had not complied with discovery orders and directives, had been irresponsible at best in preventing destruction of e-mails, had not fully permitted data mining of e-mails as previously ordered, and had failed to produce documents it should have produced months earlier)].

3.10[5][f] Terminating Sanction Not Available As Remedy for Opposing Party's Failure to Pay Monetary Sanction. A terminating sanction issued solely because of a failure to pay a monetary discovery sanction is never justified [*Newland v. Superior Court* (1995) 40 CA4th 608, 614, 47 CR2d 24].

3.10[6] Contempt Sanction.

3.10[6][a] Misuse of Discovery Process May Be Contempt of Court. The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court [CCP § 2023.030(e); see *Newland v. Superior Court* (1995) 40 CA4th 608, 610, 47 CR2d 24 (in appropriate case, failure to pay ordered sanction is punishable as contempt)].



Warning:

Although discovery sanctions against attorneys are generally exempt from the requirement of referring them to the State Bar, the exception does not apply to sanctions for contempt, even if they pertain to the misuse of discovery [see *B&P Code* § 6086.7(a)(1), (3)].

3.10[6][b] Contempt Sanctions Are Specifically Allowed Against Certain Deponents. Contempt sanctions are specifically authorized in the following circumstances:

- A deponent who disobeys a deposition subpoena in any manner described in CCP § 2020.220(c) [CCP § 2020.240];



Cross Reference:

See 3.08[1].

- A deponent who disobeys an order to compel answer or production under CCP § 2025.480 [CCP § 2025.480(g)].



Cross Reference:

See 3.08[2].

3.10[6][c] Contempt Sanction Is Drastic and Rarely Used. Although the statutory language authorizes use of the contempt power to enforce civil discovery, the use of that drastic sanction in this context is rare [see *In re De La Parra* (1986) 184 CA3d 139, 143-144, 228 CR 864 (refusal to answer interrogatories did not deserve "drastic punishment," and terminating and monetary more appropriate if the court's dignity not "truly compromised")].



Cross References:

DeMeo, *California Deposition and Discovery Practice*, § 42.10 (Matthew Bender).

California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

3.10[7] Particular Sanction Must Be Appropriate to Dereliction. Discovery sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but deprived of discovery [*Hartbrodt v. Burke* (1996) 42 CA4th 168, 175, 49 CR2d 562 ; *Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 CA3d 481, 487, 282 CR 530].

Examples:

- In a trade secret case, the court granted a terminating sanction against defendants who intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives. The court rejected defendants' argument that plaintiffs were required to show prejudice from the deletion of the data, observing that defendants' own actions made it virtually impossible to determine what evidence defendants had destroyed [*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161].

- In an action by investors against general partners, the parties entered into a stipulated protective order providing that certain confidential documents would not be disclosed to third parties. After the defendants accused the plaintiffs of violating the protective order, the court issued an order prohibiting plaintiffs or their counsel from discussing the lawsuit with any other investors without first notifying the defendants and seeking the court's permission. The court later denied plaintiffs' request to speak with several investors who had contacted plaintiffs' counsel. The appellate court held that by prohibiting plaintiffs' counsel from speaking to third parties, the trial court's orders violated plaintiffs' *first amendment* right to freedom of speech [*Maggi v. Superior Court* (2004) 119 CA4th 1218, 1223-1226].

- In an employment discrimination case, the plaintiff brought motions to compel further responses to the questions at depositions of defendants' designated persons. Plaintiff also sought evidence and monetary sanctions for defendant's failures to adequately respond to discovery requests; the trial court denied the motion to compel, but granted the motion for evidence sanctions. On petition for writ of mandamus, the appellate court let a peremptory writ of mandate issue directing respondent court to vacate its order denying plaintiff's motions to compel further responses, and enter a new and different order granting the motions. The court refused to instruct the trial court to impose an *evidence* sanction, which would exceed the level of punishment justified under the facts and law. Instead, the court directed the trial court to conduct further proceedings on the issue of whether a *monetary* sanction should be imposed [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398-1399, 115 CR2d 137].

- In a tort case brought by an adult for sexual molestation when he was still a minor, the plaintiff failed to respond to interrogatories and document requests concerning the existence of prior similar complaints. In imposing an evidence preclusion sanction, the trial court prohibited introduction of evidence at trial that had been repeatedly withheld during discovery. The appellate court noted that absent unusual extenuating circumstances, the appropriate sanction for repeated and willful failure to provide the evidence to the opposing party is preclusion of that evidence from the trial, even if it causes termination of the opponent's case [*Juarez v. Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 389-390, 97 CR2d 12].

- In a business case, the trial court imposed terminating sanctions and entered a \$22 million default judgment after defendants failed to comply with three discovery orders pertaining to document production. The trial court struck the answer, entered defendants' default, and also dismissed their cross-complaint and complaint in a related case. Considering the totality of the circumstances, the court found that defendants and their attorney had willfully and intentionally violated the discovery laws and prior discovery orders. The court rejected the imposition of issue sanctions as inappropriate in this particular case [*Lang v. Hochman* (2000) 77 CA4th 1225, 1240-1246, 92 CR2d 322].

- In a fraud case against a doctor who misrepresented the expected FDA approval of his laser surgery technique and the use of the technique was used in Europe, plaintiffs unsuccessfully and repeatedly requested the production of relevant documents. In addition to issuing requested sanctions, the court

imposed evidence sanctions prohibiting the defense from introducing any documents regarding any FDA application for the laser technique. The court stated that imposition of a lesser sanction would have permitted defendant to benefit from his withholding of discovery by forcing plaintiffs to proceed to trial without the benefit of the bargained-for evidence. The court acted within its discretion in imposing an evidence sanction tailored to defendants' particular discovery misuse by precluding evidence of having sought FDA approval for the laser procedure [*Vallbona v. Springer* (1996) 43 CA4th 1525, 1546, 51 CR2d 311].

Judge's Perspective:

Even when discovery abuse has been so serious or pervasive such that the court presumes the party seeking discovery has been prejudiced (such as when documents or data are destroyed) the sanctions awarded by the court may still not exceed those which are necessary in order to secure compliance with the court's order, or to cure the prejudicial effect of the discovery abuse.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

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3.11 Motion for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction.

3.11[1] Moving Papers.

3.11[1][a] Motion and Notice of Motion. A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought and specify the type of sanction sought [CCP § 2023.040].



Strategic Point:

A motion for sanctions may request a range of sanctions in the alternative, e.g., for issue and evidentiary sanctions, or alternatively a terminating sanction [see, e.g., *Walker v. San Francisco Hous. Auth.* (2002) 100 CA4th 685, 690, 122 CR2d 758 ; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 493, 89 CR2d 353 (defendants moved for terminating sanctions or, alternatively, for lesser sanctions)].



Cross Reference:

Form, see 3.19.

3.11[1][b] Notice of Motion Must Include Supporting Memorandum. The notice of motion shall be supported by a memorandum [CCP § 2023.040; see also CCP §§ 1005(b), 1010; *Cal Rules Ct, Rule 3.1113(a)* (memorandum in support of motion)].



Cross Reference:

Forms of supporting motions for discovery sanctions, see *California Points and Authorities*, § 82.10 (Matthew Bender).

3.11[1][c] Notice of Motion Must Include Declaration in Support of Monetary Sanction If Sought. The notice of motion shall be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [CCP § 2023.040].

3.11[1][d] Notice of Motion for Issue or Evidence Sanction Must Include Separate Statement. Any motion involving the content of a discovery request or the responses to that request must be accompanied by a separate statement [*Cal Rules Ct, Rule 3.1345(a)*]. If the motion for sanctions is made in conjunction with one of the following motions, this statement is required [*see, e.g., Stewart v. Colonial W. Agency, Inc. (2001) 87 CA4th 1006, 1011-1012, 105 CR2d 115* (award of monetary sanctions against attorney to compel further deposition answers, although imposed on wrong member of law firm)].

The motions that require a separate statement are [*Cal Rules Ct, Rule 3.1345(a)*]:

- Motion to compel further responses to requests for admissions;
- Motion to compel further responses to interrogatories;
- Motion to compel further responses to a demand for inspection of documents or tangible things;
- Motion to compel answers at a deposition;
- Motion to compel or to quash production of documents or tangible things at a deposition;
- Motion for medical examination over objection; and
- Motion for issue or evidence sanctions.

No separate statement is required when no response has been provided to the request for discovery [*Cal Rules Ct, Rule 3.1345(b)*].

A separate statement is a separate document filed and served with the discovery motion that sets forth all the information necessary to understand each discovery request and all the responses to it that are at issue. The separate statement must be full and complete so that no person is required to review any other document to determine the full request and the full response. Material may not be incorporated by reference [*Cal Rules Ct, Rule 3.1345(c)*].

The separate statement must include, for each discovery request, the following [*Cal Rules Ct, Rule 3.1345(c)*]:

- The text of the request, interrogatory, question, or inspection demand;
- The text of each response, answer, or objection, and any further responses or answers;
- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute;
- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it;
- If the response to a particular discovery request depends 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 must be set forth;
- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.

 Cross Reference:

Form, see 3.20.

3.11[1][e] Default Judgment Requires Supporting Evidence. A party may obtain a default judgment under *CCP* § 585(b) after the entry of default only on application to the court and after a hearing. When requesting a terminating sanction of default, the moving party should review this provision, which governs default judgments generally [see *Lang v. Hochman* (2000) 77 CA4th 1225, 1240-1241, 92 CR2d 322 (default judgment prove-up hearing scheduled after hearing resulting in terminating sanctions)].

 Cross Reference:

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

3.11[2] Order.

3.11[2][a] Losing Party Should Request Written Findings. When written findings are not required, the losing party should request them [see *Estate of Ruchti* (1993) 12 CA4th 1593, 1604, 16 CR2d 151].

3.11[2][b] Written Findings Are Required When Mandatory Monetary Sanctions Are Not Imposed. As a general rule, findings are not required for the imposition of monetary sanctions [see *California Shellfish Inc. v. United Shellfish Co.* (1997) 56 CA4th 16, 26 (citing *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261, 24 CR2d 501)]. However, when monetary sanctions are mandatory, absent "substantial justification," written findings are impliedly required if the sanction is *not* imposed [see *California Shellfish, Inc. v. United Shellfish Co.* (1997) 56 CA4th 16, 26, 64 CR2d 797 (because court found appellant acted with "substantial justification" and did *not* impose monetary sanctions, express findings were not required); *Estate of Ruchti* (1993) 12 CA4th 1593, 1603, 16 CR2d 151 (due process does not require written findings when imposing monetary sanctions, even if mandatory)].

3.11[2][c] Imposition of Monetary Sanctions Against Attorney Requires Finding. Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding that the attorney advised the conduct [see *CCP* § 2023.030(a); *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261, 24 CR2d 501].

 Cross Reference:

Form, see 3.21.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions

II. REQUESTING IMPOSITION OF SANCTIONS FOR MISUSE OF DISCOVERY PROCESS

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3.12 Order to Show Cause for Contempt.

3.12[1] Affidavit Required for Indirect Contempt. When a contempt of court is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit must be presented to the court or judge of the facts constituting the contempt (alternatively, a statement of the facts by the referees or arbitrators, or other judicial officers may be presented) [*CCP § 1211(a)*; see *CCP § 2015.5* (certification under penalty of perjury)].

Procedurally, punishment for an indirect contempt begins with the presentation of an affidavit setting forth the alleged contemptuous acts. The affidavit is, in effect, a complaint which frames the issues before the court. It is a jurisdictional prerequisite to the court's power to punish [*CCP § 1211(a)*; *Moss v. Superior Court* (1998) 17 C4th 396, 401-402, n1, 71 CR2d 215, 950 P2d 59].

3.12[2] Notice or Order to Show Cause Required. When a contempt of court is not committed in the immediate view and presence of the court or of the judge, a warrant of commitment may be granted on notice or on an order to show cause [*CCP § 1212* (also providing for warrant of attachment); see also *Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1286 n5, 100 CR2d 320].

➡ Cross Reference:

Form, see 3.22.

3.12[3] Personal Service and Full Hearing Required. A court may not punish a contempt committed out of its presence without a full hearing at which the contemner appears after having been personally served with the affidavit and order to show cause [*Lund v. Superior Court* (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707 ; *Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1286, 100 CR2d 320].

Exception--Service on Attorney When Contemner Concealed:

When the alleged contemner is concealing himself or herself to avoid service of an order to show cause, or remains outside the state for that purpose, the court may direct that service be made on the contemner's attorney of record [*Kroneberger v. Superior Court* (1961) 196 CA2d 206, 210, 16 CR 339 ; see *CCP § 1015* (service on attorney); see also *Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1287, 100 CR2d 320].

3.12[4] Judgment of Contempt.

3.12[4][a] Judgment Must Specify Act and Include Finding That Act Is Within Contemner's Power. A judgment of contempt must not only specify the act to be performed, it must also include a finding that the act is within the power of the contemner to perform [*Nutter v. Superior Court* (1960) 183 CA2d 72, 75, 6 CR 404].

The *defendant* must have the ability to comply with the order [*Mitchell v. Superior Court* (1989) 49 C3d 1230, 1256, 265 CR 144, 783 P2d 731 (pornographic theater manager did not have control over performing employees); *In re Cassil* (1995) 37 CA4th 1081, 1087, 44 CR2d 267].

3.12[4][b] Judgment Should Contain Factual Findings. While an indirect contempt judgment need not recite the court's factual findings as a jurisdictional prerequisite, those findings should be specifically recited orally or in the judgment to assist a reviewing court [see *Moss v. Superior Court* (1998) 17 C4th 396, 404 n3, 71 CR2d 215, 950 P2d 59].

**Cross References:**

Form, see 3.22.

DeMeo, *California Deposition And Discovery Practice*, § 42.10 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMisconductCivil ProcedureSanctionsContemptGeneral Overview



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Chapter 3 Sanctions
III. OPPOSING IMPOSITION OF SANCTIONS

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3.13 CHECKLIST: Opposing Imposition of Sanctions.

☐ If motion for sanctions was filed, determine whether grounds exist to object to moving papers or motion procedure.

- ☐ Determine whether notice was sufficient.
- ☐ Determine whether procedure provides for opportunity to be heard.
- ☐ Determine whether motion is in proper form.

Authority:

CCP §§ 2023.030, 2023.040

Discussion:

See 3.14

☐ If monetary sanctions are sought, determine grounds for opposition:

- ☐ Determine whether substantial justification exists for conduct.
- ☐ Determine whether circumstances exist that would make imposition of sanction unjust.
- ☐ Review moving party's declaration and determine whether:

☐ Expenses sought are reasonable and related to the discovery abuse described or,

rather, punitive, which is inappropriate.

- ☐ Reasonable expenses are itemized and explained.
- ☐ Pro se litigant is seeking reasonable expenses that do not include attorney's fees.
- ☐ In the case of sanctions against the attorney, establish, if applicable, that attorney did not advise conduct.

Authority:

CCP § 2023.030(a)

Discussion:

See 3.14[1]

- ☐ If issue, evidence, or terminating sanction is sought, determine grounds for opposition:
 - ☐ Consider any mistaken impression or honest confusion that resulted in conduct.
 - ☐ Consider explanation for conduct that would render conduct understandable or less egregious.
 - ☐ Consider whether, under circumstances, the less drastic imposition of monetary sanctions would be more appropriate. Be prepared to argue that the more serious sanctions sought are too extreme and that lesser sanctions would achieve the objective of protecting the interests of the opposing party.

Authority:

CCP § 2023.030; Hartbrodt v. Burke (1996) 42 CA4th 168, 173, 49 CR2d 562

Discussion:

See 3.14[2]

- ☐ If order to show cause for contempt was filed with respect to an indirect contempt, determine whether proper procedures were followed:
 - ☐ Determine whether alleged contemner was personally served or whether his or her attorney was served if he or she was avoiding service.
 - ☐ Determine whether alleged contemner is being afforded a full hearing.
 - ☐ Determine whether order to show cause was based on sufficient affidavit.
 - ☐ Consider arguing that less serious sanctions are more appropriate.

Authority:

CCP §§ 1015, 1211(a), 2015.5, 2023.030; Kroneberger v. Superior Court (1961) 196 CA2d 206, 210, 16 CR 339

Discussion:

See 3.14[4]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions

III. OPPOSING IMPOSITION OF SANCTIONS

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3.14 Options and Strategies for Opposing Imposition of Sanctions.

3.14[1] Opposing Imposition of Monetary Sanction.

3.14[1][a] Showing Substantial Justification to Render Mandatory Imposition of Monetary Sanction Unjust.

The court will impose mandatory monetary sanctions when authorized unless the losing party convinces the court that the party acted with "substantial justification or that other circumstances make the imposition of the sanction unjust" [see *CCP § 2023.030(a)*; *California Shellfish, Inc. v. United Shellfish Co. (1997) 56 CA4th 16, 25-26, 64 CR2d 797*]. Inasmuch as monetary sanctions under *CCP § 2023.030(a)* (and as authorized in particular discovery proceedings) are considered the least severe form of discovery sanction, the party requesting such sanctions has relatively light burdens of proof and persuasion. Thus, the opposing party's burden is met by showing substantial justification or other circumstances rendering the sanction unjust.

Examples:

- A party who served a deposition subpoena on a nonparty prior to filing a complaint misused the discovery process within the meaning of *CCP § 2023.010*. In upholding monetary sanctions, the court of appeal noted that the plaintiff did not even file points and authorities in opposition to the motion to quash the deposition subpoenas, and instead filed only a letter to the court stating its position that the motion to quash was untimely. The court therefore had "little alternative but to impose the monetary sanctions" [*California Shellfish Inc. v. United Shellfish Co. (1997) 56 CA4th 16, 24-25, 64 CR2d 797*].

- In a personal injury case in which the plaintiff refused to submit to x-rays of parts of her body allegedly injured by the defendant, the court properly awarded monetary sanctions against *plaintiff* to compensate the defense for its motion to compel compliance with a demand for a physical examination (*CCP § 2032.240*) were properly awarded against the plaintiff. However, sanctions against her attorney, who did not advise her conduct, were not proper. The appellate court found that plaintiff had failed to provide substantial justification for her refusal to submit to x-rays. Although she asserted a generalized fear of exposure to radiation, there was no evidence that she had previously been exposed to such an

amount of x-ray radiation or that additional x-rays would expose her to risk. On the contrary, plaintiff's personal physician filed a declaration stating that in his view plaintiff should submit to the x-rays and that he had so advised her. Moreover, plaintiff's purported fear of x-rays was inconsistent with her agreement to have the x-rays taken by her own physician but not the physician retained by defendants [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 260, 24 CR2d 501].

3.14[1][b] Limiting Amount of Sanction to Reasonable Expenses. A monetary sanction for misuse of the discovery process is limited to the opposing party's reasonable expenses, including attorney's fees, incurred as a result of that conduct [see CCP § 2023.030(a)]. In a motion for monetary sanctions, the requesting party must submit a declaration setting forth facts supporting the amount sought [see CCP § 2023.040]. Opposing counsel should challenge any unreasonable or unsupported expenses by filing a counter-declaration [*London v. Dri-Honing Corp.* (2004) 117 CA4th 999, 1010].

Example:

A monetary award against the plaintiff was upheld based on the following: \$2,100 for attorney fees and costs defendants incurred in the preparation and argument of the motion to compel. Defense counsel submitted a declaration substantiating the amount. However, the trial court's *additional* \$1,000 monetary award against plaintiff to punish her failure to cooperate with defendants' discovery was error because it was unrelated to the actual expenses defendants incurred [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 262-263, 24 CR2d 501].



Cross References:

Discussion of monetary sanctions, see 3.10[2].

Discussion of declaration of expenses, see 3.11[1].

Form of memorandum opposing motion for monetary sanction, see *California Points and Authorities*, Ch. 82, *Discovery: Sanctions for Discovery Misuse*, § 82.30 (Matthew Bender).

3.14[1][c] Opposing Sanction Against Attorney on Ground That Attorney Did Not Advise Conduct. Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding that the attorney advised that conduct [CCP § 2023.030(a); *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261, 24 CR2d 501 (citing *Corns v. Miller* (1986) 181 CA3d 195, 200, 226 CR 247 (construing similar language in former CCP § 2034(b)(2)(D)))]. Counsel who did not advise the client's conduct may be able to support that assertion by reference to the court record of the discovery proceedings in question.

Example--Attorney Did Not Advise Conduct:

In a personal injury case in which the plaintiff refused to submit to x-rays of parts of her body allegedly injured by the defendant, monetary sanctions to compensate the defense for its motion to compel compliance with a demand for a physical examination (CCP § 2032.240) were properly awarded against the plaintiff, but not her attorney. Declarations and letters showed that plaintiff's counsel had attempted to convince her to submit to the x-rays and that counsel had made substantial efforts to try to reach some compromise. The fact that plaintiff's counsel opposed the motion did not give rise to an inference of having advised disobedience in the first instance; counsel were simply doing their job as advocates trying to protect a client from sanctions [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 259-261, 24 CR2d 501].



Cross Reference:

Form of memorandum opposing motion for monetary sanction, see *California Points and Authorities*,

Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.21 (Matthew Bender).

3.14[1][d] Opposing Imposition of Attorney's Fees Incurred by Pro Se Litigant. If the party seeking the monetary sanction of reasonable attorney's fees is acting in *propria persona*, he or she is not entitled to *attorney's fees*, but may recover other reasonable expenses actually incurred, such as photocopying, computer-assisted legal research, and other identifiable and allocable costs [see *Kravitz v. Superior Court* (2001) 91 CA4th 1015, 1020-1021, 111 CR2d 385 ; *Argaman v. Ratan* (1999) 73 CA4th 1173, 1180, 86 CR2d 917]. As with all reasonable expenses constituting monetary sanctions, a written declaration is prerequisite to recovery [see CCP § 2023.040].

3.14[2] Opposing Imposition of Issue, Evidence, or Terminating Sanction.

3.14[2][a] Issue, Evidence, and Terminating Sanctions Are Serious Sanctions, Not to Be Considered Lightly. Issue, evidence, and terminating sanctions under the Discovery Act are considered the "serious" available sanctions [see, e.g., *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1399, 115 CR2d 137 ; *Newland v. Superior Court* (1995) 40 CA4th 608, 613, 47 CR2d 24 (sanctions are listed in graduated severity, beginning with monetary awards and ending with terminating orders)]. Imposition of issue or evidence sanctions may be tantamount to a terminating sanction, since they may completely undermine a party's case and lead directly to an adverse judgment. Therefore, carefully document and present all mitigating circumstances or mistaken impressions that apply [see, e.g., *Hartbrodt v. Burke* (1996) 42 CA4th 168, 173, 49 CR2d 562 (plaintiff's refusal to produce vital tape recording led to terminating sanction and dismissal)].

A motion for any of these sanctions is not a trivial matter, especially if the record reflects multiple instances of discovery abuse [see, e.g., *Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1616, 26 CR2d 786 (terminating sanctions proper when obtaining discovery was "like pulling teeth")].

3.14[2][b] Less Drastic Alternatives May Be Appropriate. As an alternative to opposing the imposition of any and all sanctions, a party may assert that issue, evidence, or terminating sanctions are too extreme under the circumstances. Counsel should argue that less drastic alternatives exist that would remedy the particular abuse [see, e.g., *Hartbrodt v. Burke* (1996) 42 CA4th 168, 173, 49 CR2d 562 (although plaintiff asserted that less drastic alternatives to dismissal would be appropriate, court disagreed)]. The most commonly imposed lesser sanction is a monetary sanction against the party or the attorney who advised the conduct [see CCP § 2023.030(a)].

Example:

In an employment discrimination case, the plaintiff brought motions to compel further responses with regard to defendant's depositions, seeking further depositions of the person most knowledgeable about the issues raised, and seeking evidence and monetary sanctions. The trial court denied the motion to compel but granted the motion for evidence sanctions. On petition for writ of mandamus, the appellate court let a peremptory writ of mandate issue directing respondent court to vacate its order denying plaintiff's motions to compel further responses, and enter a new and different order granting the motions. The court refused to instruct the trial court to impose an *evidence* sanction, which would have exceeded the level of punishment justified under the facts and law. Instead, the court directed the trial court to conduct further proceedings on the issue of whether a *monetary* sanction should be imposed [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398-1400, 115 CR2d 137].



Warning:

A plaintiff cannot defeat defendant's motion for a terminating discovery sanction by filing a voluntary dismissal without prejudice [*Hartbrodt v. Burke* (1996) 42 CA4th 168, 168-175, 176, 49 CR2d 562].



Cross Reference:

Forms of memoranda opposing motions for discovery sanctions, see *California Points and Authorities*,

Ch. 82, Discovery: Sanctions for Discovery Misuse, §§ 82.20 -82.22, 82.31.

3.14[3] Opposing Imposition of Sanction for Misuse of Discovery Process on Ground of Improper Notice or Absence of Opportunity for Hearing.

3.14[3][a] Objection to Notice and Absence of Opportunity to Be Heard. Discovery sanctions for misuse of the discovery process under *CCP § 2023.010 et seq.* may be imposed only after notice to any affected party, person, or attorney, and after opportunity for a hearing [*see CCP § 2023.030*]. A sanction order issued ex parte is void [*Parker v. Wolters Kluwer United States, Inc. (2007) 149 CA4th 285, 296, 57 CR3d 18*]. A person subject to the imposition of discovery sanctions may raise any defect in those requirements as a ground for opposition to those sanctions.

3.14[3][b] Objection to Compliance With Motion Requirements. A motion for imposition of discovery sanctions must comply with the requirements set forth in *CCP § 2023.040*. A person subject to the imposition of discovery sanctions may raise any failure to comply with those requirements as a ground for opposition to those sanctions.



Cross Reference:

See 3.11.

3.14[4] Opposing Contempt Sanction.

3.14[4][a] Person Cannot Be Punished for Indirect Contempt in Absence of Personal Service and Full Hearing for Indirect Contempt. A person subject to an order to show cause for contempt who has not been personally served or afforded a full hearing may oppose the proceeding on those grounds [*see CCP §§ 1211(a)* (affidavit required), 2015.5 (certification under penalty of perjury); *Lund v. Superior Court (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707*; *Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 CA4th 1281, 1287, 100 CR2d 320*].

The requirements of notice and hearing are jurisdictional. Inasmuch as the contempt proceeding is punitive and separate from the cause out of which it arose, the prescribed procedural safeguards must be accorded the alleged contemner [*Kroneberger v. Superior Court (1961) 196 CA2d 206, 210, 16 CR 339*]. In a contempt proceeding, every "i" must be dotted and every "t" crossed [*see Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 CA4th 1281, 1287, 100 CR2d 320*].

Exception--Service on Attorney When Contemner Concealed:

An alleged contemner may, however, be served through his or her attorney if he or she has been concealing himself or herself to avoid service, or remains outside the state for that purpose [*Kroneberger v. Superior Court (1961) 196 CA2d 206, 210, 16 CR 339*; *see CCP § 1015* (service on attorney); *see also Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 CA4th 1281, 1286-1287, 100 CR2d 320*].

3.14[4][b] Person Cannot Be Punished for Indirect Contempt in Absence of Sufficient Affidavit. If an order to show cause for contempt is not supported by a sufficient affidavit, or if the order is not signed by a judge, the alleged contemner may oppose the proceeding on those grounds [*CCP § 1211(a)*; *see CCP § 2015.5* (certification under penalty of perjury)]. Any question as to the adequacy of the order to show cause and the affidavit and declaration on which it was based should be raised by an appropriate pleading in response to that order [*Morelli v. Superior Court (1968) 262 CA2d 262, 266, 68 CR 572*].

3.14[4][c] Contempt Sanction for Discovery Enforcement Is Drastic. Although the statutory language authorizes use of the contempt power to enforce civil discovery, the use of that drastic sanction in this context is rare [*see In re De La Parra (1986) 184 CA3d 139, 143-144, 228 CR 864*]. A party subject to a contempt sanction in this context may always argue that procedure is too drastic, especially if the public interests are not at issue [*see, e.g., In re*

De La Parra (1986) 184 CA3d 139, 143-144, 228 CR 864 (discussing rare use of incarceration under contempt sanction in criminal trial involving news reporter's rights under *US Const, amend I*).

3.14[4][d] Person Is Not Subject to Contempt for Failing to Perform Act That He or She Is Incapable of Performing. A judgment of contempt must not only specify the act to be performed, it must also include a finding that the act is within the power of the contemner to perform [*Nutter v. Superior Court* (1960) 183 CA2d 72, 75, 6 CR 404].

A person must have the ability to comply with the order [*Mitchell v. Superior Court* (1989) 49 C3d 1230, 1255-1256, 265 CR 144, 783 P2d 731 ; *In re Cassil* (1995) 37 CA4th 1081, 1087, 44 CR2d 267].

Example:

It is not a contempt of court for a party to fail to pay a sum, however small, when it is not in his or her power so to do [*Nutter v. Superior Court* (1960) 183 CA2d 72, 75, 6 CR 404].

3.14[4][e] Affidavit in Opposition Should Set Forth Facts Explaining Circumstances. A person opposing a contempt sanction should file an affidavit in opposition, setting forth the circumstances of the conduct, e.g., explaining an inability to comply with an order, if appropriate [see, e.g., *Nutter v. Superior Court* (1960) 183 CA2d 72, 74, 6 CR 404 (in family law proceeding, husband subject to contempt explained that he did not have financial ability to pay child support award)].



Cross References:

California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

Forms of memoranda opposing motions for discovery sanctions, see *California Points and Authorities*, Ch. 82, *Discovery: Sanctions for Discovery Misuse*, §§ 82.20 -82.22, 82.31 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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Chapter 3 Sanctions

IV. OBTAINING RELIEF FROM IMPOSITION OF DISMISSAL OR DEFAULT SANCTION

1-3 MB Practice Guide: CA Civil Discovery 3.15

3.15 CHECKLIST: Obtaining Relief From Imposition of Dismissal or Default Sanction.

☐ If dismissal or default sanction has been entered, determine whether grounds exist for relief from dismissal or default judgment.

☐ Determine whether discretionary relief is available due to mistake, inadvertence, surprise, or excusable neglect.

☐ Determine whether mandatory relief is available based solely on attorney's mistake, inadvertence, surprise, or excusable neglect.



Timing:

No more than six months after entry of judgment.

Authority:

CCP § 473(b)

Discussion:

See 3.17-3.18

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct



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IV. OBTAINING RELIEF FROM IMPOSITION OF DISMISSAL OR DEFAULT SANCTION

1-3 MB Practice Guide: CA Civil Discovery 3.16

3.16 Options and Strategies for Obtaining Relief From Dismissal or Default.

It is not appropriate to seek relief from imposition of dismissal or default sanction under *CCP* § 473(b) as a means of correcting earlier procedural failures of the party seeking relief [see *In re Marriage of Fuller* (1985) 163 CA3d 1070, 1076, 210 CR 73 (motion under section not proper substitute for appeal of order imposing sanctions)]. In some cases, the appropriate procedure is a petition for a writ of mandate [see *In re Marriage of Fuller* (1985) 163 CA3d 1070, 1076, 210 CR 73 (writ of mandate to reach constitutional issue of notice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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IV. OBTAINING RELIEF FROM IMPOSITION OF DISMISSAL OR DEFAULT SANCTION

1-3 MB Practice Guide: CA Civil Discovery 3.17

3.17 Grounds for Discretionary Relief From Dismissal or Default Judgment: Mistake, Inadvertence, Surprise, or Excusable Neglect.

The court may, on any terms that are just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect [CCP § 473].

► **Cross References:**

Discussion of discretionary relief from dismissal or default judgment, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief (Matthew Bender).

Discussion of relief from terminating sanction, see *California Forms of Pleading and Practice*, Ch. 192, *Discovery: Sanctions for Discovery Misuse*, § 192.13 (Matthew Bender).

Forms, see *California Forms of Pleading and Practice*, Ch. 489, *Relief From Judgments and Orders*, §§ 489.360 -489.361 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview



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Chapter 3 Sanctions

IV. OBTAINING RELIEF FROM IMPOSITION OF DISMISSAL OR DEFAULT SANCTION

1-3 MB Practice Guide: CA Civil Discovery 3.18

3.18 Grounds for Mandatory Relief From Dismissal or Default Judgment: Mistake, Inadvertence, Surprise, or Excusable Neglect Based on Attorney Affidavit.

3.18[1] Application Must Be Made on Attorney's Sworn Affidavit No More Than Six Months After Entry of Judgment. Notwithstanding any other requirements of *CCP* § 473, whenever an application for relief is made no more than six months after the entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court shall vacate any resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*CCP* § 473(b)(64)].

3.18[2] Mandatory Relief Available Only When Attorney Is Solely Responsible for Misconduct. Mandatory relief under *CCP* § 473(b) can be granted only when the facts show that the attorney is solely responsible for the misconduct [*Lang v. Hochman* (2000) 77 CA4th 1225, 1251, 92 CR2d 322 (based on failure to obey numerous discovery requests and orders, court rejected *CCP* § 473(b) motion, finding both defendant and defendant's counsel to have been at fault)]. If both the attorney and client are at fault, mandatory relief under *CCP* § 473(b) is not available [see *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 622-623, 34 CR2d 26 (trial court did not abuse its discretion in denying defendant relief from issue and evidence sanctions under *CCP* § 473 because the court did not believe attorney's sworn statement that "discovery fiasco" was solely his fault; moreover, court's finding implicating defendant in discovery misconduct was supported by substantial evidence)].

Example--Mandatory Relief Available:

Substantial evidence supported the trial court's finding that the plaintiffs' attorney's admitted misconduct regarding discovery requests and motions to compel resulted in the default judgment. The evidence also showed that plaintiffs were not responsible, in whole or in part, for the default judgments [*Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 867-868, 62 CR2d 98].

Example--Mandatory Relief Not Available:

After the trial court dismissed plaintiff's case for failure to comply with a discovery order, plaintiff moved for relief under *CCP* § 473. Plaintiff initially based her motion on her ill health and personal problems, but the court found those reasons did not constitute excusable neglect. Plaintiff's counsel then filed a supplemental declaration asserting that he was primarily at fault for violating the discovery order.

The trial court granted relief based on counsel's declaration and vacated dismissal of the case. The court of appeal found that the trial court had abused its discretion and reversed. The evidence showed that counsel was attempting to cover up for the client [*Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 991-992, 40 CR2d 727].

3.18[3] Mandatory Relief Not Available If Attorney's Misconduct Is Intentional. A party is not entitled to relief from judgment under *CCP* § 473 if its attorney's misconduct in discovery is not the result of mistake, inadvertence, surprise, or neglect, but rather is intentional [*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 CA4th 1058 (counsel failed to respond to discovery, disregarded the court's discovery orders, and ignored opposing counsel's attempts to meet and confer, with the plan to claim attorney fault and revive dismissed claims through a motion under *CCP* § 473)].



Cross Reference:

Discussion of discretionary relief from dismissal or default judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.85, 36.87.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview



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Chapter 3 Sanctions

V. FORMS

A. Requesting Imposition of Issue, Evidence, or Terminating Sanction, and Monetary Sanctions

1-3 MB Practice Guide: CA Civil Discovery 3.19

3.19 Notice of Motion, Motion, and Supporting Declaration for Imposition of Issue, Evidence, or Terminating Sanction, and Monetary Sanctions Based on Discovery Misuse.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER IMPOSING _____ [specify
) types of sanctions requested, e.g., MONETARY AND
) ISSUE] SANCTIONS AGAINST
) _____ [identify party, e.g., DE-
) FENDANT] _____ [name], [AND
) IMPOSING MONETARY SANCTIONS AGAINST
) _____ (identify attorney)] FOR
) FAILURE TO OBEY ORDER COMPELLING
_____, [specify, e.g., RESPONSE
TO INTERROGATORIES], SUPPORTING DE-
CLARATION OF _____ [name],
STATEMENT OF _____ [name],
AND MEMORANDUM IN SUPPORT OF MOTION
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [*identify party, e.g., Defendant Mary Jones*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [*street address*], _____ [*identify party, e.g., Plaintiff John Smith*] will, and hereby does, move for an order that _____ [*specify, e.g., issue, evidence, and terminating*] sanctions be imposed against _____ [*identify party, e.g., Defendant Mary Jones*], specifically that _____ [*specify order sought, e.g., Defendant Mary Jones be prohibited from introducing the following matters in evidence in this action: Defendant may not argue self defense*]. _____ [*Identify moving party, e.g., Plaintiff John Smith*] will further move for an order imposing a monetary sanction against _____ [*identify persons, e.g., Defendant Mary Jones and her attorney Jane Lee*] and in favor of _____ [*identify moving party, e.g., Plaintiff John Smith*] in the amount of \$_____. The motion will be made on the ground that _____ [*identify party, e.g., Defendant Mary Jones*] has failed to obey the order of this court dated _____ [*date*] compelling _____ [*specify, e.g., response to Interrogatories Nos. 5 and 8 in Plaintiff John Smith's first set of interrogatories on or before December 20, 2005*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] served and filed herewith pursuant to *CCP § 2023.040*, on the separate statement of _____ [*name*] served and filed herewith pursuant to *Cal Rules Ct, Rule 3.1345(a)(7)*, on the memorandum served and filed herewith, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party's status or name*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff, Mary Jones*].

2. On _____ [*date*], this court entered an order compelling _____ [*identify party, e.g., Defendant Mary Jones*] to _____ [*describe order, e.g., respond to Interrogatories Nos. 5 and 8 of Plaintiff John Smith's first set of interrogatories on or before December 20, 2005*], a copy of which is attached hereto as Exhibit A and made a part hereof.

3. _____ [*Identify party, e.g., Defendant Mary Jones*] has failed to _____ [*describe order, e.g., respond to those interrogatories*] in a proper manner in that _____ [*describe insufficiency of lack of compliance, e.g., she provided incomplete and evasive answers to the interrogatories described above*].

4. As a result of the failure of _____ [*identify party, e.g., Defendant Mary Jones*] to obey the above-described court order, _____ [*identify moving party, e.g., Plaintiff John Smith*] has incurred expenses as follows: _____ [*itemize and explain reasonable expenses, including attorney's fees*], for a total of \$_____.

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

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

NOTES.

Authority:

CCP § 2023.040

Grounds:

See 3.06 -3.09

Related Form of Separate Statement:

See 3.20

Related Form of Order:

See 3.21

Related Form of Memorandum:

See California Points and Authorities, Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.11 (Matthew Bender)



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Chapter 3 Sanctions

V. FORMS

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1-3 MB Practice Guide: CA Civil Discovery 3.20

3.20 Separate Statement Supporting Motion for Issue or Evidence Sanction.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff
vs.
_____, [name],
Defendant.

)
) No. _____
) SEPARATE STATEMENT IN SUPPORT OF MO-
) TION FOR ORDER IMPOSING ISSUE OR EVID-
) ENCE SANCTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

This separate statement is submitted in support of the motion by _____ [identify moving party, e.g., Plaintiff John Smith] for an order imposing on _____ [identify party, e.g., Defendant Mary Jones] issue and monetary sanctions. As required under *Cal Rules Ct, Rule 3.1345*, it provides information relating to the discovery requests at issue in the motion, as follows:

_____, [Specify particular discovery request, e.g., Plaintiff's Interrogatories Nos. 5 and 8]

1. The text of the discovery request: _____ [set forth text].

[2. The special instructions required to understand this interrogatory request are: _____ (set forth instructions).]

[3. Definitions required to understand this interrogatory request are: _____ (set forth definitions).]

4. The text of the response(s): _____ [set forth text of response, and any further responses, to the specific request].

[5. Related pleadings and other documents are as follows: _____ (summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party).]

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status or name]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1345

Related Form for Notice of Motion:

See 3.19



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Chapter 3 Sanctions

V. FORMS

A. Requesting Imposition of Issue, Evidence, or Terminating Sanction, and Monetary Sanctions

*1-3 MB Practice Guide: CA Civil Discovery 3.21***3.21 Order on Motion for Imposition of Issue, Evidence or Terminating Sanction, and Monetary Sanction.**

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	
vs.	)	No. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party, e.g., Plaintiff John Smith] for an order imposing an issue, evidence, and terminating sanction against _____ [identify party, e.g., Defendant Mary Jones] and imposing a monetary sanction against _____ [identify persons, e.g., Defendant Mary Jones and her attorney Jane Lee], for failure to obey the order of this court dated _____ [date], compelling him/her/them to _____ [specify, e.g., serve a response to Interrogatories Nos. 5 and 8 in Plaintiff John Smith's first set of interrogatories on or before December 20, 2005], came on regularly for hearing on _____ [date]. Plaintiff appeared by counsel _____ [name, e.g., Tom Doe]; Defendant appeared by counsel _____ [name, e.g., Jane Lee].

On proof being made to the satisfaction of the court _____ [state findings of court, e.g., Defendant Mary Jones failed to obey the order of this court dated November 15, 2005, that she respond to Interrogatories Nos. 5 and 8 in Plaintiff John Smith's first set of interrogatories on or before December 20, 2005, and that her counsel Jane Lee advised her to disobey this order, and on this court's finding that the requested order ought to be granted],

[EITHER]

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [specify order, e.g., Defendant cannot assert the following defense at trial: self defense].

[EITHER]

IT IS FURTHER ORDERED that _____ [specify persons subject to monetary sanction, e.g., Defendant Mary Jones and her attorney Jane Lee] pay forthwith to John Smith] the sum of \$ _____ as reasonable expenses and attorney's fees.

[OR]

On further proof made to the satisfaction of the court that _____ [specify, e.g., Defendant Mary Jones and her attorney Jane Lee] [acted with substantial justification or set forth other circumstances making imposition of sanctions unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [specify, e.g., Defendant Mary Jones and her attorney Jane Lee].

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 2023.040

Related Form of Notice of Motion:

See 3.19



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Chapter 3 Sanctions

V. FORMS

B. Requesting Order Imposing Contempt Sanction

1-3 MB Practice Guide: CA Civil Discovery 3.22

3.22 Order to Show Cause Re Contempt and Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],
Plaintiff
vs.
_____[name],
Defendant.

)
) No. _____
) DECLARATION OF _____ [name]
) AND ORDER TO SHOW CAUSE RE CONTEMPT
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

DECLARATION OF _____ [name]

I _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff, John Smith].

2. On _____ [date], _____ [set forth facts describing initiation of discovery, e.g., plaintiff served a notice of taking the deposition of Paul Green at 100 North Main Street, Suite 200, Farallon City,

California, on December 3, 2005, at 10:00 A.M. True copies of this notice and proof of service are attached hereto as Exhibits A and B, respectively, and made a part of this order].

[*EITHER, if contempt order is sought for disobedience of deposition subpoena under Code Civ. Proc. § 2020.240 or 2025.440(b)]*

3. _____[*Set forth facts showing issuance of a deposition subpoena and cited person's consequent failure to attend or to be sworn as a witness.*]

[*OR, if contempt order is sought for disobedience by deponent of order compelling answer or production of items under Code Civ. Proc. § 2025.480(g)]*

3. _____[*Set forth facts describing order compelling an answer to a deposition question, or production of a writing or tangible thing under the deponent's control, and cited person's failure to comply therewith.*]

[*CONTINUE*]

4. _____[*At all times mentioned in this order or at the time he/she was to perform the acts described above, Paul Green has/had the ability to do so.*]

5. _____[*Name of person to be cited*]'s failure to act as described above has been willful and with the intent to frustrate the processes of this court and to deprive _____[*identify party seeking contempt order, e.g., Plaintiff*] of the benefits to which he/she is entitled under the order, in that _____[*describe*].

6. _____[*Set out expenses*].

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

Dated: _____

_____ [signature]

_____ [typed name]

ORDER TO SHOW CAUSE

To _____[*name of person to be cited*] and to _____[*name*], his/her attorney of record.

IT IS HEREBY ORDERED that you, _____[*name of person to be cited*], appear in [_____] (Department or Division) _____ of] this court, located at _____[*address*], on _____[*date*], at _____[*time*], then and there to show cause, if any, why an order should not be made adjudging you to be in contempt and punished for that contempt, pursuant to Section _____ [2020.240 or 2025.440(b) or 2025.480(g)] of the Code of Civil Procedure, for your failure to _____[*specify, e.g., attend the taking of your deposition on December 20, 2005, at*

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10.00 A.M., at 100 North Main Street, Suite 200, Farallon City, California. (*location*), pursuant to the deposition subpoena issued out of and by the clerk of this court], of which you were duly notified, as set out in the declaration of _____ [*name*], served with this order.

[IT IS FURTHER ORDERED that at the time and place stated above you show cause why you should not be required to pay to _____ (*identify party seeking contempt order, e.g., Plaintiff John Smith* the reasonable expenses including attorney's fees that he/she incurs in obtaining an order of this court adjudging you in contempt, which expenses are set out in the attached declaration of John Smith.)]

IT IS FURTHER ORDERED that the service of this order to show cause and a copy of the supporting declaration of _____ [*name*] be made on _____ [*name of person to be cited*] at least _____ days before the date and time set for the hearing of this order to show cause.

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 1209(a)(5), 2020.240, 2023.040, 2025.440(b), 2025.480(g)

Related Form of Memorandum:

See *California Points and Authorities, Ch. 82, Discovery: Sanctions for Discovery Misuse, § 82.15*
(Matthew Bender)



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Chapter 4 Law and Motion Procedure

1-4 MB Practice Guide: CA Civil Discovery 4.syn

§ 4.syn Synopsis to Chapter 4: Law and Motion Procedure

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Chapter 4 Law and Motion Procedure
I. STRATEGY

1-4 MB Practice Guide: CA Civil Discovery 4.01

4.01 Scope.

This chapter covers:

- Objectives and strategies for law and motion [see 4.02].
- Procedure and format requirements for bringing a noticed motion [see 4.03 -4.15; Forms: See 4.54 -4.58, 4.61].
- Procedure requirements for opposing a written motion [see 4.16 -4.19].
- Replying opposition to motion [see 4.20, 4.21].
- Hearing and ruling on motion [see 4.22 -4.32; Form: see 4.60].
- Procedures and requirements for bringing ex parte motion [see 4.33 -4.45; Form: see 4.59].
- Appointment and opposing appointment of discovery referee [see 4.46 -4.48; Forms: see 4.62 -4.64].
- Acceptance of and objections to referee's report [see 4.49 -4.53].

This chapter also includes general forms for use in law and motion matters relating to discovery. Specific forms of notice of motion, declarations, and orders appear in the chapters relating to specific discovery issues.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureDiscoveryGeneral Overview



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Chapter 4 Law and Motion Procedure
I. STRATEGY

1-4 MB Practice Guide: CA Civil Discovery 4.02

4.02 Objective and Strategy.

The goals of law and motion practice in discovery are:

- To obtain a court order to enforce or resist specific discovery matters; or
- To have the court impose sanctions.

Strategic considerations relating to specific discovery motions are addressed in the chapters of this publication that cover the individual motions.



Warnings:

- Check the timing requirements for the specific motion you are preparing to make sure you meet those requirements.
- Because the Code of Civil Procedure requires that motions be brought in good faith [*see CCP § 128.5*], it is critical that parties attempt to meet and confer prior to the filing of a discovery motion, when appropriate. Correspondence that summarizes the nature and extent of the communications prior to the filing of the motion will assist the court in evaluating the parties' conduct prior to the filing of the motion.

Judge's Perspective:

In bringing the discovery motion, counsel should keep in mind that judges do not wish to become embroiled in vituperative exchanges over who did what to whom. Keep the discovery motion focused on why the information requested is needed. Additionally, with respect to motions to compel further responses, make sure that the separate statement is succinct. Only go after information that is needed. Keep your credibility.



Cross References:

Detailed discussion and forms on specific motions, see chapter in this publication relating to the specific

motion.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

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4.03 CHECKLIST: Bringing a Noticed Motion.

☐ Verify that civil law and motion rules apply. Rules apply to:

☐ Applications for orders before trial, **except for** causes arising under:

☐ Welfare and Institutions Code.

☐ Probate Code.

Exception:

Law and motion rules **do** apply to discovery proceedings in probate.

☐ Family Code.

Exception:

Law and motion rules **do** apply to discovery proceedings in family law.

☐ CCP §§ 527.6, 527.7 and 527.8 (injunctive relief relating to harassment and violence).

☐ Application for an order regarding:

☐ Enforcement of judgment.

☐ Attachment of property.

- ☐ Appointment of a receiver.
- ☐ Obtaining or setting aside a judgment by default.
- ☐ Writs of review, mandate and prohibition.
- ☐ Petition to compel arbitration.
- ☐ Enforcement of an award by arbitration.

Authority:

Cal Rules Ct, Rules 3.1100, 3.1103(a)

Discussion:

See 4.04

- ☐ Determine if the motion must be brought on notice and length of notice required. If not, proceed ex parte.

- ☐ Determine whether giving that notice would defeat the purpose of the motion. If so:

- ☐ Seek order shortening notice.

Discussion:

See 4.06, 4.07

- ☐ Determine required notice period:

- ☐ Usually at least 16 Court days before hearing.

- ☐ Longer notice periods based on manner of service:

- ☐ Additional five calendar days if mailed in California to a California address.

- ☐ Additional 10 calendar days if mailed and either the place of mailing or of address is outside California but within the United States.

- ☐ Additional 20 calendar days if either the place of mailing or of address is outside the United States.

- ☐ Additional two calendar days if served by express mail, or another method of overnight delivery, or fax.

**Warning:**

Check the statute on which the motion is based for any different time requirement.

Authority:

CCP § 1005(b); Cal Rules Ct, Rule 3.1300(a)

Discussion:

See 4.07, 4.08

☐ Prepare moving papers:

- ☐ Motion and notice of motion.
- ☐ Supporting memorandum.
- ☐ Separate statement if content of discovery request or response is involved.
- ☐ Affidavits and declarations.
- ☐ Request for judicial notice, if any.
- ☐ Request introduction of oral evidence at hearing, if desired.
- ☐ Evidentiary objections, if any, to evidence submitted in opponent's papers.

Authority:

CCP §§ 1010, 2003, 2015.5; Cal Rules Ct, Rules 3.1112(a), 3.1113, 3.1345(a), 3.1306

Discussion:

See 4.10, 4.12

Forms:

See 4.54, 4.55, 4.56

- ☐ File papers in clerk's office.

Authority:

Cal Rules Ct, Rule 3.1302(a)

Discussion:

See 4.13

- ☐ Pay filing fees. The fee for filing any discovery motion is \$40.

Authority:

Gov Code § 70617(a)

Discussion:

See 4.13

- ☐ Serve papers using standard service requirements.

Authority:

CCP §§ 1010, 1017

Discussion:

See 4.08

- ☐ File proof of service of motion papers no later than five court days before hearing.

Authority:

Cal Rules Ct, Rule 3.1300(c)

Discussion:

See 4.26

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

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4.04 Civil Law and Motion Rules Apply to Discovery Motions.

The law and motion rules apply to any proceedings on applications for orders before trial. This includes discovery proceedings in causes arising under the Family Code and Probate Code, even though proceedings under those codes are otherwise excepted from the requirement [*Cal Rules Ct, Rules 3.1100, 3.1103(a)(1)*].

The rules also apply to orders regarding: the enforcement of judgments, attachment of property, appointment of a receiver, obtaining or setting aside a judgment by default, writs of review, mandate and prohibition, a petition to compel arbitration, and enforcement of an award by arbitration [*Cal Rules Ct, Rule 3.1103(a)(2)*].

Exceptions:

Causes arising under Welfare and Institutions Code, Probate Code (except discovery), Family Code (except discovery), or *CCP* §§ 527.6, 527.7, 527.8 (injunctive relief re harassment and violence) [*Cal Rules Ct, Rule 3.1103(a)(1)*].

Judicial Council rules preempt local rules that relate to:

- Ex parte applications.
- Motions.
- Discovery.
- Form and format of papers.

A trial court, division, or branch may not enforce or enact any local rules in these areas [*Cal Rules Ct, Rule 3.20*]. All existing local rules in this area are null and void unless otherwise required by Judicial Council or statute [*Cal Rules Ct, Rule 3.20(a)*].

Exceptions:

Judicial Council rules do not preempt [*Cal Rules Ct, Rule 3.20(b)*]:

- Local rules adopted under the Trial Court Delay Reduction Act.
- Trial and post-trial proceedings including (but not limited to) motions in limine.
- Proceedings under:
 - ☐ CCP §§ 527.6, 527.7, and 527.8 (relating to injunctive relief for harassment and violence).
 - ☐ Family Code.
 - ☐ Probate Code.
 - ☐ Welfare and Institutions Code.
 - ☐ Penal Code and all criminal proceedings.

In addition to the general law and motion rules, several Judicial Council rules specifically regulate discovery motions [*Cal Rules Ct, Rules 3.1345-3.1348*]. These rules govern such matters as:

- Separate statement requirement for discovery motions [*Cal Rules Ct, Rule 3.1345(a)-(c)*].
- Identification of interrogatories, inspection demands, or requests of admissions in discovery motions by set and number [*Cal Rules Ct, Rule 3.1345(d)*].
- Service of motion papers on a nonparty deponent [*Cal Rules Ct, Rule 3.1346*].
- Sanctions for failure to provide discovery [*Cal Rules Ct, Rule 3.1348*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to Compel



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

1-4 MB Practice Guide: CA Civil Discovery 4.05

4.05 Motion Is Brought in Court Where Case Pending.

Motions must be brought in the court in which the underlying action is pending [*CCP* § 1004; *see CCP* § 166 (judge's power to act in chambers and away from court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

1-4 MB Practice Guide: CA Civil Discovery 4.06

4.06 When Noticed Motion Is Required.

A noticed motion is a motion made on written notice to the adverse party. Other than motions made during trial, the majority of motions are noticed. Notice of motions must be given in accordance with *CCP* § 1005 unless otherwise ordered or specifically provided in law [*Cal Rules Ct, Rule 3.1300(a)*].

Judge's Perspective:

Courts require discovery motions to be pursuant to notice. Ex parte applications concerning discovery impasses should concern themselves with requests for shortening time. Counsel in many instances improperly request an ex parte ruling on the discovery motion itself.



Strategic Point--Moving Party:

With the exception of an order shortening time to serve a deposition notice, interrogatories, an inspection demand, or requests for admissions early in the case [*CCP* §§ 2025.210(b), 2030.020(d), 2031.020(d), 2033.020(d)], an ex parte application to stay a deposition [*CCP* § 2025.270(d)], or to hear a discovery motion, the ex parte procedure is rarely used. The reason is, rather than grant relief ex parte, the court can shorten time to hear a noticed motion to a few or several days and thereby give the other party at least some notice of the requested relief. If the ex parte procedure is used, it should be combined with a motion for a protective order or other proper relief, to be heard on shortened time. Otherwise, the court will be reluctant to grant the ex parte application. In practice, the moving papers for the motion heard on shortened time are usually the same as the moving papers for a motion. In fact, the court often expects that the papers for the motion are prepared at the time an ex parte application is filed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & Form



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

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4.07 Notice Requirement.

4.07[1] Appearance Made Without Objection Waives Defective Notice. Defects and irregularities with notice of a motion or a failure to give notice is normally waived by the adverse party's appearing at the hearing and opposing the motion on its merits [*Vlahovich v. Cruz* (1989) 213 CA3d 317, 320, 261 CR 565 ; *Tate v. Superior Court* (1975) 45 CA3d 925, 930, 119 CR 835]. However, no waiver occurs if the appearance is for the limited purpose of objecting to the court's consideration of the motion on the ground of insufficient notice [*Bohn v. Bohn* (1913) 164 C 532, 538-539, 129 P 981].

4.07[2] Actual Knowledge of Motion Does Not Waive Written Notice Requirement. An opposing party's actual knowledge of a pending court proceeding does not excuse the moving party from giving the written notice required by statute [*County of Santa Clara v. Perry* (1998) 18 C4th 435, 442, 75 CR2d 738, 956 P2d 1191 (retroactivity of child support in paternity limited to time of notice of motion)].

4.07[3] Notice Requirement May Be Excused If Motion Is Made in Court in Counsel's Presence. Failure to give notice of a motion that usually requires advance notice may be excused if the motion is made orally in open court in the presence of counsel for the adverse party [*Thieme v. Commercial Lighting & Maint. Co.* (1960) 177 CA2d 575, 576, 2 CR 382].



Warning:

As a practical matter, if you do not have a written motion, the motion will likely be denied in the tentative ruling for failure to give proper notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Pleading & Practice Motion Practice Content & Form



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Chapter 4 Law and Motion Procedure
II. BRINGING A NOTICED MOTION

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4.08 Length of Notice.

4.08[1] Papers Must Be Served at Least 16 Court Days Before Hearing. When notice is required, unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed at least 16 court days before the hearing [*CCP § 1005(b)*; *Cal Rules Ct, Rule 3.1300(a)*]. The papers served must be a copy of the papers filed or to be filed with the court [*CCP § 1005(b)*].

Exception:

In unlawful detainer actions, discovery motions may be made on five days notice [*CCP § 1170.8*; *Cal Rules Ct, Rule 3.1347(a)*].



Cross Reference:

Form, see 4.54 (notice of motion).

4.08[2] Time Is Extended for Service by Mail, Fax, Overnight Delivery, or Electronic Service.

4.08[2][a] Service by Mail. If the notice is served by mail, the 16-day period increases as follows [*CCP § 1005(b)*]:

- By five calendar days if the place of mailing and of address are in California.
- By 10 calendar days if either the place of mailing or of address is outside California but within the United States.
- By 20 calendar days if either the place of mailing or of address is outside the United States.

4.08[2][b] Service by Overnight Delivery. If the notice is served by express mail, or another method of overnight delivery, the 16-day period is increased by two calendar days [*CCP § 1005(b)*].

4.08[2][c] Service by Fax. If the notice is served by facsimile transmission, the 16-day period increases by two calendar days [*CCP § 1005(b)*].

**Warning:**

The parties must have agreed, with written confirmation, to accept service by fax [*CCP* § 1013(e); *Cal Rules Ct, Rule 2.306(a)(1)*].

4.08[2][d] Electronic Service. Electronic service extends the 16-day period by two court days [*CCP* § 1010.6(a)(6)].

**Warning:**

The receiving party must have agreed to accept electronic service in the action unless the court so orders in:

- A class action;
- A consolidated action or group of actions; or
- A coordinated action or complex case [*CCP* § 1010.6(a)(6), (8); *Cal Rules Ct, Rules 2.253(a), 2.260*].

4.08[3] Manner of Service.

4.08[3][a] General Service. The Discovery Act does not provide any specific manners of service for discovery motions. Therefore, discovery notices and other papers must be served as provided in *CCP* § 1010 [see *CCP* § 1005; *Cal Rules Ct, Rule 3.1300(a)*].

If a party has an attorney in the action or proceeding, notices and papers must be served on the attorney instead of on the party [*CCP* § 1015; *Cal Rules Ct, Rule 1.21(a)*].

The manners of service include the following:

- Service on the party's attorney, if the party has an attorney in the action or proceeding [*CCP* § 1015];
- Personal service [*CCP* § 1011];
- Substituted service on an absent attorney [*CCP* § 1011(a)];
- Substituted service and service by mail on a party [*CCP* § 1011(b); see also *Cal Rules Ct, Rule 3.252*];
- Service by mail [*CCP* §§ 1012, 1013];
- Service by express mail or other overnight service [*CCP* § 1013(c)];
- Service by fax [*CCP* § 1013(e)];
- Electronic service [*CCP* § 1010.6(a)(6)];
- Service by telegraph [*CCP* § 1017]; and

- Service on a person in a foreign country pursuant to the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters" [20 US Treaties 361].

Time allowing, most discovery motions are served by mail, facsimile, or overnight mail. Unless there is a good reason (i.e., time is running out to notice or bring the motion), personal service for a discovery motion is costly.

Papers served by mail, express mail or other overnight service, or fax, should either bear a notation of the date and place of mailing, deposit, or transmission, or be accompanied by an unsigned copy of the affidavit or declaration, or certificate of mailing, deposit, or transmission [CCP § 1013(b), (d), (f), (g)].

Exceptions:

- Service of subpoenas, writs, other process issued in the suit, and service of papers to bring the party into contempt are exempt from this requirement [CCP §§ 1015, 1016; *Lyydikainen v. Industrial Accident Comm'n* (1939) 36 CA2d 298, 303, 97 P2d 993].

- Third parties who have refused to appear at, produce documents, or answer questions at a deposition must be personally served with a written notice and all moving papers, unless the nonparty deponent has agreed to accept service by mail [Cal Rules Ct, Rule 3.1346].

4.08[3][b] Service on Nonresident, Nonrepresented Party Who Has Appeared. If the party to be served resides outside California and has no attorney in the action or proceeding, service may be made on the court clerk [CCP § 1015].

4.08[3][c] Service Is Not Required If Party Has Not Appeared or Is in Default. A notice of motion need not be served on any party whose default has been duly entered or who has not appeared in the action or proceeding [CCP § 1010; see also CCP § 1014].

4.08[3][d] Moving Party Must File Proof of Service With Court. Moving party must file proof of service no later than five court days before the time appointed for the hearing [Cal Rules Ct, Rules 1.21(b), 3.1300(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedurePleading & PracticeMotion PracticeTime Limitations



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4.09 Court May Shorten Time for Good Cause.

The court, on its own motion or on application for an order shortening time supported by a declaration showing good cause, may prescribe shorter times for the filing and service of papers than the times specified in *CCP § 1005* [*Cal Rules Ct, Rule 3.1300(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime Limitations



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4.10 Supporting Papers.

4.10[1] Papers Not Previously Served Must Accompany Notice of Motion. A copy of any paper on which the motion is based, not previously served and filed, must accompany the notice of motion [*CCP § 1010; see also CCP § 1005(b)*]. These papers typically include any supporting affidavits or declarations, requests for judicial notice, and the supporting memorandum [*see Cal Rules Ct, Rules 3.1112(a), (b), 3.1113*].

4.10[2] Motion Must Be Supported by Memorandum. A party filing a discovery motion must serve and file with it a supporting memorandum [*Cal Rules Ct, Rules 3.1112(a), 3.1113(a)*]. The court may construe the absence of the memorandum as an admission that the motion is not meritorious and therefore deny the motion [*Cal Rules Ct, Rule 3.1113(a)*].



Cross References:

Discussion, see 4.12 (format for memorandum).

Forms of memoranda supporting motions, see California Points and Authorities, Chs. 80-89, Discovery (Matthew Bender).

4.10[3] Separate Statement Must Be Submitted for Motions Involving Content of Discovery Request or Response.

4.10[3][a] Separate Statement Is Required for Motions to Compel or for Issue or Evidentiary Sanctions. A motion involving the content of a discovery request or the responses to a request must be accompanied by a separate statement [*Cal Rules Ct, Rule 3.1345(a)*].

Motions requiring a separate statement include [*Cal Rules Ct, Rule 3.1345(a)*]:

- Motions to compel further responses to:



Requests for admissions.

- ☐ Interrogatories.
- ☐ Demands for inspection of documents or tangible things.

- Motions to compel answers at a deposition.
- Motions to compel or quash the production of documents or tangible things at a deposition.
- Motions for issue or evidentiary sanctions.

A separate statement is not required if no response has been provided to the discovery request [*Cal Rules Ct, Rule 3.1345(b)*].

4.10[3][b] Separate Statement Must Be Complete to Allow Understanding Without Reference to Other Papers. The statement must provide all the information needed to understand each discovery request and response at issue so that no person needs to review any other document to determine the full request and response [*Cal Rules Ct, Rule 3.1345(c)*; see *Mills v. U.S. Bank (2008) 166 CA4th 871, 893, 83 CR3d 146* (failure to include discovery responses in separate statement violated former Rule 335 (now 3.1345); attaching responses to separate statement was insufficient)].



Warning:

Do not incorporate material by reference in a separate statement [*Cal Rules Ct, Rule 3.1345(c)*].

For each discovery request to which further response, answer, or production is requested, the statement must include [*Cal Rules Ct, Rule 3.1345(c)*]:

- The text of the request, interrogatory, question, or demand.
- The text of each response, answer, or objection, and any further responses or answers.
- A statement of the factual and legal reasons for compelling further responses, answers, or productions as to each matter in dispute.
- If necessary, the text of all definitions, instructions and other matters required to understand each discovery request and the responses to it.
- If the response to a particular request depends on the response to another request, or if further response to a particular request is deemed necessary because of the response to another request, the other request and response must be set forth.
- If the pleadings, other documents on file, or other discovery items are relevant to the motion, the party relying on them must summarize each relevant document.



Cross Reference:

Form, see 4.56.

4.10[4] Affidavits or Declarations May Be Included.

4.10[4][a] Material in Declarations Establishes Grounds for Motion. A notice of motion is normally accompanied by one or more declarations under penalty of perjury, which provide the evidentiary facts required to establish the grounds of the motion. If the declaration is not yet before the court, a copy of it must accompany the moving papers [see *CCP § 1010*; see also *CCP § 1005(b)*].

4.10[4][b] Facts Should Be Within Personal Knowledge of Declarant. A declaration under penalty of perjury [*CCP § 2015.5*] in support of a motion must normally set forth facts within the personal knowledge of the declarant [see *CCP §§ 2002, 2003*; *Evid Code §§ 702, 1200(b)*; see, e.g., *Witchell v. De Korne* (1986) 179 CA3d 965, 974-975, 225 CR 176].

4.10[4][c] Declaration Concerning Attempt at Informal Resolution of Motion May Be Required. For many types of discovery motions (particularly motions to compel or limit discovery), the parties are required by statute to "meet and confer" in a "reasonable and goodfaith attempt at an informal resolution of each issue presented by the motion" [*CCP § 2016.040*]. The applicable discovery statute will require the motion to be accompanied by a "meet and confer declaration under Section 2016.040" [see, e.g., *CCP §§ 2017.020(a), 2017.220(a), 2019.030(b), 2024.050(a), 2025.410(c), 2025.420(a), 2025.480(b), 2028.040(b), 2028.050(b), 2030.090(a), 2030.300(b), 2030.310(a), 2031.060(a), 2031.310(b)(2), 2032.250(a), 2032.620(a), 2032.650(a), 2033.080(a), 2033.290(b), 2034.250(a), 2034.470(b), 2034.610(c), 2034.710(c)*].



Warning:

Your meet and confer efforts should be reflected in your affidavit or declaration in support of the motion. If you do not make a showing that you met and conferred in good faith, the court can order the parties to meet and confer, or deny the motion and impose monetary sanctions [see *CCP § 2023.020* (failure to comply with meet-and-confer requirement as sanctionable misuse of discovery process)].



Cross Reference:

Failure to confer adequately regarding informal resolution as basis for sanctions, see *Ch. 3, Sanctions, 3.06[9]*.

4.10[5] Request to Introduce Oral Evidence. A party may also wish to submit a request to introduce oral evidence at hearing [*Cal Rules Ct, Rule 3.1306(b)*]. Unless the court, for good cause, allows testimony, the evidence on a discovery hearing is limited to declarations and requests for judicial notice [*Cal Rules Ct, Rule 3.1306(a)*].



Timing:

No later than three court days before the hearing, the party seeking permission to introduce oral evidence must file a written statement stating the nature and extent of the proposed evidence and a reasonable time estimate for the hearing. If filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery no later than two days before the hearing [*Cal Rules Ct, Rule 3.1306(b)*].

Exception:

A party need not make a request to submit oral evidence in rebuttal to the oral evidence of the party who made the request.

4.10[6] Exhibits May Be Used. Evidentiary exhibits may accompany the moving papers [*Cal Rules Ct, Rule 2.114* (manner of attachment)]. Exhibits usually provide documentary evidence central to the action. In most instances, the exhibit requires authentication by declaration attached to the exhibit.

4.10[7] Request for Judicial Notice. If the motion relies on evidence or matters subject to judicial notice, judicial notice must be requested in a separate document that lists the specific items for which notice is requested [*Cal Rules Ct,*

Rule 3.1113(m)].



Cross References:

Discussion, see 4.28[2].

Form, see 4.61.

4.10[8] Proposed Order May Be Lodged, but Must Not Be Attached. If a party prepares a proposed order or judgment, it must be lodged and served with, but not attached to, a supporting memorandum and other moving papers [*Cal Rules Ct, Rule 3.1113(n)*].



Cross Reference:

Form, see 4.60.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Pleading & Practice Motion Practice Supporting Memoranda



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4.11 General Format Requirements.

4.11[1] Discovery Motion Papers Follow General Law and Motion Format. Discovery motions are subject to the general format requirements applicable to papers filed in trial courts [*Cal Rules Ct, Rules 2.100-2.119*], as well the general format requirements applicable generally to law and motion proceedings under *Cal Rules Ct, Rule 3.1110* [see *Cal Rules Ct, Rules 3.1100, 3.1103(a)*].

4.11[2] Paper.

4.11[2][a] Recycled Paper. Recycled paper must be used for all original papers and all copies of papers, documents, and exhibits, whether filed or served on other parties [*Cal Rules Ct, Rules 1.22(a), 2.101(a)(1)*].

4.11[2][b] Standard Paper. The paper used must be opaque and unglazed, white or unbleached, of standard quality not less than 20-pound weight and 8 1/2 by 11 inches in size [*Cal Rules Ct, Rule 2.103*].

4.11[3] Print, Font, and Line Spacing.

4.11[3][a] Printing Requirement. The paper must be typewritten or printed, or prepared by a photocopying or other duplicating process that will produce clear and permanent copies equally legible to printing [*Cal Rules Ct, Rule 2.104*].

4.11[3][b] Font Size. Paper must use a type size not smaller than 12 points [*Cal Rules Ct, Rule 2.104*].

4.11[3][c] Line Spacing. Only one side of the paper is to be used. The lines on each page must be double or one and one-half spaced, and the lines must be consecutively numbered. Descriptions of real property may be single-spaced, and quotations and footnotes may be single-spaced on unnumbered lines if they otherwise comply generally with the spacing requirements of *Cal Rules Ct, Rule 2.111* [*Cal Rules Ct, Rules 2.102, 2.108*].

4.11[4] Presentation.

4.11[4][a] Hole-Punching. Papers presented for filing must have two pre-punched normal-size holes, centered 2 1/2 inches apart and 5/8 of an inch from the top of the paper [*Cal Rules Ct, Rule 2.115*].

4.11[4][b] Attachment of Papers. All pages of the memorandum and each exhibit must be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read [*Cal Rules Ct, Rule 3.1110(e)*].

4.11[4][c] Reference to Paper Previously Filed. Any paper previously filed must be referred to by date of execution and title [*Cal Rules Ct, Rule 3.1110(d)*].

4.11[5] Page Numbering. Pages are to be numbered consecutively at the bottom, and each paper must consist entirely of original pages without riders, firmly bound together at the top [*Cal Rules Ct, Rules 2.109, 2.113*].

4.11[6] Requirements for First Page and Caption.

4.11[6][a] Lines 1 to 8. In the space commencing with line 1, to the left of the center of the page, state the name, office address, or, if none, residence address, telephone number, fax number and e-mail address, and State Bar membership number of the attorney for whom the paper is presented, or of the party if he or she is appearing in person [*Cal Rules Ct, Rule 2.111(1)*].

Including the fax number and e-mail address on any document does not constitute consent to service by either fax or e-mail unless otherwise provided by law [*Cal Rules Ct, Rule 2.111(1)*].

The space between lines 1 and 7 to the right of the center of the page must be blank for the use of the clerk [*Cal Rules Ct, Rule 2.111(2)*].

4.11[6][b] Titles and Case Number. The caption is to include the following information:

- On line 8, at or below 3 1/3 inches from the top of the paper, the title of the court [*Cal Rules Ct, Rule 2.111(3)*].
- Below the title of the court, in the space to the left of the center of the page, the title of the case by the names of first party on each side with appropriate indication of any other parties and if a cross-action or actions are involved, so state [*Cal Rules Ct, Rule 2.111(4)*].
- To the right of and opposite the title, the case number [*Cal Rules Ct, Rule 2.111(5)*].
- Immediately below the case number, the nature of the paper, such as, "NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO REQUESTS FOR ADMISSION, SUPPORTING MEMORANDUM, AND DECLARATION OF [NAME]," [*Cal Rules Ct, Rule 2.111(6)*].
- Below the nature of the paper, the name of the judge or department, if any to which the case is assigned [*Cal Rules Ct, Rule 2.111(7)*].
- Below the nature of the case, if the paper is filed in a case pending before a referee, the word "Referee:" followed by the referee's name [*Cal Rules Ct, Rule 2.111(8)*].

4.11[6][c] Below the Case Number. The first page must specify immediately below the case number [*Cal Rules Ct, Rule 3.1110(b)*]:

- The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable.
- The nature or title of any attached document other than an exhibit.

- The date of filing of the action.
- The trial date, if set.

4.11[7] Footers. Each page must have a footer in the bottom margin, below the page number and separated by a printed horizontal line, which states the title of the paper or some clear and concise abbreviation [*Cal Rules Ct, Rule 2.110*]. The title or abbreviated title given in the footer must be in at least 10-point type [*Cal Rules Ct, Rule 2.110*].

4.11[8] Exhibits. Exhibits may be fastened to pages of the specified size, and when prepared by a machine copying process, must be equal to typewritten material in legibility and permanency of image [*Cal Rules Ct, Rule 2.114*].

If a memorandum has exhibits, each must be separated by a hard 8 1/2 by 11-inch sheet with hard paper or plastic tabs extending below the bottom of the page and bearing the designation of the exhibit. An index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter [*Cal Rules Ct, Rule 3.1110(f), (g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & Form



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4.12 Format for Memorandum.

4.12[1] Page Limits. The general page limits for a memorandum in support of a discovery motion are [*see Cal Rules Ct, Rule 3.1113(d)*]:

- An opening or responding memorandum may not exceed 15 pages.
- A reply or closing memorandum may not exceed 10 pages.

These page limits do not include [*see Cal Rules Ct, Rule 3.1113(d)*]:

- Exhibits;
- Declarations;
- Attachments;
- Table of contents;
- Table of authorities; or
- Proof of service.

If the memorandum includes a table of contents and table of authorities, the caption page also appears to be excluded in calculating the page length of the memorandum.



Warning:

A memorandum that exceeds these page limitations will not be rejected for filing on the ground that it is too long. However, the court has discretion to refuse to consider the memorandum. If the court so decides, its minutes or order must so indicate [*Cal Rules Ct, Rules 3.1113(g), 3.1300(d)*].

Judge's Perspective:

In discovery motions, there is really no reason that the memorandum should exceed the page limitation. For the most part, the judges are intimately familiar with discovery standards, and the cases cited (except for issues concerning privilege) are standard well-known cases. Emphasis should be placed on the separate statement.

4.12[2] Page Numbering. For memoranda that include tables of contents and authorities:

- The caption page is not to be numbered;
- The tables are to be numbered separately using lower-case Roman numerals; and
- The consecutive numbering of the memorandum itself in Arabic numerals is to begin on the first page of the text [*see Cal Rules Ct, Rule 3.1113(h)*].

4.12[3] Longer Memorandum May Be Allowed on Ex Parte Motion. A party may apply to the court ex parte, at least 24 hours before a memorandum is due, for leave to file a longer memorandum. The application must state reasons why the argument cannot be made within the page limitations [*Cal Rules Ct, Rule 3.1113(e)*]. The applicant must give written notice of the ex parte application to the other parties [*Cal Rules Ct, Rule 3.1113(e)*].

**Strategic Point:**

An applicant should, if possible, make the application sufficiently in advance so that the memorandum may be brought within applicable page limits if the application is denied. Counsel should also avoid any temptation to circumvent the page-limit requirements by way of format "sleight of hand," in lieu of an application or should an application be denied. These practices are obvious to the courts and create a highly negative impression [*see, e.g., In re Marriage of Green (1989) 213 CA3d 14, 28, 261 CR 294*].

**Cross Reference:**

Form of memorandum supporting ex parte motion, see *California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs, § 1.11 (Matthew Bender)*.

4.12[4] Memorandum Longer Than 10 Pages Must Include Tables of Contents and Authorities. A memorandum longer than 10 pages must include a table of contents and table of authorities [*Cal Rules Ct, Rule 3.1113(f)*].

4.12[5] Memorandum Longer Than 15 Pages Must Include an Opening Summary of Argument. A memorandum filed in a trial court civil law and motion proceeding exceeding 15 pages must include an opening summary of argument [*Cal Rules Ct, Rule 3.1113(f)*].

4.12[6] Statement of Facts Must Be Included. A memorandum filed in a civil law and motion proceeding must contain a statement of facts [*Cal Rules Ct, Rule 3.1113(b)*]. The facts must come from any source that the court may accept as evidence in the particular proceeding.

4.12[7] Memorandum Must Contain Statement of Law, Evidence, and Argument. A memorandum filed in a trial court civil law and motion proceeding must contain a concise statement of the law, evidence and arguments relied on, as well as a discussion of the statutes, cases, and textbooks cited in support of the position advanced [*Cal Rules Ct, Rule 3.1113(b)*].

4.12[8] References to Declarations and Exhibits Must Be Specific. References in a memorandum to a

declaration, affidavit, or exhibit must include the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*Cal Rules Ct, Rule 3.1113(l)*].

4.12[9] Cases, Statutes, and Other Authorities May Need to Be Attached. If a memorandum cites to a court opinion, a copy of the opinion must be attached to the memorandum and furnished to the court and other parties in either of the following two situations [*Cal Rules Ct, Rule 8.1115(c)*]:

- When the opinion is an unpublished opinion by the Court of Appeal or by an appellate department of the superior court, but is nevertheless citable under *Cal Rules Ct, Rule 8.1115(b)*.
- When the opinion is authored by any court but is available only in a computer-based source of decisional law.

The copy should be attached and tabbed as an exhibit as required by *Cal Rules Ct, Rule 3.1110(f)*.

If a California case is cited before the time that it is published in the advance sheets of the Official Reports, or if any authority is cited other than California cases, statutes, constitutional provisions, or state or local rules, a copy of that case must be attached and tabbed [*Cal Rules Ct, Rule 3.1113(j)*]. In other words, a copy of any cited authority from outside California must be lodged. Also any cited authority from California that is not listed in Rule 3.1113(j), including regulations and ordinances, must be attached.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda



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4.13 Papers Must Be Filed in Clerk's Office.

All papers relating to a law and motion proceeding, unless otherwise provided by local court rule, must be filed in the clerk's office [*Cal Rules Ct, Rule 3.1302(a)*]. Except for motions for summary judgment or adjudication and applications to appear as counsel pro hac vice, the fee for filing a motion, application, or any other paper requiring a hearing, including ex parte, subsequent to the first paper, is \$40 [*Gov Code § 70617(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.14 Court May Refuse to Consider Papers Filed Late.

Papers submitted before the close of the clerk's office on the day the papers are due are deemed timely filed [*Cal Rules Ct, Rule 3.1300(e)*]. No paper may be rejected for filing on the ground that it was untimely submitted. However, the court may, in its discretion, refuse to consider a late filed paper; in this situation, the minutes or order must so indicate [*Cal Rules Ct, Rule 3.1300(d)*].

Legal Topics:

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4.15 Motion Deemed Made on Service and Filing.

A motion is deemed to have been made and to be pending before the court, for all purposes, on the service and filing of the notice of motion [CCP § 1005.5; *see also* *Sweat v. Hollister* (1995) 37 CA4th 603, 613, 43 CR2d 399 (disapproved on another point in *Santisas v. Goodin* (1998) 17 C4th 599, 609 n5, 71 CR2d 830, 951 P2d 399)]. However, this provision will not serve to deprive a party of a hearing on the motion to which he or she is otherwise entitled [CCP § 1005.5].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.16 CHECKLIST: Opposing Written Motion.

☐ Prepare memorandum.



Warning:

Failure to oppose a motion waives appeal.

Authority:

Bell v. American Title Ins. Co. (1991) 226 CA3d 1589, 1602, 277 CR 583

Discussion:

See 4.12, 4.17

☐ Prepare declarations and affidavits.

Authority:

CCP §§ 2002, 2003, 2009, 2015.5

Discussion:

See 4.18

Form:

See 4.55

☐ File and serve papers at least nine court days prior to hearing.

Authority:

CCP §§ 1005(b), 1010.6, 1013

Discussion:

See 4.19

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion
PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil
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4.17 Memorandum May Be Filed.

Although not expressly authorized by statute or by the California Rules of Court, practice permits counsel for the adverse party to oppose a discovery motion by filing a memorandum in opposition to it. Failure to oppose a motion results in a waiver on appeal of any objection to the resulting order [*see Bell v. American Title Ins. Co. (1991) 226 CA3d 1589, 1602, 277 CR 583* (party neither filed opposition nor objected at hearing)].



Cross References:

Discussion of format for memorandum, see 4.12.

Forms of memoranda opposing motions, see California Points and Authorities, Chs. 80-89, Discovery (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda



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4.18 Declarations or Affidavits May Be Filed.

Unless prohibited with respect to a specific motion, counsel may also file counter affidavits and counter declarations in opposition to the motion [*see CCP §§ 2002, 2003, 2009, 2015.5*].

Cross Reference:

Form, see 4.55.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.19 Opposition Papers Must Be Filed and Served at Least 9 Court Days Prior to Hearing.

Opposition papers must be filed and served *at least* nine court days prior to the hearing [*CCP § 1005(b)*]. Although *CCP § 1005(b)* expressly provides that *CCP § 1013* does not apply to papers governed by section 1005, it does not exclude application of *CCP § 1010.6(a)(6)*, which allows a two court day extension if the opposition papers were served electronically under *CCP § 1010.6* [*CCP §§ 1005(b), 1010.6*].



Warning:

The papers must be served in a manner "reasonably calculated to ensure delivery ... not later than the close of the next business day" after the papers are filed with the court [*CCP § 1005(c)*].

Exception:

In unlawful detainer actions, opposition papers must be served and filed on or before the court day before the hearing [*Cal Rules Ct, Rule 3.1347(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime Limitations



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Chapter 4 Law and Motion Procedure
IV. REPLYING TO OPPOSITION

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4.20 CHECKLIST: Replying to Opposition.

- ☐ File and serve reply papers at least five court days prior to hearing.

Authority:

CCP §§ 1005(b), 1010.6, 1013; Cal Rules Ct, Rule 3.1300(a)

Discussion:

See 4.21

Legal Topics:

For related research and practice materials, see the following legal topics:

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IV. REPLYING TO OPPOSITION

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4.21 Reply Papers Must Be Filed and Served Five Court Days Before Hearing.

All reply papers must be filed with the court and a copy served at least five court days before the hearing [*CCP* § 1005(b); *Cal Rules Ct, Rule 3.1300(a)*].

Although *CCP* § 1005(b) expressly states that *CCP* § 1013 does not apply to papers governed by § 1005, it does not exclude application of *CCP* § 1010.6(a)(6), which allows a two court day extension if the opposition papers were served electronically under *CCP* § 1010.6 [*CCP* § 1005(b), 1010.6].



Warning:

The papers must be served in a manner "reasonably calculated to ensure delivery ... not later than the close of the next business day" after the papers are filed with the court [*CCP* § 1005(c)].

Reply papers on specific motions may be subject to a different filing period [*see, e.g., Cal Rules Ct, Rule 3.1342(c)* (15-day period to file response to opposition to motion for discretionary dismissal under *CCP* § 583.410 *et seq.*); *see also Bergman v. Rifkind & Sterling, Inc. (1991) 227 CA3d 1380, 1384, 1386-1387, 278 CR 583* (distinguishing between reply to opposition and document that merely provided procedural update)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 Law and Motion Procedure
V. HEARING AND RULING ON MOTION

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4.22 CHECKLIST: Hearing and Ruling on Motion.

- ☐ Notify court immediately if counsel must change hearing date.

Authority:

Cal Rules Ct, Rule 3.1304(b)

Discussion:

See 4.25

- ☐ File a notice of non-appearance if counsel does not plan to appear at hearing.

Authority:

Cal Rules Ct, Rule 3.1304(c)

Discussion:

See 4.26

Form:

See 4.62

- ☐ If counsel wishes to appear by telephone at hearing:

☐ Counsel has the option of appearing by telephone in most conferences and law and motion hearings at which witnesses are not called to testify.

☐ Check local rules for fees and telephonic service provider.

☐ Place the phrase "Telephone Appearance" below the title of the moving or opposing papers.

☐ Serve notice at least three court days before appearance.

Authority:

Cal Rules Ct, Rule 3.670(c), (d), (i), (l); CCP § 367.5

Discussion:

See 4.27

Form:

See 4.57

☐ To retract request for telephonic appearance, notify all parties and the court by telephone.



Timing:

At least two court days prior to the appearance.

Authority:

Cal Rules Ct, Rule 3.670(g)(3)

Discussion:

See 4.27[2][h]

☐ If court offers tentative rulings, check procedure and then calendar to check the ruling.

Authority:

Cal Rules Ct, Rule 3.1308(c)

Discussion:

See 4.29

☐ Present evidence at a law and motion hearing by:

☐ Declaration or affidavit;

☐ Request for judicial notice. Party must request and:

☐ Give each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable adverse party to prepare to meet the request; and

☐ Furnish court with sufficient information to enable it to take judicial notice of the matter.

☐ Must be presented in a separate document.

- ☐ For request under *Evid Code* § 452 or 453, provide court and each party with copy of material to be judicially noticed. If material is part of a file in court in which matter is being heard, the party must:
- ☐ Specify in writing the part of the file sought to be judicially noticed, and
 - ☐ Arrange with clerk to have file in courtroom at time of hearing.
- ☐ Oral Evidence. Party seeking to use oral evidence must:
- ☐ File written statement setting forth nature and extent of evidence proposed to be introduced and reasonable time estimate for hearing.
-  **Timing:**
No later than three court days before the hearing.
- ☐ Serve a copy on the other parties.
-  **Timing:**
Manner of service to assure delivery no later than two days before the hearing.
- Authority:**
Evid Code § 453; *Cal Rules Ct*, *Rules 3.1113(m), 3.1306*
- Discussion:**
See 4.28
- Forms:**
See 4.55, 4.61
- ☐ Prepare proposed order before hearing.
- ☐ Check local rules to see if required.
- ☐ If order not prepared prior to hearing:
- ☐ Prepare order;
 - ☐ Have opposing counsel approve as to form;
 - ☐ Submit to judge for signature.

☐ Conform copies and serve on all parties.

☐ Court will enter order or minute order.

Authority:

CCP § 1015; Eldridge v. Superior Court (1989) 208 CA3d 1350, 1354, 256 CR 724

Discussion:

See 4.30, 4.31, 4.32

Legal Topics:

For related research and practice materials, see the following legal topics:

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4.23 Court May Make Decision Without Hearing.

The court may determine a motion without permitting oral argument [*see Beckett v. Kaynar Mfg. Co. (1958) 49 C2d 695, 698-699, 321 P2d 749* (no hearing requirement for confirmation of arbitration award, which is heard in summary manner as provided for hearing motions); *Sweat v. Hollister (1995) 37 CA4th 603, 613, 43 CR2d 399* (disapproved on another point in *Santisas v. Goodin (1998) 17 C4th 599, 609 n5, 71 CR2d 830, 951 P2d 399*)]. Thus, a telephonic ruling may be the final ruling if the court so intends [*see Sweat v. Hollister (1995) 37 CA4th 603, 614, 43 CR2d 399* (court's telephonic ruling granting summary judgment was intended to be final, so plaintiff could not request oral argument and then voluntarily dismiss prior to hearing; right to dismiss was cut off by final ruling on motion even though court retained power to amend that ruling); *see also Lewis v. Superior Court (1999) 19 C4th 1232, 1247-1253, 1260-1261, 82 CR2d 85, 970 P2d 872* (no right to oral argument before issuance of peremptory writ in first instance)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.24 Clerk Will Post Schedule for Law and Motion Hearings.

The clerk of court is required to post a general schedule showing the days and departments for holding each type of law and motion hearing, including discovery motion hearings [*see Cal Rules Ct, Rule 3.1304(a)*].

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4.25 Moving Party Must Notify Court Immediately of Change in Date.

If a matter will not be heard on the scheduled date, the moving party must notify the court immediately [*Cal Rules Ct, Rule 3.1304(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.26 Party May File Notice of Non-appearance at Hearing.

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter unless the court orders otherwise [*Cal Rules Ct, Rule 3.1304(c)*]. The court will rule on the motion as if the party had appeared [*Cal Rules Ct, Rule 3.1304(c)*].



Cross Reference:

Form for notice of non-appearance, see 4.62.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.27 Appearance at Hearing.

4.27[1] Court May or May Not Rule on Motion If No Party Appears. If a party fails to appear at a law and motion hearing without giving notice of non-appearance, the court may take the matter off calendar (to be reset only on motion), or the court may rule on the matter [*Cal Rules Ct, Rule 3.1304(d)*].



Cross References:

Discussion, see 4.26.

Form, see 4.62.

4.27[2] Considerations Regarding Telephonic Appearance.

4.27[2][a] Telephonic Appearance Generally Is Permitted Unless Court Requires Personal Appearance. A party that has provided notice may appear by telephone at the following conferences, hearings, and proceedings [*CCP § 367.5(b)*; *Cal Rules Ct, Rule 3.670(c)*]:

- Case management conferences, provided the party has made a good faith effort to meet and confer before the conference and has timely served and filed a case management statement.
- Trial setting conferences.
- Hearings on law and motion, except motions in limine.
- Hearings on discovery motions.
- Status conferences, including conferences to review the status of an arbitration or mediation.
- Hearings to review the dismissal of an action.

- Any other hearings, conferences, or proceedings if the court determines that a telephone appearance is appropriate.

Exception:

The court may require a party to appear in person at a hearing, conference, or proceeding listed above if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case [CCP § 367.5(c); *Cal Rules Ct, Rule 3.670(e)(2)*].

If, at any time during a hearing, conference, or proceeding conducted by telephone, the court determines that a personal appearance is necessary, the court may continue the matter and require a personal appearance [*Cal Rules Ct, Rule 3.670(f)*].



Strategic Point:

Even when a telephonic appearance is permitted, a personal appearance usually is more effective, and should be made on any critical motion.

4.27[2][b] Personal Appearance Required for Certain Proceedings. A personal appearance is required for all hearings, conferences, and proceedings not specified in 4.27[2][a], including the following [*Cal Rules Ct, Rule 3.670(d)(1)-(6)*]:

- Trials and hearings at which witnesses are expected to testify.
- Hearings on temporary restraining orders.
- Settlement conferences.
- Trial management conferences.
- Hearings on motions in limine.
- Hearings on petitions to confirm the sale of property under the Probate Code.

Exception:

The court may permit a party to appear by telephone if the court determines that a telephone appearance is appropriate [*Cal Rules Ct, Rule 3.670(e)(3)*].

4.27[2][c] Specified Persons Are Required to Make Personal Appearance. A personal appearance is required for the following persons [*Cal Rules Ct, Rule 3.670(d)(7)-(9)*]:

- Applicants seeking an ex parte order, except when the applicant is seeking an order for permission to file a memorandum in excess of the applicable page limits, for an extension of time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, or by stipulation of the parties.
- Persons ordered to appear to show cause why sanctions should not be imposed for violation of a court order or a rule.
- Persons ordered to appear in an order or citation issued under the Probate Code.

Parties who are not required to appear in person under *Cal Rules Ct, Rule 3.670(d)(7)-(9)* may appear by telephone [*Cal Rules Ct, Rule 3.670(d)*].

Exception:

The court may permit a party to appear by telephone if the court determines that a telephone appearance is appropriate [*Cal Rules Ct, Rule 3.670(e)(3)*].

4.27[2][d] Fees May Be Assessed for a Telephonic Appearance. A court may provide teleconferencing for court appearances by entering into a contract with a private vendor. The contract may provide that the vendor charge the party appearing by telephone a reasonable fee, specified in the contract, for its services [*Cal Rules Ct, Rule 3.670(i)*]. A court may require by local rule a particular conference call provider be used for telephone appearances [*Cal Rules Ct, Rule 3.670(l)*].

4.27[2][e] Statements Must Be Audible and Identified to a Participant. The court is required to ensure that the statements of participants are audible to all other participants and the court staff [*Cal Rules Ct, Rule 3.670(j)*]. The court will also ensure that a participant's statements are identified as being made by that participant [*Cal Rules Ct, Rule 3.670(j)*].

4.27[2][f] Court Will Publish Procedures. The court is required to publish notice providing parties and attorneys with the information necessary for them to appear by telephone at conferences, hearings, and proceedings [*Cal Rules Ct, Rule 3.670(m)*].

4.27[2][g] Phrase "Telephone Appearance" Must Appear Below Title of Papers. Counsel choosing to appear by telephone must place the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers [*Cal Rules Ct, Rule 3.670(g)(1)(A)*]. Optionally, at least three days before the hearing, counsel must notify the court and all other parties of the intention to appear by phone. This can be done orally in person, or on the phone, or if in writing, counsel must file and serve a "Notice of Intent to Appear by Telephone" at least three court days before the appearance. Service must be reasonably calculated to ensure delivery no later than next business day [*Cal Rules Ct, Rule 3.670(g)(1)(B)*].



Cross Reference:

Form for notice of appearance by telephone, see 4.57.

4.27[2][h] Notification Required to Retract Notice of Telephonic Appearance. If counsel subsequently chooses to appear in person, counsel must notify the court, all other counsel, and all parties appearing in propria persona by telephone at least two court days before the appearance [*Cal Rules Ct, Rule 3.670(g)(3)*].

4.27[2][i] Other Party May Decide to Appear By Telephone. After receiving notice of a telephone appearance from another party, a party that has not given notice may decide also to appear by telephone by notifying the court and all other parties that have appeared in the action, no later than noon on the court day before the appearance, of its intent to appear by telephone [*Cal Rules Ct, Rule 3.670(g)(2)*].

4.27[2][j] Court May Waive Notice Requirement. The court, on a showing of good cause, may permit a party to appear by telephone at a conference, hearing, or proceeding even if the party has not given the notice required, and may permit a party to appear in person even if the party has not retracted its notice of telephonic appearance [*Cal Rules Ct, Rule 3.670(g)(4)*].

4.27[2][k] Court May Order Appearance. After a party has requested a telephone appearance under Rule 3.670(g), if the court requires the personal appearance of the party, the court will give reasonable notice to all parties before the hearing and may continue the hearing if necessary to accommodate the personal appearance. The court may direct the court clerk, a court-appointed vendor, a party, or an attorney to provide the notification. If the court uses a

telephonic tentative ruling system, the notification that parties must appear in person may be given as part of the tentative ruling on a specific law and motion matter one court day before the hearing [*Cal Rules Ct, Rule 3.670(h)*].

Legal Topics:

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4.28 Evidence to Be Considered.

4.28[1] Evidence Is Generally Presented by Affidavit or Declaration. Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown [*Cal Rules Ct, Rule 3.1306(a)*; see also *Smith, Smith & Kring v. Superior Court* (1997) 60 CA4th 573, 578, 70 CR2d 507 (only evidence trial court should have considered is that contained in declarations filed in support of and in opposition to motion)].



Warning:

Hearsay or other incompetent evidence in an affidavit received without a proper objection or motion to strike, is to be regarded as competent evidence in support of the subsequent order [*Flood v. Simpson* (1975) 45 CA3d 644, 649, 119 CR 675].

Distinguish:

Matters set forth in unverified Statements of Facts and in memoranda are *not* evidence and cannot provide the basis for the granting of the motion [*Smith, Smith & Kring v. Superior Court* (1997) 60 CA4th 573, 578, 70 CR2d 507].

4.28[2] Evidence May Be Presented by Request for Judicial Notice.

4.28[2][a] Judicial Notice Can Be Mandatory or Permissive. Judicial notice can be mandatory or permissive. *Evid Code* § 451 lists matters of which the court is required to take judicial notice.

Evid Code § 452 lists matters of which the court may take judicial notice. As to those matters, the court is required to take judicial notice if a party so requests and [*Evid Code* § 453]:

- Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable the adverse party to prepare to meet the request; and
- Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

4.28[2][b] Judicial Notice Must Be Requested in Separate Document. The request that the court take judicial notice must be made in a separate document listing the specific items for which notice is requested [*Cal Rules Ct, Rule 3.1113(m)*].



Cross Reference:

Form, see 4.61.

4.28[2][c] Copy of Material Must Be Provided. The party requesting judicial notice of material under *Evid Code* § 452 or 453 must provide the court and each party with a copy of the material. If the material is part of a file in the court in which the matter is being heard, the party must (1) specify in writing the part of the file sought to be judicially noticed, and (2) make arrangements with the clerk to have the file in the courtroom at the time of the hearing [*Cal Rules Ct, Rule 3.1306(c)*; see also *Cal Rules Ct, Rule 3.1113(m)* (request for judicial notice)].

4.28[3] Party Requesting Oral Evidence Must File Written Statement. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence to be introduced and a reasonable time estimate for the hearing. If the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery no later than two days before the hearing [*Cal Rules Ct, Rule 3.1306(b)*].



Warning:

A court will allow oral testimony at a hearing on a discovery motion only in the most unusual circumstances. Unless there is a demonstrated reason why the information cannot be presented by declaration or why there is a need to cross-examine an opposing declarant, a request to present testimony at the hearing is likely to be met with an extremely negative reaction.



Cross Reference:

Form, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.68.

Legal Topics:

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4.29 Individual Court May Provide Tentative Rulings.

4.29[1] Two Tentative Ruling Procedures Are Authorized. A court that offers tentative rulings is required to follow one of two procedures, one requiring notice of intent to appear in order to have a hearing, and one in which a hearing follows as a matter of course [*see Cal Rules Ct, Rule 3.1308(a)*].

Exception:

Other than following one of the two tentative ruling procedures set out in *Cal Rules Ct, Rule 3.1308(a)*, courts are not to issue tentative rulings except (1) by posting a calendar note containing tentative rulings on the hearing day, or (2) by announcing the tentative ruling at the time of oral argument [*Cal Rules Ct, Rule 3.1308(b)*].

4.29[2] Local Rules Must State Tentative Ruling Procedure. If a court elects to follow one of the established tentative ruling procedures, it must so state in its local rules. The local rule will specify the telephone number for obtaining tentative rulings, as well as the time by which rulings will be available [*Cal Rules Ct, Rule 3.1308(c)*].

4.29[3] Tentative Ruling Procedure Must Be Uniform Within Court or Branch. If a court, or a branch of a court, adopts a tentative ruling procedure, then that procedure must be used by all judges in the court or branch who issue tentative rulings [*Cal Rules Ct, Rule 3.1308(d)*].

Rule 3.1308 does not require any judge to issue tentative rulings [*Cal Rules Ct, Rule 3.1308(e)*].

4.29[4] Tentative Ruling With No Hearing Unless Requested. Under the first procedure, the court makes its tentative ruling available by telephone, and, at the court's option, by any other method the court designates, by no later than 3:00 p.m. on the court day before the scheduled hearing [*Cal Rules Ct, Rule 3.1308(a)(1)*].

If the court desires oral argument, its tentative ruling must so direct. The ruling also may note any issues on which the court wishes the parties to provide further argument [*Cal Rules Ct, Rule 3.1308(a)(1)*].

If the court has not directed argument, oral argument is permitted only if a party notifies all other parties and the court of its intention to appear by 4:00 p.m. on the court day prior to the hearing. This notice must be given by telephone or in

person. The court is directed to accept telephone notice, and has discretion to designate alternative methods by which a party intending to appear may give notice to the court [*Cal Rules Ct, Rule 3.1308(a)(1)*].

The tentative ruling becomes the court's ruling if the court has not directed oral argument and notice of intent to appear has not been given [*Cal Rules Ct, Rule 3.1308(a)(1)*].

4.29[5] Tentative Ruling Followed by Hearing Without Need for Request. Under the second procedure, the court makes its tentative ruling available by telephone, and, at the court's option, by any other method the court designates, by a specified time prior to the hearing [*Cal Rules Ct, Rule 3.1308(a)(2)*].

The tentative ruling may note any issues on which the court wishes the parties to provide further argument at the hearing. The parties do not need to give notice of intent to appear to have a hearing. The tentative ruling, or such other ruling as the court may render, will not become the court's final ruling until the hearing [*Cal Rules Ct, Rule 3.1308(a)(2)*].

Legal Topics:

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4.30 Court Generally Rules on Motion at Hearing.

The court will usually rule on the motion at the hearing. If the court grants the motion, a formal order is normally required.

The moving party may have prepared the formal order in advance of the hearing and, if it correctly reflects the court's ruling, both the order and copies may be handed to the courtroom clerk for the judge's signature and for conforming the copies. Otherwise, counsel will prepare the order after the hearing, secure opposing counsel's approval as to form, and submit it to the judge for his or her signature [see *Cal Rules Ct, Rule 3.1312* (procedure for preparation and transmittal of order)]. Counsel will then have the copies conformed and serve a conformed copy on the adverse party's attorney or, if none, on the adverse party [see *CCP § 1015*].

Judge's Perspective:

Although the Code of Civil Procedure and local court rules may not require a proposed order to be submitted with a party's moving or opposition papers, local practice in some jurisdictions is for counsel to submit a proposed order to the court, either with a party's papers, or separately before the hearing. One of the advantages to doing so, particularly in case of summary judgment or summary adjudication motions when the court is required to recite the issues of material fact in dispute, is to help the judge navigate your moving or opposition papers. Some judges, when reviewing a summary judgment or summary adjudication motion, use the proposed orders as a starting point for reviewing a party's papers.

If the motion is denied, a formal order is not normally prepared. Whether the motion is granted or denied, however, a minute order is made which is entered in the court's permanent minutes. Rough minutes are not official court records, but if the only minutes kept by the court are the longhand minutes prepared during the course of the day, these constitute the permanent minutes [see *Fortenberry v. Weber (1971) 18 CA3d 213, 220, 95 CR 834* (California courts have not adopted any uniform method of keeping minutes and recording entry of minute orders in their records)].

Judge's Perspective:

In complex litigation courts, the judges welcome oral argument and counsel should be prepared to argue orally. Many complex litigation judges do not issue tentative rulings so as not to discourage counsel from presenting oral argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.31 Court Enters Orders.

Orders are entered by one of two methods:

- The court may order the clerk to enter a minute order; or
- The court may make a formal order, the entry of which consists of filing the signed order with the clerk [*Eldridge v. Superior Court* (1989) 208 CA3d 1350, 1354, 256 CR 724].

Legal Topics:

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4.32 Court May Take Matter Under Submission.

If the court takes the matter under submission, instead of ruling on the motion at the hearing, the court clerk is required to notify the parties of the ruling or order. The notification must specifically identify the matter ruled on and may be given by mailing the parties a copy of the ruling or order. In a case involving multiple parties, any notice of a ruling or order served by a party must [*Cal Rules Ct, Rules 3.1100, 3.1103(b), 3.1109*]:

- Name the moving party;
- Name the party against whom relief was requested; and
- Specifically identify the particular motion ruled on.

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. BRINGING AN EX PARTE MOTION DURING DISCOVERY

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4.33 CHECKLIST: Bringing Ex Parte Motion During Discovery.

☐ Verify that civil law and motion rules apply. Rules apply to:

☐ Applications for orders before trial, except for causes arising under:

☐ Welfare and Institutions Code.

☐ Probate Code.

Exception:

Law and motion rules do apply to discovery proceedings in probate.

☐ Family Code.

Exception:

Law and motion rules do apply to discovery proceedings in family law.

☐ CCP §§ 527.6, 527.7, 527.8 (injunctive relief relating to harassment and violence).

☐ Application for an order regarding:

☐ Enforcement of judgment.

☐ Attachment of property.

- ☐ Appointment of a receiver.
- ☐ Obtaining or setting aside a judgment by default.
- ☐ Writs of review, mandate and prohibition.
- ☐ Petition to compel arbitration.
- ☐ Enforcement of an award by arbitration.

Authority:

Cal Rules Ct, Rules 3.1100, 3.1103(a)

Discussion:

See 4.04

- ☐ Verify that you can proceed ex parte.

Discussion:

See 4.06, 4.07

- ☐ Contact opposing parties:

- ☐ Inform as to time and place of motion.
- ☐ Inform as to nature of relief requested.
- ☐ Attempt to determine whether party will appear to oppose motion.

**Timing:**

No later than 10:00 a.m. on court day before ex parte appearance absent showing of exceptional circumstances justifying shorter notice.

Authority:

Cal Rules Ct, Rules 3.1203, 3.1204(a)

Discussion:

See 4.35

- ☐ Prepare declaration of notice stating:

- ☐ That opposing parties were given notice of time and location of hearing;

- ☐ Good faith efforts to inform parties have been made, if unable to inform them; or
- ☐ Reasons why moving party should not be required to inform opposing parties; and
- ☐ The date, time, manner, and name of party informed, the relief sought, any response from the party, and whether opposition is expected.

Authority:

Cal Rules Ct, Rules 3.1203, 3.1204

Discussion:

See 4.36

Form:

See 4.59

☐ Prepare written application. Include:

- ☐ Case caption.
- ☐ Name, address, and telephone number of any attorney known to the applicant to be an attorney for a party or if none, the name, address, and telephone number of the party if known.
- ☐ Clear statement of relief requested.
- ☐ Disclosure of any prior applications of same character or for same relief.
- ☐ Declaration in support of application.
- ☐ Declaration based on personal knowledge regarding notice of the application.
- ☐ Supporting memorandum.
- ☐ Proposed order.

Authority:

Cal Rules Ct, Rules 3.1201, 3.1202

Discussion:

See 4.37

Forms:

See 4.59, 4.60

- ☐ Declaration of irreparable harm, immediate danger, or other statutory basis for granting ex parte

relief

Authority:

Cal Rules Ct, Rule 3.1202(c)

Discussion:

See 4.38

- ☐ Serve ex parte application



Timing:

First reasonable opportunity.

Authority:

Cal Rules Ct, Rule 3.1206

Discussion:

See 4.42

- ☐ Calendar appearance and appear personally.

Exception:

Applicant or applicant's counsel need not personally appear on application to:

- File memorandum in excess of page limit.
- Extend time to serve pleadings.
- Set hearing dates on alternative writs and orders to show cause.
- Stipulations by the parties or other court orders.

Authority:

Cal Rules Ct, Rule 3.1207

Discussion:

See 4.40

- ☐ Pay filing fees.

Authority:

Gov Code § 70617(a)

Discussion:

See 4.13

- ☐ Have judge sign original order if motion is granted.

- ☐ Have the copies conformed by the courtroom clerk or by a deputy clerk in the court clerk's office and filed.
- ☐ Serve notice of decision, conformed copy of orders, and copy of ex parte papers on all parties.

Authority:

CCP §§ 1015, 1019.5(a)

Discussion:

See 4.43, 4.44, 4.45

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders



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4.34 Who May Grant an Ex Parte Motion.

Judges may grant ex parte motions in chambers [*CCP § 166(a)(1)*; *see also CCP § 1003*]. Ex parte motions may also be granted by court commissioners [*CCP § 259(a)*; *Gov Code § 72190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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4.35 Party Must Advise Opposing Parties or Counsel of Appearance.

A party making an ex parte application must notify all parties of the application. The person giving notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application. The party giving notice must also attempt to determine whether the opposing party will appear to oppose the application [*Cal Rules Ct, Rule 3.1204(a)*].



Timing:

The notice of an ex parte application must be made to all parties not later than 10:00 a.m. the court day before the ex parte appearance. Exceptions exist if there are reasons not to notify the opposing party or if exceptional circumstances justify a shorter time for notice. A declaration accompanying the ex parte application will need to state the reasons why notice should not be required or the exceptional circumstances justifying shorter notice [*Cal Rules Ct, Rules 3.1203, 3.1204*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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4.36 Declaration of Notice Must Be Submitted.

4.36[1] Declaration Must Contain Specific Efforts to Contact Parties. Along with the application for the ex parte motion, a declaration of notice must be submitted stating [*Cal Rules Ct, Rule 3.1204(b)*]:

- That the opposing parties were given notice of the time and location of the hearing;
- That the applicant made a good faith effort to inform the opposing parties, but was unable to do so and the reasons why; or
- The reasons why the applicant should not be required to inform the opposing parties.

The declaration of notice must include a statement of the date, time, manner, and name of party informed, the relief sought, any response from the party, and whether opposition is expected or why notice should not be required [*Cal Rules Ct, Rule 3.1204(b)*].

If notice was provided later than 10:00 a.m. on the court day before the ex parte appearance, the declaration regarding notice must explain the exceptional circumstances that justify the shorter notice [*Cal Rules Ct, Rule 3.1204(c)*].



Cross Reference:

Form, see 4.59.

4.36[2] Clerk Cannot Reject Application for Failure to Comply With Notification Requirements. The clerk may not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with the notification requirements [*Cal Rules Ct, Rule 3.1205*].



Warning:

The judge, barring exceptional circumstances, can and will reject an application for deficient notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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VI. BRINGING AN EX PARTE MOTION DURING DISCOVERY

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4.37 Requirements for Contents of Application.

4.37[1] Ex Parte Application Format Requirements. Ex parte applications must be in writing [*Cal Rules Ct, Rule 3.1201*]. The application must include the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party, if known to the applicant [*Cal Rules Ct, Rule 3.1202(a)*].

In addition, the application packet requires [*Cal Rules Ct, Rules 3.1201, 3.1202(c)*]:

- The case caption.
- A clear statement of the relief requested.
- A declaration in support of the application making the factual showing of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief.
- A competent declaration based on personal knowledge regarding notice of the application.
- A memorandum.
- A proposed order.



Cross References:

Discussion of declarations, see 4.36[1].

Discussion of demonstration of immediate harm, see 4.38.

Form of ex parte application, see 4.59.

Form of notice of decision, see 4.60.

4.37[2] Party Must Disclose Prior Applications If of the Same Character or for Same Relief. If an ex parte application for an order has been made to the court and refused in whole or in part, any subsequent application of the same character or for the same relief, even if made on an alleged different state of facts, must include a full disclosure of any previous applications and the court's actions thereon [*Cal Rules Ct, Rule 3.1202(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeContent & Form



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4.38 Applicant Must Demonstrate Irreparable Harm, Immediate Danger, or Statutory Basis to Proceed Ex Parte.

An applicant for an ex parte order must make a factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief [*Cal Rules Ct, Rule 3.1202(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & Form



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1-4 MB Practice Guide: CA Civil Discovery 4.39

4.39 Ex Parte Motion Is Brought to Judge or Commissioner Assigned to Case.

In the case of a court with a single judge, a party brings an ex parte motion to the judge of the court. In the case of a multiple judge court, an ex parte motion is brought to the judge or commissioner to whom the case has been assigned [CCP § 1004]. Or, if the case has not yet been assigned to a judge or department, the motion is brought to the presiding judge of the court or to the law and motion judge, depending on local court requirements.



Warning:

Precise procedure varies widely among the courts and, if in doubt, counsel should check the local court rules for the particular court.

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. BRINGING AN EX PARTE MOTION DURING DISCOVERY

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4.40 Personal Appearance by Applicant or Counsel Generally Required.

The court will not consider an ex parte application unless the applicant or applicant's counsel personally appears, **except** in the case of the following applications [*Cal Rules Ct, Rule 3.1207*]:

- To file a memorandum in excess of the applicable page limit.
- For extensions of time to serve pleadings.
- To set hearing dates on alternative writs and orders to show cause.
- Stipulations by the parties or other orders of the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.41 Motion Deemed Pending Upon Service and Filing of Notice of Motion.

The motion is deemed to have been made and to be pending before the court on the proper service and filing of the notice of motion [*CCP* § 1005.5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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4.42 Papers Must Be Served at First Reasonable Opportunity.

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless service has been made [*Cal Rules Ct, Rule 3.1206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. BRINGING AN EX PARTE MOTION DURING DISCOVERY

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4.43 Judge Signs Original Order.

If the ex parte motion is granted, the judge or commissioner will sign the original of the order. Counsel should then have the copies conformed by the courtroom clerk or by a deputy clerk in the court clerk's office and have the originals of the motion, if written, and the order filed if they have not been taken by the courtroom clerk for filing already.



Cross Reference:

Form of order, see 4.63.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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4.44 Notice of Decision Must Be Served on Other Parties.

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, unless notice is waived by all parties in open court and is entered in the minutes [CCP § 1019.5(a)].

Exception:

In practice, a notice of decision is rarely given for ex parte applications.



Cross Reference:

Form of notice of decision, see 4.60.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4.45 Applicant Must Serve Conformed Copy of Order and Written Ex Parte Motion on Other Parties.

Counsel must serve a conformed copy of the order, together with a copy of the written ex parte motion, if any, on opposing counsel or on the opposing party if not represented by counsel [*CCP* § 1015].

In the case of an order shortening time for service of a notice of motion [*CCP* § 1005(b); *Cal Rules Ct, Rule 3.1300(b)*], the court may require that the notice of motion, supporting papers, and order shortening time be served on opposing counsel personally [*CCP* §§ 1011, 1015] within a stated period. Otherwise, the documents may be served by mail pursuant to *CCP* §§ 1012, 1013.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 Law and Motion Procedure
VII. APPOINTMENT AND OPPOSING APPOINTMENT OF DISCOVERY REFEREE

1-4 MB Practice Guide: CA Civil Discovery 4.46

4.46 CHECKLIST: Appointment and Opposing Appointment of Discovery Referee.

- ☐ If desired, stipulate or move in writing to appoint discovery referee.
 - ☐ Court may appoint without parties' consent.
- ☐ Raise issue of economic hardship if appropriate.
 - ☐ Court determines parties' ability to pay pro rata share of fee.
 - ☐ Court determines fair and reasonable apportionment of cost.
 - ☐ If party is unable to bear costs, court should consider alternatives, such as pro bono referee, retired judge, or retention of matter by trial court.
 - ☐ Court is not authorized to appoint referee without making find on ability to pay.

Authority:

CCP §§ 639(a)(5), (d)(6), 643(c); Cal Rules Ct, Rule 3.922(f)

Discussion:

See 4.47[1] -[3]

Forms:

See 4.62 (motion), 4.63 (order)

- ☐ Object to appointment of a referee, if desired:

- ☐ Serve on all parties and referee and file.

**Timing:**

Reasonable diligence. No express time limit is given.

Authority:

CCP §§ 640, 641, 641.2; Cal Rules Ct, Rule 3.905

Discussion:

See 4.47[5]

- ☐ Consider exercising peremptory challenge of referee, if necessary:

- ☐ If appointed for *all* discovery purposes, move to challenge appointment either:

☐ Within 10 days after notice of the appointment, or

☐ Within 10 days after the party's appearance if the party had not yet appeared in the action at the time of notice of appointment.

- ☐ If assigned only for *limited* discovery purposes and the referee assigned is known at least 10 days before the date set for hearing, move to disqualify the referee at least five days before the date set for hearing.

Authority:

CCP §§ 170.6(a)(2), 639(a), (b)(A), (b)(B)

Discussion:

See 4.48

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureDiscoveryGeneral Overview



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VII. APPOINTMENT AND OPPOSING APPOINTMENT OF DISCOVERY REFEREE

1-4 MB Practice Guide: CA Civil Discovery 4.47

4.47 Supporting or Opposing Appointment of Discovery Referee.

4.47[1] Referee May Be Appointed by Stipulation or on Motion of Party or Court. On determining that a referee is necessary, a trial court may appoint a referee in any pending action to hear and determine any and all discovery motions and disputes, to report findings, and to make recommendations. The court may appoint a referee on the written motion of any party, or on its own motion, if the parties do not consent to it [*CCP* § 639(a)(5)].

The order must indicate whether the referee is being appointed for all discovery purposes in the action [*CCP* § 639(c); *Cal Rules Ct, Rule 3.922(d)(2)*; see also *CCP* § 639(d) (required contents of written order)].

A discovery referee must not be appointed unless the exceptional circumstances of the particular case require it [*Cal Rules Ct, Rule 3.920(c)*].

A court cannot appoint a referee at a cost to the parties unless it makes one of the findings as required by *CCP* § 639(d)(6) regarding ability to pay referee's fees. The finding must be included in the order appointing the referee [*Cal Rules Ct, Rule 3.922(f)*].

➡ Cross Reference:

Form of order, see 4.63.

4.47[2] Court Must Consider Parties' Financial Status. To appoint a referee at a cost to the parties, the court's order must include a finding that either [*CCP* § 639(d)(6)(A)]:

- No party has established an economic inability to pay a pro rata share of the referee's fee; or
- One or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee.

When the issue of economic hardship is raised before the referee's services begin, the court must determine a fair and reasonable apportionment of the reference costs [see *CCP* § 645.1(b); *Cal Rules Ct, Rule 3.922(f)(3)*; *McDonald v.*

Superior Court (1994) 22 CA4th 364, 368-370, 27 CR2d 310 (plaintiff's declaration was competent evidence of her ability to pay referee's fees); *see also* CCP § 1023 (rate of compensation)]. None of the cost can be recovered from the parties' counsel [*see* CCP § 645.1(b)].

"Fair and reasonable" apportionment does not mean that the court should impose all the referee costs on an objecting party that is financially able to pay merely because the other party is indigent [*Taggares v. Superior Court* (1998) 62 CA4th 94, 104, 72 CR2d 387]. However, the trial court may order the party who requests the referee to pay the fees [*Marathon Nat'l Bank v. Superior Court* (1993) 19 CA4th 1256, 1261-1262, 24 CR2d 40].

The court may modify its order as to the apportionment and may consider a recommendation by the referee as a factor in determining any modification [*Cal Rules Ct, Rule 3.922(f)(3)*].

In determining a party's inability to pay, the court considers the following requirements [CCP § 639(d)(6)(B)]:

- In determining whether a party has established an inability to pay the referee's fees, the court can consider only the ability of the party, not the party's counsel, to pay these fees.
- If a party is proceeding in forma pauperis, the party is deemed by the court to have an economic inability to pay the referee's fees.
- A determination of economic inability to pay the fees is not limited to parties that proceed in forma pauperis.
- For parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, must consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.

4.47[3] When Referee Costs Are Prohibitive, Alternatives Are Available. If appointment of a discovery referee is inappropriate because of the costs that would be incurred by the parties, the trial court should consider alternatives, including a pro bono referee, a retired judge of the superior court sitting by assignment, or retention of the matter by the trial court [*Solorzano v. Superior Court* (1993) 18 CA4th 603, 616, 22 CR2d 401 (abuse of discretion to order indigent plaintiffs to pay half of referee's fee)].

4.47[4] Role of Referee. Referees hear either some or all discovery motions and disputes relevant to discovery in the action, report findings regarding these disputes, and make recommendations on them, including sanctions [CCP § 639(a)(5); *see, e.g., Sauer v. Superior Court* (1987) 195 CA3d 213, 216, 225-226, 240 CR 489 (upholding imposition of monetary and issue sanctions recommended by referee and adopted by trial court)].

4.47[5] Opposing Appointment of Discovery Referee. Objections to the reference or to the referee appointed by the court must be made in writing and are heard by the court, not the referee [CCP § 642].



Timing:

Objection must be made with reasonable diligence [*Cal Rules Ct, Rule 3.905*].

If the parties do not agree on the selection of the referee, the court chooses among nominees offered by the parties [CCP § 640(b)]. A party does not waive objections to the appointment of a referee by participating in the nomination process [CCP § 640(c)]. Objections may be based on disqualifying factors set out in CCP §§ 641 and 641.2.



Cross Reference:

Discussion of disqualifying factors, *see* Matthew Bender[(R)] Practice Guide: California Pretrial Civil

Procedure, Ch. 25, Reference.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesAppointments



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VII. APPOINTMENT AND OPPOSING APPOINTMENT OF DISCOVERY REFEREE

1-4 MB Practice Guide: CA Civil Discovery 4.48

4.48 Referee Is Subject to Peremptory Challenge or Challenge for Cause.

4.48[1] Peremptory Challenge Against Referee for All Discovery. A party may make a peremptory challenge under *CCP* § 170.6 against a discovery referee [*CCP* § 170.6(a)]. Because each party is limited to one peremptory challenge, a party who previously made a peremptory challenge to a judge may not thereafter peremptorily challenge a discovery referee under *CCP* § 170.6 [*Baugh v. Garl* (2006) 137 CA4th 737, 746, 40 CR3d 539] .



Timing:

If a discovery referee has been appointed for all discovery purposes, any motion to disqualify the referee by peremptory challenge under *CCP* § 170.6 must be made to the court by a party either:

- Within 10 days after notice of the appointment; or
- Within 10 days after the party's appearance if the party had not yet appeared in the action at the time of notice of appointment [*CCP* § 639(b)(A)].

4.48[2] Peremptory Challenge Against Referee for Limited Discovery Purposes. If the discovery referee has been assigned only for limited discovery purposes, and the parties know who the referee is at least 10 days before the hearing date, a motion to disqualify the referee by peremptory challenge under *CCP* § 170.6 must be made at least five days before the date set for hearing [*CCP* § 639(b)(B)].

4.48[3] Referee Is Subject to Challenge for Cause. The provisions for disqualifying a judge for cause apply to referees [*CCP* § 170.5(a) (judge defined to include referee); *see CCP* §§ 170.1-170.5].



Cross Reference:

Discussion/forms, *see* Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 22, Disqualification of Judge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral Overview



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VIII. ACCEPTANCE OF AND OBJECTIONS TO REFEREE'S REPORT

1-4 MB Practice Guide: CA Civil Discovery 4.49

4.49 CHECKLIST: Acceptance of and Objections to Referee's Report.

- ☐ Referee must file a report within twenty days of the conclusion of the hearing, if any.
- ☐ Referee must serve report on all parties.
- ☐ If necessary, object to report in writing.



Timing:

File objection within 10 days of the referee's report filing and service or other time as court may direct.

- ☐ Serve written objection on all parties and the referee.
- ☐ Opposing party may respond to objections.



Timing:

File and serve on all parties and referee within ten days.

- ☐ Trial court may accept report without holding a hearing.

Authority:

CCP § 643(c)

Discussion:

See 4.50 -4.53

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesJudicial
ReviewCivil ProcedureDiscoveryGeneral Overview



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VIII. ACCEPTANCE OF AND OBJECTIONS TO REFEREE'S REPORT

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4.50 Referee's Report Must Be Submitted Within 20 Days of Case Submission.

The referee must file his or her report within 20 days of the conclusion of the hearing (if any) and submission of the case [CCP § 643(a)]. The referee must serve his report on all parties [CCP § 643(c)].

➡ **Cross Reference:**

Form, see *California Forms of Pleading and Practice*, Ch. 38, *Reference*, § 38.70 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral Overview



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Chapter 4 Law and Motion Procedure
VIII. ACCEPTANCE OF AND OBJECTIONS TO REFEREE'S REPORT

1-4 MB Practice Guide: CA Civil Discovery 4.51

4.51 Objections to Referee's Report Must Be Written and Timely.

A party who objects to a referee's report must file a written objection within ten days of the filing and service of the report or any objections are deemed waived. [CCP § 643(c); *Martino v. Denevi* (1986) 182 CA3d 553, 557-558, 227 CR 354 (objections waived)].

The objecting party must serve the written objection on all parties and the referee [CCP § 643(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral Overview



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VIII. ACCEPTANCE OF AND OBJECTIONS TO REFEREE'S REPORT

1-4 MB Practice Guide: CA Civil Discovery 4.52

4.52 Responses to Objections to Referee's Report.

If a party wishes to respond to another party's objections to a referee's report, the responding party must file a response with the court and serve it on all parties and the referee within ten days after the objection was served [CCP § 643(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral Overview



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VIII. ACCEPTANCE OF AND OBJECTIONS TO REFEREE'S REPORT

1-4 MB Practice Guide: CA Civil Discovery 4.53

4.53 Court May Accept Referee's Report Without Hearing.

The trial court reviews any objections to the referee's report and responses to objections and enters appropriate orders. The court may modify or disregard the referee's recommendations [*CCP § 643(c)*]. The trial court is to independently consider the referee's findings before acting on the referee's recommendations. However, the trial court is not required to hold a hearing on the referee's recommendations as a matter of law [*see Marathon Nat'l Bank v. Superior Court (1993) 19 CA4th 1256, 1260-1261, 24 CR2d 40*].

If the court's order demonstrates a considered and careful review, not only of the referee's report, but also of the transcript of the proceedings before the referee, and of the objections, replies, and other papers filed after the referee's report was submitted, the court fulfills its judicial responsibilities [*Marathon Nat'l Bank v. Superior Court (1993) 19 CA4th 1256, 1260-1261, 24 CR2d 40*].



Cross Reference:

Form, see 4.64.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesJudicial Review



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.54

4.54 Notice of Motion.

Notice of Motion.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR
) _____ [specify order sought] [,
) SUPPORTING _____ (AFFIDAVIT
) or DECLARATION) OF _____
) (name) AND MEMORANDUM IN SUPPORT OF
) MOTION]
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

[EITHER]

To _____ [party, e.g., Defendant Mary Jones] and to _____ [name] his/her attorney of record:

[OR]

To each _____ [party, e.g., Defendant] named above, and to the attorney of record for each such party:

[CONTINUE]

NOTICE IS HEREBY GIVEN that, on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [city], _____ [party, e.g., Plaintiff John Smith] will, and hereby does, move for an order _____ [specify, e.g., granting leave to propound a supplemental demand for inspection of documents]. The motion will be made on the grounds that _____ [specify legal grounds, e.g., Plaintiff John Smith only recently became aware of the existence of the documents that are the subject of the demand, which are relevant to the issue of Defendant Mary Jones' prior knowledge of the product defects alleged in this action].

The motion will be based on this notice of motion, on the _____ [affidavit(s) or declaration(s)] of _____ [name(s)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

NOTES.

General Format of Papers:

See 4.11

General Notice Requirements:

See 4.07, 4.08

Supporting Papers:

See 4.10

Related Form of Declaration:

See 4.55

Related Form of Separate Statement:

See 4.56

Related Form of Memoranda:

See *California Points and Authorities, Ch. 1, Writing Legal Memoranda and Briefs, § 1.10 (Matthew Bender)*; Chs. 80-89, Discovery (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion
PracticeContent & FormCivil ProcedureDiscoveryGeneral Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.55

4.55 Declaration.

Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],

Plaintiff,

vs.

_____[name],

Defendant.

)

)

)

)

)

)

)

)

)

)

)

)

)

NO. _____

DECLARATION OF _____ [name]

IN SUPPORT OF _____ [party,

e.g., DEFENDANT'S] MOTION FOR

_____ [specify]

Date: _____

Time: _____

Location: _____

Judge: _____

Date Action Filed: _____

Trial Date: _____

I, _____ [name], declare:

1. I am _____ [declarant, *e.g.*, an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for Defendant Mary Jones or *other statement as appropriate*] and hereby make this declaration in support of _____ [moving party, *e.g.*, Defendant Mary Jones's] motion for _____ [specify].

2. _____ [Here, and in subsequent paragraphs, set forth relevant facts to which declarant is competent to testify, or of which court must take judicial notice, or of which court may take judicial notice with request that it do

so. If additional facts not within declarant's personal knowledge and not subject to judicial notice are required, secure additional declarations setting forth those facts from persons competent to testify to those facts.]

[Include, if required by statute governing the motion: 3. _____ (specify actions taken to confer with opposing party in a reasonable and good faith attempt to resolve the issues covered by the motion informally.)]

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

_____[date]

_____[signature]

NOTES.

Authority:

CCP § 2015.5

General Format of Papers:

See 4.11

Related Form of Notice of Motion:

See 4.54

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.56

4.56 Separate Statement for Motion.

Separate Statement for Motion.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) SEPARATE STATEMENT IN SUPPORT OF MO-
) TION FOR ORDER _____ [specify,
) e.g., COMPELLING DEFENDANT MARY JONES
) TO ANSWER QUESTIONS AT DEPOSITION AND
) PRODUCE FOR INSPECTION DOCUMENTS DE-
) SCRIBED IN DEPOSITION NOTICE]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

This separate statement is submitted in support of the motion by _____ [moving party, e.g., Plaintiff John Smith] _____ [specify relief sought, e.g., to compel Defendant Mary Jones to answer questions and produce documents or things specified in the deposition notice]. As required under *Cal. Rules of Ct., Rule 3.1345*, the information relating to the discovery request and the responses at issue in the motion is as follows:

DEPOSITION QUESTION _____ [identify specific question, e.g., by transcript page and line]

1. Text of Question: _____ [*specify text of question*].

2. Text of Response(s): _____ [*specify text of response*].

[*Include if relevant: 3. Related Definitions and Instructions: _____ (specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific question and the response to it.)*]

[*Include if relevant: 4. Related Requests and Responses: _____ (if the response to the specific discovery request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the response to it.)*]

[*Include if relevant: 5. Related Pleadings and Other Documents: _____ (summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.)*]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific discovery request*].

[*Set out separately, as above, any further specific questions or items that are the subject of the motion, together with any related information.*]

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*identify*]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1345(a)

General Format of Papers:

See 4.11

Separate Statement Requirement:

See 4.10[3]

Related Form for Notice of Motion:

See 4.54

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Pleading & Practice Motion Practice Supporting Memoranda Civil Procedure Discovery General Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.57

4.57 Notice of Intent to Appear by Telephone.

Notice of Intent to Appear by Telephone.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF INTENT TO APPEAR BY TELE-
_____ [name],	)	PHONE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones], and to his/her attorney of record
_____ [name]:

NOTICE IS HEREBY GIVEN that counsel for _____ [party giving notice, e.g., Plaintiff John Smith]
intends to appear by telephone for hearing of the _____ [specify matter to be heard at which
appearance by telephone is permitted under the California Rules of Court, e.g., motion] noticed for
_____ [date], in [_____ (Department or Division) _____ of] this
court.

_____ [date]

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party giving notice]

NOTES.

Authority:

Cal Rules Ct, Rule 3.670(b), (c); CCP § 367.5

Notice of Appearance by Telephone:

See 4.27[2][g]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.58

4.58 Motion to Shorten Time for Hearing on Motion.

Motion to Shorten Time for Hearing on Motion.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

APPLICATION AND SUPPORTING DECLARA-
TION OF _____ [name] FOR EX
PARTE ORDER SHORTENING TIME FOR SER-
VICE OF NOTICE OF MOTION FOR

_____ [specify, e.g., ORDER COM-
PELLING FURTHER RESPONSE TO WRITTEN
INTERROGATORIES] AND ACCOMPANYING
PAPERS

APPLICATION

I, _____ [name], hereby apply on behalf of _____ [moving party, e.g., Plaintiff John Smith] in the above-captioned matter, for an order, pursuant to *Code of Civil Procedure Section 1005(b)*, shortening time for service of the attached notice of motion for _____ [specify, e.g., order compelling further response to written interrogatories] and supporting papers, to _____ [number] days before the hearing.
Dated: _____.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff _____ [name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. _____ [State facts showing good cause for shortening time for notice of motion, e.g., This is an action for damages arising from an automobile accident. It is currently scheduled to commence trial on July 1, 2005. As more fully set forth in the attached motion and accompanying papers, defendant's responses to plaintiff's first set of interrogatories were evasive and nonresponsive. Plaintiff's accident reconstruction expert needs responsive answers to the subject interrogatories in order to conduct further tests. In the absence of an order shortening time, this motion to compel further answers to interrogatories will not be heard, nor will further answers be obtained in time for the necessary tests to be performed prior to trial].

3. On or about _____ [date], I _____ [informed defendant's attorney, Tom Roe when and where the application would be made by fax and mail. A copy of the fax log and a copy of the proof of mailing is attached as Exhibits A and B. He refused to agree to the proposed shortening of time or attempted to inform defendant and his/her attorney when and where the application would be made but was unable to do so in that my process server went to the address of Tom Roe's office, but the office was vacant and a For Lease sign was on the door. I attempted to fax the document and attempted to phone the office, but the phone continuously rang. The process server's declaration and my declaration and fax log are attached as Exhibits A, B, and C or specify reasons why plaintiff should not be required to inform the defendant or his/her attorney].

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

Dated: _____.

_____ [signature]

NOTES.

Authority:

CCP § 1005; Cal Rules Ct, Rule 3.1300(b)

Shortening Time:

See 4.09

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion

PracticeTime Limitations



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.59

4.59 Ex Parte Application/Motion for Order.

Ex Parte Application/Motion for Order.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	EX PARTE _____ [MOTION or
_____ [name],	)	APPLICATION] FOR ORDER
Defendant.	)	_____ [specify order sought]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____ [MOTION or APPLICATION]

_____ [Party, e.g., Defendant Mary Jones] hereby _____ [moves or applies] for an order _____ [specify order sought]. This _____ [motion or application] is made on the ground that _____ [specify]. [A prior application was made on June 30, 2005 for an ex parte order to Order the Deposition of Dr. Peter Jones. The court refused that application in whole. This application is based on a different state of facts.]
Dated: _____.

_____ [signature]

Attorney for _____ [moving party]

DECLARATION

I, _____ [name], declare:

1. I am the _____ [specify, e.g. attorney of record herein for Defendant Mary Jones].

2. The name, address and telephone number of the _____ [attorney for the opposing party or opposing party], as known to me, is _____ [set out name, address, and telephone number].

[EITHER]

3. On _____ [date], at _____ [time], I informed _____ [name], _____ [name of opposing party or attorney person to whom notice was given], the opposing _____ [party or party's attorney], of the date, time and place that the above application for an order _____ [specify relief sought] would be made.

4. _____ [name of opposing party or attorney person to whom notice was given] informed me that _____ [describe response to notice, including whether or not opposition is expected].

[OR]

4. I attempted, in good faith, to inform _____ [name], the opposing _____ [party or party's attorney], of the time and place that the above application for an order _____ [specify order sought] would be made. I was unable to do so even though _____ [describe efforts made].

[OR]

4. Notice to the _____ [name], the opposing _____ [party or party's attorney], of the above application for an order _____ [specify order sought] should not be required because _____ [specify reason].

[CONTINUE]

5. _____ [Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief rather than setting the matter for hearing on noticed motion].

6. _____ [Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing right to order sought; if facts are not within applicant's personal knowledge, have person with knowledge make an affidavit or execute a declaration under penalty of perjury, attach affidavit or declaration to this application, and incorporate it by reference. Attach as many affidavits or declarations as are

necessary to establish the required facts.]

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

_____ [date]

_____ [signature]

NOTES.

Authority:

Cal Rules Ct, Rules 3.1201, 3.1202(a), (b)

General Format of Papers:

See 4.11

Notice Requirement:

See 4.35

Contents of Application and Supporting Declarations:

See 4.36 -4.38

Related Form of Notice of Decision:

See 4.60

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.60

4.60 Notice of Decision.

Notice of Decision.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF _____
_____ [name],	)	[DECISION <i>or</i> ORDER]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

To the above-named _____ [nonprevailing party, e.g., Defendant] and to
_____ [name], his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on _____ [date], the above-entitled court duly entered
_____ [an order or a decision] _____ [granting or denying] the motion of
_____ [party] for _____ [specify nature of requested decision or order].
Dated: _____

_____ [firm name, if any]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:

CCP § 1019.5(a)

Notice Requirement:

See 4.44

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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Chapter 4 Law and Motion Procedure
IX. FORMS

4.61 Request for Judicial Notice.

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	REQUEST FOR JUDICIAL NOTICE
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____[Party, e.g., Plaintiff John Smith], under the provisions of *Evidence Code* Sections 452, subdivision _____, and 453, requests that the court take judicial notice of _____[specify matter of which notice is requested to be taken, together with sufficient information to enable the court to take notice]

Ohio Revised Code Annotated Sections 4511.29 and 4511.30 (Baldwin 1992), which regulate driving left of the center

of a road and were in effect at all times mentioned in the complaint on file herein.

[OR, court record]

the attached certified copies of the complaint and answer filed in the _____ [specify court, e.g., Superior Court of California, County of Farallon,] in a prior action by plaintiff against this defendant on the same claim as alleged in the complaint on file herein, and the certified copy of the judgment entered in that case on _____ [date], after a full trial on the merits, adjudicating that plaintiff take nothing by his/her complaint.

[OR, fact of common local knowledge]

the fact that this city was severely damaged by an earthquake that struck without warning in the early morning hours of _____ [date], resulting in _____ [specify, e.g., a portion of the city's moving some five feet to the north], on the ground that the earthquake and its results are facts of such common knowledge within the territorial jurisdiction of this court that they cannot reasonably be the subject of dispute.

[OR set forth other matter and CONTINUE]

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party's status and name]

NOTES.

Authority:

Evid Code §§ 451-453; Cal Rules Ct, Rule 3.1113(m)

Judicial Notice:

See 4.10[5], 4.28[2]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.62

4.62 Notice of Motion and Motion for Reference.

Notice of Motion and Motion for Reference.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR REF-
_____ [name],	)	ERENCE, SUPPORTING DECLARATION OF
Defendant.	)	_____ [name] AND MEMOR-
	)	ANDUM IN SUPPORT OF MOTION
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

To _____ [party, e.g., Defendant Mary Jones] and to _____ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [city], _____ [party, e.g., Plaintiff John Smith] will, and hereby does, move for an order under *Code of Civil Procedure* Section 639(a)(5), appointing a referee to hear and determine _____ [any and all discovery motions and disputes in this action or specify limited purpose of appointment] and to report findings and make a

recommendation thereon. The motion will be made on the grounds that _____[specify].

The motion will be based on this notice of motion, on the declaration(s) of _____[name(s)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party's status and name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff or other statement as appropriate].

2. _____ [State facts, in as many paragraphs as necessary, establishing grounds for reference of discovery motions and disputes in the action].

[3. _____ (State facts necessary for findings required by Code Civ. Proc. § 639(d)(6), e.g., Both parties are able, without economic hardship, to pay a pro rata share of referee's fees. Thus, it is appropriate that the referee's fees be allocated to be paid in equal shares by each party).]

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

_____ [date]

_____ [signature]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 639(a)(5), (d)(6); Cal Rules Ct, Rule 3.921

Discovery Referees:

See 4.47 et seq.

Related Form of Order:

See 4.63

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersRefereesGeneral
OverviewCivil ProcedureJudicial OfficersRefereesAppointments



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.63

4.63 Order Appointing Referee.

Order Appointing Referee.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____
ORDER

The motion of _____ [party, e.g., Plaintiff John Smith] for an order for reference came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; defendant appeared by counsel _____ [name].

On proof made to the satisfaction of the court, the court finds that the motion ought to be granted because _____ [specify exceptional circumstances specific to the particular case that require reference].

IT IS ORDERED that the motion be, and it hereby is, granted as follows:

[EITHER, if parties have stipulated to a referee or have submitted nominations and the same name appears on both lists of nominations]

1. _____ [Name and if State Bar member: State bar number _____],

_____[business address], _____[telephone number], is appointed referee to hear evidence and to determine _____[all discovery matters for purposes of this action *or specify issue(s) to be determined*] pursuant to *Code of Civil Procedure Section 639(a)(5)* and to report his/her findings to the court in accordance with the requirements of *Code of Civil Procedure Section 643*. His/her certificate stating that he/she will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court is attached hereto as Exhibit A.

[OR, if referee must be selected]

1. The parties are ordered to meet and confer and to attempt to agree on a nominee to act as referee to hear evidence and to determine _____[all discovery matters for purposes of this action *or specify issue(s) to be determined*] pursuant to *Code of Civil Procedure Section 639(a)(5)* and to report his/her findings and recommendation to the court.

2. The parties are ordered to notify the court of their agreement or failing to agree, each party is ordered to file a written nomination setting forth the name and address of three nominees within _____[number, e.g., 10] days. Thereafter each nominee shall file with the court a declaration setting forth all prior contacts with the parties and counsel herein and any matters required to be disclosed in accordance with subdivisions (D)(2)(f) and (D)(2)(g) of canon 6 of the Code of Judicial Ethics, and setting forth the nominee's consent to serve in this case and the nominee's awareness of and willingness to comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court. Thereafter the court shall select and appoint a referee by a separate order herein.

[CONTINUE]

3. The referee shall have the authority to set the date, time, and place for all hearings determined by the referee to be necessary, to direct the issuance of subpoenas, to preside over hearings, to take evidence, and to rule on the objections, motions, and other requests made during the course of the hearing.

4. The maximum hourly rate that the referee(s) may charge is \$_____. [Add if appropriate: The maximum number of hours for which the/each referee may charge is _____.]

[EITHER]

5. No party has established an economic inability to pay a pro rata share of the referee's fee.

[OR]

5. _____[Name of one or more parties] has/have established an economic inability to pay his/her/its pro rata share of the referee's fees; and _____[name of other party or parties] has/have agreed voluntarily to pay that additional share of the referee's fee.

[CONTINUE]

6. The referee shall submit a written report to the parties and to the court within _____[e.g., 20] days after the completion of the hearing, with findings and recommendations thereon, including a recommendation for allocation of payment and any recommendation for the imposition of sanctions.

7. Any objections to the report shall be served and filed no later than 15 calendar days after the report is mailed to counsel, that any party who objects to the report shall serve and file notice of a request for a hearing, and that copies of the objections and any responses shall be served on the referee and all other parties.

8. _____ [Include other orders as necessary, including any conditions on the reference, and/or terms for paying the referee's fees].

Dated: _____

_____ [signature]

Judge of the _____ Court

NOTES.

Authority:

CCP § 639(c), (d); Cal Rules Ct, Rule 3.922

Related Form of Notice of Motion:

See 4.62

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Judicial Officers Referees Appointments



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Chapter 4 Law and Motion Procedure
IX. FORMS

1-4 MB Practice Guide: CA Civil Discovery 4.64

4.64 Objection to Referee's Report.

Objection to Referee's Report.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) OBJECTIONS TO REPORT OF REFEREE MADE
) PURSUANT TO SPECIAL REFERENCE
) Date: _____
) Time: _____
) Dept.: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____
) Referee: _____ [name(s)]

_____, [Moving party, e.g., Defendant Mary Jones] objects to the report of the referee(s) made pursuant to a special reference under *Code of Civil Procedure* Section 639(a)(5) and filed on _____ [date], on the following grounds:

1. The evidence does not support the decision of the referee.

[ADD, in subsequently numbered paragraphs,
other grounds as appropriate, e.g.:]

2. Errors of law were committed in the _____ [introduction or exclusion] of evidence.

3. Newly discovered evidence.

4. Accident or surprise.

Summary Statement

The present action was commenced by plaintiff to _____ [state nature of action]. An order of reference under *Code of Civil Procedure Section 639* _____ [specify subsection under which reference was made] was made on the _____ [agreement of the parties or motion of _____ (party, e.g., Plaintiff John Smith) or court's own motion] and entered in this action on _____ [date], appointing _____ [name of referee(s)] to _____ [specify duties] and to report to this Court his/her/their decision on _____ [facts to be determined]. A hearing was held on _____ [date] by the referee at which the parties appeared, _____ [specify, e.g., personally and by counsel], and at which evidence in the form of _____ [specify, e.g., testimony and exhibits introduced by the parties] was admitted. The hearing was concluded and the matter submitted to the referee whose report was filed herein on _____ [date].

1. The Evidence Does Not Support the Decision of the Referee.

The referee decided that _____ [set forth portion of decision to which exception is made]. The only evidence before the referee on that issue was _____ [specify, e.g., the testimony of Dr. Peter Jones, which showed _____ [describe nature of pertinent evidence]]. There was no other evidence presented to rebut or contradict this evidence and no other evidence to support the referee's decision.

[2. State additional grounds of exceptions as headings and develop each ground in the paragraph following the heading.]

Dated: _____

_____ [signature]

Attorney for _____ [moving party]

NOTES.

Authority:

CCP § 643(c)

Procedure and Timing of Objections to Referee's Report:

See 4.51

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Judicial Officers Referees Judicial Review



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Chapter 5 Discovery of Electronically Stored Information

1-5 MB Practice Guide: CA Civil Discovery 5.syn

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

§ 5.syn Synopsis to Chapter 5: Discovery of Electronically Stored Information

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Theresa A. Sutton, Esq. n**

2009 Revisions by Publisher's Editorial Staff

FOOTNOTES:

(n3)Footnote *. Partner, intellectual property group, Orrick, Herrington & Sutcliffe LLP, Menlo Park

(n4)Footnote **. Associate, intellectual property group, Orrick, Herrington & Sutcliffe LLP, Meno Park



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Chapter 5 Discovery of Electronically Stored Information
I. STRATEGY

1-5 MB Practice Guide: CA Civil Discovery 5.01

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.01 Scope.

This chapter covers:

- Making requests for electronically stored information [*see* 5.03 -5.12; *Forms*: 5.67, 5.69 -5.73].
- Responding to requests for electronically stored information [*see* 5.13 -5.21, *Forms*: 5.69, 5.74].
- Avoiding production of electronically stored information that is not reasonably accessible [*see* 5.22 -5.25].
- Using a deposition subpoena to obtain electronically stored information from a nonparty [*see* 5.26 -5.29].
- Responding to a deposition subpoena for electronically stored information [*see* 5.30 -5.36].
- Protecting confidentiality and privilege [*see* 5.37 -5.46].
- Admitting electronically stored information at trial [*see* 5.58 -5.65].
- Using forensic experts [*see* 5.47 -5.49].
- Protecting clients and data [*see* 5.50 -5.51; *Forms*: 5.66, 5.68].
- Seeking sanctions for spoliation of evidence [*see* 5.52 -5.57].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryGeneral Overview



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Chapter 5 Discovery of Electronically Stored Information
I. STRATEGY

1-5 MB Practice Guide: CA Civil Discovery 5.02

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.02 Objective and Strategy.

A vast amount of information is stored in computers and other electronic devices. Such information is frequently essential to prove the case of one or more of the parties to litigation. Obtaining such evidence so that it can be examined and introduced at trial, and ensuring that it is preserved from destruction until such time as it can be obtained, can be a critical part of a party's litigation strategy.

Electronically stored information is no less discoverable than paper evidence. However, discovery of electronically stored information presents special challenges, including preservation, spoliation, form of production, privacy, and privilege. In 2009, California enacted the Electronic Discovery Act [Stats. 2009 ch. 5] to address these issues. The Act took effect immediately, as an urgency measure, on June 29, 2009 [see Kiesel & Williams, "California E-Discovery: Analysis of the 2009 Legislation and Rules" (LexisNexis 2009)]. Conforming changes to *Cal Rules Ct, Rule 3.724*, were approved by the Judicial Council with an effective date of August 14, 2009.



Consider:

The Electronic Discovery Act is modeled on federal rules governing e-discovery that took effect December 1, 2006 [see *FRCP 16(b)(3)(B)(iii)*, *(iv)*, *26(b)(2)(B)*, *(b)(5)*, *(f)(3)(c)*, *34(b)(1)(C)*, *(b)(2)(D)*, *(b)(2)(E)*, *37(e)*]. The federal rules were one of the first attempts nationally to address e-discovery in a comprehensive manner, and as a result state courts have often looked to these rules in attempting to resolve e-discovery issues in the absence of state law. As a result, California courts may be expected to look to federal decisions construing the federal rules--some of which are discussed in this chapter--for guidance, at least until California courts have had a chance to interpret California's Electronic Discovery Act.

For purposes of California law, "electronically stored information" (commonly referred to as "ESI") is "information that is stored in an electronic medium" [see *CCP § 2016.020(e)*]. "Electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" [see *CCP § 2016.020(d)*]. Electronically stored information can be found in such sources as e-mail, computer hard drives, network servers, personal digital assistants (PDAs), backup tapes, temporary files and metadata.



Strategic Point--All Parties: Hidden ESI.

Some discoverable ESI may not be obvious. For example, computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. The same is true of information describing the history, tracking, or management of an electronic file (sometimes called "metadata") [see *FRCP 26(f)*, advisory committee's note]. Federal courts generally have ordered the production of metadata when it is sought in an initial document request and the producing party has not yet produced the documents in any form [see *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.* (S.D.N.Y. 2008) 255 F.R.D. 350, 354, 357 (detailed discussion of production of metadata)]. Metadata was also used in California state courts before the Electronic Discovery Act [*People v. Hawkins* (2002) 98 CA 4th 1428, 1450, 121 CR 2d 627 (allowing use of computer clock access times)].



Cross References:

Comprehensive discussion of electronic discovery in California, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

DeMeo, California Deposition and Discovery Practice, Ch. 2A, Computer Records (Matthew Bender).

ESI in federal practice, see Moore's Federal Practice Ch. 37A, Discovery of Computer-Based Information (Matthew Bender 3d ed.).

Discussion on discovery of computer records in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverability



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Chapter 5 Discovery of Electronically Stored Information
II. REQUESTING ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.03

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.03 CHECKLIST: Requesting Electronically Stored Information.

☐ Notify opposing party that litigation is imminent and that opposing party has a duty to preserve evidence.

Authority:

CCP § 2023.010; Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 (decided under former CCP § 2023)

Discussion:

See 5.04, 5.05

Form:

See 5.67

☐ Seek ex parte relief for entry of a preservation order if there is reason to believe that despite request for suspension of opponent's retention and destruction policy, evidence will be destroyed or notice will result in destruction of evidence.

Authority:

Cal Rules Ct, Rule 3.1200-3.1207; Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385

Discussion:

See 5.05

☐ Meet and confer regarding preservation of electronically stored information and related discovery issues.

Authority:

Cal Rules of Ct, Rules 3.724, 3.728(13)

Discussion:

See 5.06

Form:

See 5.68, 5.69

☐ Determine sources of potential electronic discovery:

- ☐ Electronic mail.
- ☐ Voice mail.
- ☐ Computer hard drives.
- ☐ Network servers.
- ☐ PDAs, smartphones and other hand-held devices.
- ☐ Mass storage devices:
 - ☐ Backup tapes.
 - ☐ DVD.
 - ☐ CD.

- ☐ Web servers.
- ☐ Internet forums and message boards.

Discussion:

See 5.07

☐ Serve a small number of interrogatories early in the case to determine:

- ☐ If opponent has a records retention policy.
- ☐ Who manages it.
- ☐ Whether they have suspended their retention policy.

- ☐ Potential sources of information.

Authority:

CCP §§ 2017.710, 2030.010 et seq.

Discussion:

See 5.08[1]

Form:

See 5.08[1]

Interrogatory Checklist and Forms:

See Ch. 9, Interrogatories

- ☐ Take deposition of opponent's person most knowledgeable (PMK) regarding opponent's computers, networks, retention and destruction practices, policies, and procedures.

- ☐ Question PMK regarding:

- ☐ Retention and destruction policy.
- ☐ Whether they have suspended the policy.
- ☐ Who manages their records.
- ☐ Where they store backup tapes.
- ☐ Identification of key witnesses for additional sources of evidence.

Authority:

CCP § 2025.230(a)(3), (4)

Discussion:

See 5.08[2]

Forms:

See 5.71; Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California; Ch. 8, Depositions on Written Questions

- ☐ Seek physical inspection of opponent's computer hard drives, network, or other electronic storage units.

Authority:

CCP § 2031.010(c)

Discussion:

See 5.08[3]

- ☐ Consider inspecting computers and networks onsite.

Authority:

CCP § 2031.010(d)

Discussion:

See 5.08[4]

- ☐ Propound document requests.

Authority:

CCP § 2031.010

Discussion:

See 5.08[5]

Form:

See 5.72

- ☐ Propound demand for inspection, copying, testing and/or sampling of electronically stored information, specifying form of production.

Authority:

CCP §§ 2031.010, 2031.030(a)(2)

Discussion:

See 5.09 -5.10

Form:

See 5.73

- ☐ Work with responding party to ensure minimal disruption to business.

Authority:

Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055 ; Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1421, 130 CR2d 385

Discussion:

See 5.11

- ☐ Use the Internet for additional information beyond discovery.

Authority:

Pullin v. Superior Court (2000) 81 CA4th 1161, 1165 n4, 97 CR2d 447

Discussion:

See 5.12

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic
DiscoveryPreservation



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Chapter 5 Discovery of Electronically Stored Information
II. REQUESTING ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.04

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.04 Electronically Stored Information Is Discoverable.

Any party may demand that any other party produce electronically stored information for inspecting, copying, testing or sampling [*CCP* § 2031.010(a), (e)].



Cross Reference:

Definition of "electronically stored information" see 5.02.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverability



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Chapter 5 Discovery of Electronically Stored Information
II. REQUESTING ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.05

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.05 Party Seeking Discovery Should Initially Send Letter Regarding Preservation of Evidence.

As soon as litigation is imminent, counsel should notify the opposing party of its duty to preserve evidence [CCP § 2023.010; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511] . This notice is usually referred to as a "preservation letter" or "preservation demand."

Strategic Points--Requesting Party:



- The preservation letter should specifically refer to different types of electronically stored information.
- If counsel for the party seeking production of ESI has a reasonable belief that, despite a request for suspension of the responding party's retention and destruction policy, evidence will be destroyed or that notice will result in the certain destruction of evidence, the party seeking production preliminarily may seek ex parte relief for the entry of a preservation order. Even if the party seeking production loses at this stage, the responding party will have notice of its obligation to preserve evidence [Cal Rules Ct, Rule 3.1200-3.1207; *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385] .



Cross References:

Sample preservation letter, see 5.67.

Discussion regarding preservation of evidence during litigation, see *Ch. 14, Preservation of Evidence, 14.13.*

Discussion regarding spoliation of evidence, see 5.52 -5.57.

Detailed discussion of preservation letters, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferencing, and Case Management Conference, 5.09-5.13.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryPreservation



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Chapter 5 Discovery of Electronically Stored Information
II. REQUESTING ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.06

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.06 Parties Must Meet and Confer Regarding Preservation of Electronically Stored Information and Related Discovery Issues.

The parties must meet and confer, in person or by telephone, no later than 30 calendar days before the date set for the initial case management conference, to consider various issues specified by statute [*Cal Rules Ct, Rule 3.724*; see also *Cal Rules Ct, Rule 3.727* (other matters to be considered)]. They are specifically required to consider the following issues in connection with electronically stored information [*Cal Rules Ct, Rule 3.724(8)*]:

- Any issues relating to the preservation of discoverable electronically stored information.
- The form or forms in which information will be produced.
- The time within which the information will be produced.
- The scope of discovery of the information.
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production.
- The method for asserting or preserving confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings
- How the cost of production of electronically stored information is to be allocated among the parties.
- Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.

The court's case management order may include appropriate orders relating to the discovery of electronically stored information [*Cal Rules of Ct, Rule 3.728(13)*].



Strategic Points--All Parties:

- In practice, it is best to initiate informal discussion and negotiations regarding e-discovery prior to the format meet-and-confer conference, so that all parties will have an idea of what to expect and, more importantly, how to prepare.
- It is essential that both parties prepare carefully for the meet-and-confer conference. Parties should be informed about their own client's data storage methods and be prepared to answer the opponent's questions in that regard, as well as informing the other party about what e-discovery they plan to conduct. Failure to prepare adequately invites sanctions.



Strategic Point--Requesting Party:

- The statute does not require that issues relating to electronically stored information must be considered at the same meeting or conference where other issues are discussed. If e-discovery will constitute a significant part of the total discovery in the litigation, a separate meeting or conference specifically to cover e-discovery issues should be considered.
- Counsel should use the meet and confer process to negotiate agreements on issues that are likely to arise during discovery of electronically stored information, such as preservation of evidence, confidentiality, and the format of production. These agreements can become part of the court's case management order.



Cross Reference:

Sample preservation order, see 5.68.

Sample electronically stored information protocol, see 5.69.

Detailed discussion of meeting and conferring regarding preservation of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management Conference, 5.14-5.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryPreservation



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Chapter 5 Discovery of Electronically Stored Information
II. REQUESTING ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.07

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.07 Sources of Electronically Stored Information.

5.07[1] Electronic Mail. E-mail is probably the most common type of electronically stored information. If produced electronically, the attached metadata (information describing the history, tracking, or management of an electronic file) can provide the requesting party with valuable information that is not available in traditional, hard copy documents.

5.07[2] Voice Mail. In some instances, voice data may be recovered and searched.



Strategic Point--Requesting Party:

Be sure to ask in discovery what, if any, voice mail storage capabilities the opposing party may have.

5.07[3] Computer Hard Drives. Computer hard drives contain documents generated by the user, files and information generated by the computer, and evidence of activity through use of the computer (such as when files are created, deleted, downloaded, or transmitted, and how).

5.07[4] Network Servers. Corporate parties may have network servers set up to direct electronic traffic, store shared files, and back up computer systems. These servers often are backed up on a regular basis and can contain snapshots of a company's entire network of data.

5.07[5] PDAs, Smartphones and Other Hand-held Devices. Hand-held devices such as Blackberrys and I-Phones that combine computing, telephone, Internet and networking features are a good source for e-mail, phone records, and personal or business schedules.

5.07[6] Mass Storage Devices. Mass storage devices store large amounts of data and include all types of disk drives, tape drives, and optical disks. The main types of mass storage are:

- Backup tapes.

- DVDs.

- CDs.

5.07[7] Web Servers. Web servers may be part of the responding party's network servers or they may be standalone stations. Web servers may contain archive copies of the responding party's website contents. They also should contain a directory of who has accessed the server.

5.07[8] Internet Forums and Message Boards. Internet forums and message boards are online discussion sites that usually center on a specific interest or topic.



Strategic Point--Requesting Party:

- As Internet forums and message boards are generally for specific interest groups, users have less fear about posting information, and, thus, they are a particularly good source of information about an opponent and his or her viewpoints, quirks, or complaints.
- An opponent may operate a business from his or her home or use his or her company-issued laptop from home. He or she may access personal e-mail through an Internet service provider (ISP), and may post to Internet forums or message boards. Interrogatories may include requests for information regarding an opponent's personal e-mail provider and ISPs.



Warning:

Subpoenas to email service providers or ISPs seeking the contents of e-mails stored on their facilities likely are unenforceable under the Stored Communications Act [*18 USC § 2701-2712*; see *O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1442-1447, 44 CR3d 72] .



Cross Reference:

Discussion of Stored Communications Act, see 5.45[1].

Detailed discussion of sources of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, Understanding Electronic Evidence, 1.23-1.35.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverability



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.08 Counsel Should Obtain Evidence About How Electronically Stored Information Is Maintained.

5.08[1] Counsel May Send Interrogatories Early in the Case. Counsel may wish to serve a small number of interrogatories early in the case to determine whether an opponent has a records retention policy and who manages it. Counsel should also confirm that they have suspended their retention policy in response to counsel's request that they do so. Interrogatories also are a good method for identifying potential sources of information [*CCP* § 2030.010].

Properly formulated questions should focus on what media the opponent uses (computers, peripheral storage devices, shared servers), how the opponent stores its data, the estimated cost and burden of retrieval, the identity of the manager of data and systems, and retention and destruction policies.

► **Cross References:**

Sample interrogatories, see 5.70.

Checklist, discussion, and forms, see Ch. 9, Interrogatories.

Learning about opponent's ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, Planning E-Discovery, 4.09.

5.08[2] Counsel Should Take Deposition of Person Most Knowledgeable Regarding Opponent's Computer Services. An early deposition of the opponent's person most knowledgeable ("PMK") will help counsel create a discovery plan. The deposition notice for the PMK must provide a general description of the information requested that is sufficient to help the opponent identify the person or persons who may be most knowledgeable in the area requested. The PMK can help counsel to understand the retention and destruction policy and whether they have suspended it. Counsel will want to know who manages their records and where they store backup tapes. Counsel also can use this opportunity to identify key witnesses for additional sources of evidence. The first deposition should be of the person most knowledgeable about the opponent's computers, networks, retention and destruction practices, policies, and procedures [*CCP* § 2025.230(a)(3), (4)].

 Cross References:

Sample deposition questions, see 5.71.

Checklists, discussion and forms, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside California.

5.08[3] Counsel Should Demand Inspection of Opponent's Computer System Based On PMK Answers.

Based on the information learned through the PMK deposition and responses to interrogatories, counsel should ask to physically inspect the opponent's computer hard drives, network, or other electronic storage units, and test or sample data [CCP § 2031.010(c)].



Strategic Point--Responding Party:

Counsel should offer to provide a forensic copy of the requested devices, and be sure to conduct a preliminary review for privilege and work product protection.

Checklist, discussion and forms, see Ch. 10, Inspection of Documents, Tangible Things and Land.

5.08[4] Counsel May Request Onsite Inspection of Networks and Computers. Counsel should consider whether it makes sense to inspect computers and networks onsite. The requesting party should offer to do so after business hours, when disruption is less likely [CCP § 2031.010(d)].



Strategic Points--Requesting Party:

It is important to retain a qualified forensic expert for the examination of the opposing party's computer systems. The court is more likely to issue an order for inspection if the request is carefully limited in scope and the court is provided with an expert's declaration specifying the method by which the inspection will be conducted.

Another reason for using a forensic expert is that if counsel performs the examination personally, he or she becomes a witness as to how the material was located and downloaded.

 Cross References:

Discussion regarding using forensic experts, see 5.47 -5.49.

Checklist, discussion and form, see Ch. 10, Inspection of Documents, Tangible Things and Land.

5.08[5] Propound Document Requests for Additional Information. Counsel should request documents relevant to information gained as a result of the interrogatories and deposition of PMK [CCP § 2031.010(b)].

 Cross References:

Discussion regarding interrogatories, see 5.08[1].

Discussion regarding deposition of PMK, see 5.08[2].

Sample demand for inspection and copying of documents, see 5.72.

Checklist, discussion and form, see Ch. 10, Inspection of Documents, Tangible Things and Land.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryPreservationCivil ProcedureDiscoveryMethodsInterrogatoriesCivil ProcedureDiscoveryMethodsOral
DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.09 Counsel Should Make Request to Inspect, Copy, Test and/or Sample Opponent's Electronically Stored Information.

As amended in 2009 to allow for the discovery of electronically stored information, the Civil Discovery Act allows a party to *test* and *sample* electronically stored information in addition to inspecting and copying it [see *CCP* § 2031.010(a), (e)]. Under this provision, a party may review a small sample of electronically stored information for relevant information and based on the results, request broader access [see, e.g., *AAB Joint Venture v. United States (Fed Cl 2007)* 75 *Fed Cl* 432, 444 (court ordered defendant to restore a portion of backup tapes from time periods specified by plaintiff, after which the parties would have an opportunity to argue whether or not additional restoration of backup tapes was likely to lead to production of relevant evidence)].

► **Cross Reference:**

Demand for production of electronically stored information, see 5.73.

Inspecting, testing and sampling ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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5.10 Requesting Party May Specify Form of Production.

A party demanding the production of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced [CCP § 2031.030(a)(2)].



Strategic Point--Requesting Party:

Consider requesting that electronically stored information be produced in its native format, which includes metadata (hidden information describing the history, tracking, or management of an electronic file). Metadata may reveal useful details such as a file's date of creation, author, dates of access, dates of modification and revision history.



Cross Reference:

Demand for production of electronically stored information, see 5.73.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.11 Requesting Party Should Work to Minimize Disruption to Responding Party.

Regardless of the method or means chosen to produce or review electronically stored information, counsel should work with the responding party to ensure minimal disruption to his or her business [see, e.g., *Playboy Enters. v. Welles* (SD Cal 1999) 60 F Supp2d 1050, 1055 ; *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 CA4th 1414, 1421, 130 CR2d 385] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethods



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5.12 Counsel Should Use Internet to Obtain Information on Opposing Party.

Nothing requires counsel to prepare the case through formal discovery only. Counsel should not hesitate to use the Internet to gather evidence. Counsel should find out all he or she can about the opponent to help develop a discovery plan. The Internet, generally, is a good place to find financial and background information. Potential sources of information include:

■ Corporation's/Individual's website:

- ☐ Press releases.
- ☐ Product information.
- ☐ Officer and director profiles.
- ☐ Investor relations materials.

■ Internet search engines:

- ☐ google.com
- ☐ bing.com
- ☐ yahoo.com
- ☐ ask.com

 blingo.com

- Internet forms and message boards.
- Blogs.



Finding and Investigating Corporate and Business Records and Filings Using Online Resources:

Many resources are available online for investigating corporations. These resources can help counsel find general information or leads for developing more focused inquiries. For example, helpful resources at *lexis.com* include:

- SEC Filings and information.
- UCC Filings.
- Business and Corporate Information.



Strategic Point--Requesting Party:

Evidence obtained in any lawful manner, even from an opponent, without using formal discovery may be introduced at trial. Evidence is not inadmissible because obtained by investigation rather than formal discovery. Information found through an informal investigation is not subject to the California Discovery Act and is not subject to discovery cutoff dates [*Pullin v. Superior Court (2000) 81 CA4th 1161, 1165 n4, 97 CR2d 447*]. Another advantage of evidence obtained from the Internet by informal investigation is that it may be protected as attorney work product, and because it may not be discoverable, it is a good source for impeachment of witnesses.



Warning--Responding Party:

Counsel should always do a thorough Internet search on his or her own client, as well as opposing parties, to identify materials the opposing party may have obtained for impeachment and to enable counsel to be prepared to refute inaccurate information that may have found its way to the Internet. It is also important to review the client's own websites before responding to discovery or preparing a witness for deposition, in order to identify what representations and assertions have been made by the client and posted publicly on the client's website. Frequently, representations made on a website for marketing or public relations purposes may be at odds with the client's claims or defenses in litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethods



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III. RESPONDING TO REQUESTS FOR ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.13

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.13 CHECKLIST: Responding to Requests for Electronically Stored Information.

☐ Perform a diligent search and a reasonable inquiry in order to comply with a demand for production of electronically stored information. Inspection must include:

- ☐ Computer hard drives.
- ☐ Disks.
- ☐ Peripheral storage devices.
- ☐ Networks.

Authority:

CCP § 2031.230; Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050

Discussion:

See 5.14

☐ If responding party objects to specified form for producing electronically stored information, state in response the form in which responding party intends to produce each type of information.

Authority:

CCP § 2031.280(c)

Discussion:

See 5.15

Form:

See 5.74

- ☐ If the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, identify types or categories of sources of electronically stored information that are not reasonably accessible.

Authority:

CCP § 2031.210(d)

Discussion:

See 5.20

Form:

See 5.74

- ☐ If any of the following conditions exists, consider seeking limits on frequency and extent of discovery:

- ☐ It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.
- ☐ The discovery sought is unreasonably cumulative or duplicative.
- ☐ Party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought
- ☐ Likely burden or expense of proposed discovery outweighs likely benefit, taking into account amount in controversy, resources of the parties, importance of the issues in the litigation, and importance of requested discovery in resolving the issues.

Authority:

CCP §§ 2031.060(f), 2031.310(g)

Discussion:

See 5.21

- ☐ Conduct privilege review before turning any electronically stored information over to opposing party:

Authority:

Evid Code § 917(b)

Discussion:

5.16, 5.36-5.46

- ☐ Produce electronically stored information in one of the following forms:

- ☐ Form agreed upon by parties or ordered by court.
- ☐ Form specified in demand.
- ☐ Form in which it is ordinarily maintained.
- ☐ Form that is reasonably usable.

Authority:

CCP § 2031.280(d)

Discussion:

See 5.17

Form:

See 5.69

- ☐ If necessary, at reasonable expense of demanding party, use detection devices to translate any data compilations included in demand into reasonably usable form.

Authority:

CCP § 2031.280(e)

Discussion:

See 5.18

- ☐ If requested, produce for inspection entire computer or hard drive.

Authority:

TBG Ins. Servs. Corp. v. Superior Court (2002) 96 CA4th 443, 448, 117 CR2d 155 ; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 89 CR2d 353

Discussion:

See 5.19

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.14 Responding Party Must Perform a Diligent Search.

The responding party is required to perform a diligent search and a reasonable inquiry in order to comply with a demand for production of electronically stored information. Such a search must include electronic storage devices, including computer hard drives, disks, peripheral storage devices, and networks [CCP § 2031.230; *Playboy Enters. v. Welles* (SD Cal 1999) 60 F Supp 2d 1050] .



Strategic Point--Responding Party:

- Develop an internal discovery plan for ESI. If a request for ESI is received during discovery, at the earliest possible the respondent's counsel should develop a plan in conjunction with the client to locate and identify responsive documents, including identifying persons who have substantive knowledge related to the conduct at issue, or knowledge of how the client produces, controls, stores and retrieves ESI. Then counsel should document the efforts taken to obtain this information from those persons, as well as the efforts taken by counsel to understand how the client produces, controls, stores and retrieves ESI. An internal ESI discovery plan is both a road map for locating responsive documents and a shield against charges of bad faith discovery conduct if undiscovered responsive documents surface at a late date in the litigation.
- Keyword searching is a generally accepted method for identifying responsive documents and narrowing the data-set to a manageable volume. Reaching agreement with opposing counsel on a set of search terms and a strategy for implementing the search will eliminate disputes over whether the responding party fulfilled its duty to conduct a reasonable search [see *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company* (SDNY 2004) 256 FRD 134, 136 ("where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives' ")].

- In order to ensure that a client has performed a diligent search, counsel must take steps to understand how the client's computer system is organized [see *Qualcomm Inc. v. Broadcom Corp. (SD Cal 2010) 2010 US Dist LEXIS 33889, *10-11* (massive cache of critical documents remained undiscovered by responding party's attorneys and unproduced by the client until after trial in part because "outside counsel did not obtain sufficient information from any source to understand how [client's] computer system is organized: where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, what records are maintained regarding the search for, and collection of, documents for litigation, etc.")].

- Counsel must ensure that a client's search reaches all employees who may have discoverable information [see *Qualcomm Inc. v. Broadcom Corp. (SD Cal 2010) 2010 US Dist LEXIS 33889, *10* ("The Court was not presented with any evidence establishing that either in-house lawyers or outside counsel met in person with the appropriate ... engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection")].



Cross References:

Analyzing Collected ESI to Narrow Scope of Production, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.29-9.35.

Keyword search strategy, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.33.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureDiscoveryElectronic DiscoveryPrivileged Information



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.15 Responding Party May Object to Specified Form of Production.

The party demanding the production of electronically stored information may specify the form of production for each type of electronically stored information [CCP § 2031.030(a)(2)]. The responding party may object to the specified form and may state in its response the form in which it intends to produce each type of information [CCP § 2031.280(c)].



Strategic Point--Responding Party:

Requesting parties often will specify that electronically stored information be produced in its native format, which includes metadata--hidden information describing the history, tracking, or management of an electronic file. Although production in native format is almost always less expensive than production in other formats, responding counsel often prefer to incur the additional expense to produce electronically stored information in some other form to avoid revealing metadata. Federal courts generally have ordered the production of metadata when it is sought in an initial document request and the producing party has not yet produced the documents in any form [see *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.* (SDNY Nov 21, 2008) 255 FRD 350, 354, 357 (detailed discussion of production of metadata)].



Cross Reference:

Response to Demand for Production of Electronically Stored Information, see 5.74.

Form of production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.47-9.56.

Objecting to form of production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, Opposing Demands for Production of Electronic Evidence in California Court, 10.07[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethods



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.16 Responding Party Should Conduct Privilege Review Before Producing Data.

Before actually producing data to the requesting party, the respondent must conduct a "privilege review" to weed out data that is protected from discovery by a legal privilege, such as the attorney-client privilege, or other data otherwise legally protected from discovery [*see Evid. C § 915(b)*].



Cross Reference:

Privilege and privacy issues in e-discovery, see detailed discussion in 5.37 -5.46.

Reviewing ESI for responsiveness and privilege, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.36-9.46.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryPrivileged
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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.17 Responding Party Must Produce Information in Form in Which It Is Ordinarily Maintained or Reasonably Usable Form.

Unless the parties otherwise agree or the court otherwise orders, if a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same electronically stored information in more than one form [CCP § 2031.280(d)].

If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature [see *L.H. v. Schwarzenegger* (ED Cal May 14, 2008) 2008 US Dist LEXIS 86829, *10-11 (quoting FRCP 34 Advisory Committee Notes to the 2006 amendment) (defendants improperly converted documents from their original format which had been searchable and sortable, into PDF files that did not have these capabilities)].



Strategic Point--Responding Party:

- Electronic documents are commonly produced in "TIFF" or "PDF" image format, together with extracted text and a "load file" (computer instructions for loading the data), which can be loaded into a litigation software package (such as Concordance or Summation) for review. Parties then agree to retain the original native documents, including metadata, for further possible review.
- It is common practice to produce databases in native format. Because databases are constructed in "bits and pieces" of information, it is usually not feasible to print out a database in image format. Most databases can only be meaningfully accessed in native format using search commands such as SQL (search query language). This sometimes requires a reviewing party to obtain a software license from a third party vendor for viewing the database data.



Cross Reference:

For a sample electronically stored information protocol containing detailed instructions regarding the format in which electronically stored information will be produced, see 5.69.

Discussion of common forms of production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.06.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic
DiscoveryPreservationCivil ProcedureDiscoveryMethods



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.18 Responding Party Must Translate Data Compilations.

If necessary, the responding party at the reasonable expense of the demanding party must use detection devices to translate any data compilations included in the demand into reasonably usable form [*CCP* § 2031.280(e); see *Person v. Farmers Ins. (1997) 52 CA4th 813, 818, 61 CR2d 30*].



Cross Reference:

Producing ESI from a database, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.11[3], 9.35.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryDiscoverabilityEvidenceDocumentary EvidenceWritingsSummaries



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III. RESPONDING TO REQUESTS FOR ELECTRONICALLY STORED INFORMATION

1-5 MB Practice Guide: CA Civil Discovery 5.19

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.19 Responding Party Must Produce for Inspection Entire Computer or Hard Drive If Requested.

The requesting party may seek production of its opponent's hard drive or other electronic storage devices for inspection [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 448, 117 CR2d 155 ; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 89 CR2d 353] .



Warning--Privacy and Privilege Issues:

Before producing any electronic storage devices, counsel should negotiate a stipulated protective order with opposing counsel to protect the use and disclosure of confidential information and ensure compliance with privacy laws. Counsel should also conduct a review for privilege or confidentiality prior to producing it to the opposing party. A redacted hard drive or backup tape should be provided, with a privilege log.



Cross Reference:

Discussion of privacy obligations, see 5.42 -5.44.

Discussion of privilege logs, see *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.20[4][b].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.20 Responding Party May Object That Source Is Not Reasonably Accessible.

In its response to a demand for discovery of electronically stored information, a party may object on the grounds that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense. The responding party must identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By objecting and identifying the type or category of sources that are not reasonably accessible, the responding party preserves its objections relating to that electronically stored information [*CCP* § 2031.210(d)].

➤ Cross Reference:

Seeking protective order when ESI is not reasonably accessible, see 5.23.

Court's power to allow discovery of information that is not reasonably accessible on showing of good cause, see 5.24.

Court's power to allocate discovery costs, see 5.25.

Objecting that source is not reasonably accessible, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, Opposing Demands for Production of Electronic Evidence in California Court, 10.07[2].

Whether a source is reasonably accessible largely depends on the media on which it is stored [*Best Buy Stores, L.P. v. Developers Diversified Realty Corp.* (D Minn 2007) 247 FRD 567, 570 (database was not reasonably accessible because it would have to be restored from original sources at a cost of at least \$124,000 plus a monthly storage cost of over \$27,000); see *Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am.* (WDNC Nov 19, 2007) 2007 US Dist LEXIS 88820 (e-mails in LotusNotes format were reasonably accessible when cost of producing them was no more than \$20,000)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.21 Responding Party May Seek Limits on Frequency or Extent of Discovery.

The court must limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [CCP §§ 2031.060(f), 2031.310(g)]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.
- The discovery sought is unreasonably cumulative or duplicative.
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.



Cross Reference:

Objecting to demand that is cumulative or burdensome, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, Opposing Demands for Production of Electronic Evidence in California Court, 10.07[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryProtective Orders



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Chapter 5 Discovery of Electronically Stored Information
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1-5 MB Practice Guide: CA Civil Discovery 5.22

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.22 CHECKLIST: Objecting to Production Of Electronically Stored Information That Is Not Reasonably Accessible.

☐ If electronically stored information is sought is from a source that is not reasonably accessible because of undue burden or expense, seek a protective order.

Authority:

CCP § 2031.060(c)

Discussion:

See 5.23

☐ If court finds good cause for production of electronically stored information but the source of ESI is not reasonably accessible because of undue burden or expense, consider requesting that court impose conditions for discovery of the electronically stored information, including allocation of cost of discovery.

Authority:

CCP § 2031.060(e)

Discussion:

See 5.24 -5.25

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsRequests for

Production & InspectionCivil ProcedureDiscoveryUndue Burdens



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.23 Responding Party May Seek Protective Order.

A party from whom electronically stored information is sought may seek a protective order on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense. The party seeking the protective order bears the burden of demonstrating that the information is from a source that is not reasonably accessible [CCP § 2031.060(c)].

Distinguish:

FRCP 26(b)(2) contains a similar provision regarding electronically stored information that is not reasonably accessible. However, under *FRCP 26(b)(2)*, the responding party need not produce the electronically stored information that is not reasonably accessible, and if the party seeking discovery disagrees, it must bring a motion to compel. Under *CCP § 2031.060(c)*, in contrast, the responding party cannot simply decline to produce the information; it must bring a motion for a protective order. Once the matter is before the court, under either the California or federal rules, the party from whom discovery is sought bears the burden of showing that the information is not reasonably accessible because of undue burden or cost [see *CCP § 2031.060(c)*, *FRCP 26(b)(2)(B)*].

A responding party claiming that electronically stored information is inaccessible must present the court with detailed information demonstrating undue burden or cost; a mere cost estimate and conclusory characterizations of their electronically stored information as inaccessible will not suffice [see *Mikron Indus. v. Hurd Windows & Doors, Inc.* (WD Wash Apr 21, 2008) 2008 US Dist LEXIS 35166, *6] .

Judge's Perspective--Consider Using Expert to Establish Inaccessibility of ESI:

When making the claim that ESI is inaccessible, consider using an expert to present the court with detailed information demonstrating undue burden or cost. An expert may be able to better articulate the fact of inaccessibility. Attorney declarations should not be used to establish the factual predicates for inaccessibility, as doing so could make the attorney a witness and opens up the possibility that the attorney could be deposed by the opposing party.

► **Cross Reference:**

General discussion of protective orders to limit scope of discovery, see *Ch. 1, Strategy and Planning, 1.15*.

General discussion of protective orders to limit frequency or extent of discovery, see *Ch. 1, Strategy and Planning, 1.16*.

Seeking protective order against demand for ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, Seeking or Opposing Protective Order, 11.03-11.07.

Form:

Motion for protective order limiting discovery, see *Ch. 1, Strategy and Planning, 1.23*.

Protective order limiting discovery, see *Ch. 1, Strategy and Planning, 1.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.24 Discovery Is Allowed on Showing of Good Cause.

Even if the responding party establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to limitations on frequency and extent [*CCP § 2031.060(d)*]. The court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery [*CCP § 2031.060(e)*].

CCP § 2031.060(d) contains no definition of good cause. However, the 2006 advisory committee note to federal counterpart *FRCP 26(b)(2)* lists the following seven factors that may be appropriate in determining whether good cause exists:

- The specificity of the discovery request.
- The quantity of information available from other and more easily accessed sources.
- The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources.
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.
- Predictions as to the importance and usefulness of the further information.
- The importance of the issues at stake in the litigation.
- The parties' resources.

In determining whether good cause exists, federal courts have considered these factors, along with the cost of the proposed discovery [*see Peskoff v. Faber (DDC 2008) 251 FRD 59, 60-61* (in \$2.5 million case, good cause existed for

\$33,000 forensic examination because information sought was highly relevant, not duplicative, and could not be obtained from other sources); *Petcou v. C.H. Robinson Worldwide, Inc.* (ND Ga Feb 25, 2008) 2008 US Dist LEXIS 13723, at *2-5 (cost of retrieving e-mails from backup tapes outweighed its likely benefit when requests were overbroad and a response would cost hundreds of thousands of dollars)].

**Cross Reference:**

Demonstrating good cause, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, Seeking or Opposing Protective Order, 11.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryDiscoverability



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5.25 Court May Allocate Expense of Discovery.

A court that orders discovery of electronically stored information from a source that is not reasonably accessible may allocate the expense of discovery [*CCP* § 2031.060(e)]. Interpreting a similar provision in *FRCP* 26(b)(2)(B), federal courts have held that court-ordered cost-shifting is inappropriate when electronic data is accessible [see *Cason-Merenda v. Detroit Med. Ctr.* (ED Mich July 7, 2008) 2008 US Dist LEXIS 51962, *11-12] .

Federal courts also have been unwilling to shift costs to the requesting party when the costs resulted from the responding party's inadequate efforts to search for and preserve electronically stored information [see, e.g., *Peskoff v. Faber* (DDC 2008) 251 FRD 59, 62 (refusing to shift cost of forensic examination when it was necessitated by responding party's inadequate search for electronically stored information and failure to deactivate network maintenance tools that automatically delete electronically stored information); *Henry v. Quicken Loans* (ED Mich Feb 15, 2008) 2008 US Dist LEXIS 11417, at *17 (refusing to shift costs to the requesting party when those costs directly resulted from the responding party's under-inclusive search)].



Cross Reference:

Allocation of expense, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, Seeking or Opposing Protective Order, 11.12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.26 CHECKLIST: Using a Deposition Subpoena to Obtain Electronically Stored Information From a Nonparty.

- ☐ Draft subpoena to be served on nonparty requesting to inspect, copy, test or sample electronically stored information.

Authority:

CCP § 1985.8(a)(1)

Discussion:

See 5.27

- ☐ Specify form or forms in which each type of electronically stored information is to be produced.

Authority:

CCP § 1985.8(b)

Discussion:

See 5.28

- ☐ Take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena.

Authority:

CCP § 1985.8(j)

Discussion:

See 5.29

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsOral Depositions



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.27 Party May Subpoena Electronically Stored Information From a Nonparty.

A party may serve a subpoena on a nonparty allowing the party to inspect, copy, test or sample electronically stored information [CCP § 1985.8(a)(1)].



Cross Reference:

Additional discussion of use of subpoenas, see *Ch. 6, Oral Depositions in California*, 6.12 -6.21.

Detailed discussion of general subpoena provisions, see *California Forms of Pleading and Practice*, Ch. 535, Subpoena (Matthew Bender).

Discussion of subpoenaing nonparty for production of ESI, see *Matthew Bender(R) Practice Guide: California E-Discovery and Evidence*, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceDemonstrative EvidenceComputer-Generated Evidence



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.28 Subpoena May Specify Form of Production.

A party serving a subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced [CCP § 1985.8(b)]. If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed may produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [CCP § 1985.8(c)(1)].

➤ **Cross Reference:**

Discussion of subpoenaing nonparty for production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.17[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryGeneral OverviewCivil ProcedureDiscoveryMethods



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.29 Subpoenaing Party Must Avoid Imposing Undue Burden or Expense.

A party serving a subpoena requiring the production of electronically stored information must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena [CCP § 1985.8(j)].



Strategic Point--Requesting Party:

This provision, which applies only to subpoenas served on nonparties and not to inspection demands served on parties, provides an additional level of protection to nonparties.



Cross Reference:

Discussion of protection from undue burden or expense, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.17[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.30 CHECKLIST: Responding to a Deposition Subpoena for Electronically Stored Information.

- ☐ If subpoenaed electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, oppose subpoena on that ground.

Authority:

CCP § 1985.8(d)

Discussion:

See 5.33

- ☐ If court finds good cause for production of electronically stored information from a source that is not reasonably accessible because of undue burden or expense, consider requesting that court impose conditions for discovery of the electronically stored information, including allocation of cost of discovery.

Authority:

CCP § 1985.8(e), (f)

Discussion:

See 5.34

- ☐ If any of following conditions exists, consider seeking limits on frequency and extent of discovery:
- ☐ It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

- ☐ Discovery sought is unreasonably cumulative or duplicative.
- ☐ Party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.
- ☐ Likely burden or expense of proposed discovery outweighs likely benefit, taking into account amount in controversy, resources of parties, importance of the issues in the litigation, and importance of requested discovery in resolving the issues.

Authority:*CCP § 1985.8(h)***Discussion:**

See 5.35

☐ Produce electronically stored information in one of following forms:

- ☐ Form agreed upon by parties or ordered by court.
- ☐ Form specified in subpoena.
- ☐ Form in which it is ordinarily maintained,
- ☐ Form that is reasonably usable.

Authority:*CCP § 1985.8(c)(1)***Discussion:**

See 5.31

☐ If necessary, at reasonable expense of subpoenaing party, use detection devices to translate any data compilations included in demand into reasonably usable form.

Authority:*CCP § 1985.8(g)***Discussion:**

See 5.32

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsEvidenceDemonstrative EvidenceComputer-Generated Evidence



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5.31 Subpoenaed Party Must Produce Information in Form Specified or in Form in Which It Is Ordinarily Maintained or Reasonably Usable Form.

A subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced [CCP § 1985.8(b)]. If the subpoena does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed may produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [CCP § 1985.8(c)(1)]. A subpoenaed person need not produce the same electronically stored information in more than one form [CCP § 1985.8(c)(2)].

➡ Cross Reference:

Discussion of form of production, see 5.17.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsOral
DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.32 Subpoenaed Party Must Translate Data Compilations Into Reasonably Usable Form.

If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, must use detection devices to translate any data compilations included in the subpoena into reasonably usable form [*CCP* § 1985.8(g)].



Cross Reference:

Discussion of translation of data compilations, see 5.18.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseEvidenceDemonstrative
EvidenceComputer-Generated EvidenceEvidenceDocumentary EvidenceWritingsSummariesEvidenceDocumentary
EvidenceWritingsTranscripts & TranslationsTranslations



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5.33 Subpoenaed Party May Oppose Production If Source Is Not Reasonably Accessible.

A subpoenaed person may oppose the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense. The subpoenaed person bears the burden of demonstrating that the information is from a source that is not reasonably accessible [CCP § 1985.8(d)]. Carrying this burden requires an evidentiary showing; the statement of a lawyer in a memorandum that the electronic information is not readily accessible or that it would be unduly burdensome to comply with the request is not sufficient [see *Auto Club Family Ins. Co. v Ahner* (ED La, Aug 29, 2007) 2007 US Dist LEXIS 63809, at *8-9 (under FRCP 45(d)(1)(D))].



Cross Reference:

Discussion of opposing production on ground source is not reasonably accessible, see 5.20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsRequests for
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5.34 Court May Order Discovery if Demanding Party Shows Good Cause for Production.

Even if the responding party establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to limitations on frequency and extent [*CCP* § 1985.8(e)]. The court may set conditions for discovery of the electronically stored information, including allocation of the expense of discovery [*CCP* § 1985.8(f)].

➡ **Cross Reference:**

Discussion of showing of good cause, see 5.24.

Legal Topics:

For related research and practice materials, see the following legal topics:

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5.35 Court Must Limit Frequency and Extent of Discovery Under Specified Conditions.

The court must limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*CCP § 1985.8(h)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.
- The discovery sought is unreasonably cumulative or duplicative.
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.



Cross Reference:

Discussion of limits on frequency and extent of discovery, see 5.21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.36 Court Order Must Protect Subpoenaed Party From Undue Burden or Expense.

A court order requiring compliance with a subpoena for electronically stored information must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance with the subpoena [*CCP* § 1985.8(k)].



Cross Reference:

Discussion of protection from undue burden or expense, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, Demanding Production of Electronically Stored Information in California Court, 6.17[4].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryProtective Orders



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Chapter 5 Discovery of Electronically Stored Information
VII. PROTECTING CONFIDENTIALITY AND PRIVILEGE

1-5 MB Practice Guide: CA Civil Discovery 5.37

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.37 CHECKLIST: Protecting Confidentiality and Privilege.

☐ Determine whether there is a reasonable expectation of confidentiality.

☐ Confidentiality is not lacking solely because communication is transmitted by electronic means.

☐ Employee has diminished expectation of privacy in data found on a company-owned computer.

Authority:

Evid Code § 917(b); TBG Ins. Servs. Corp. v. Superior Court (2002) 96 CA4th 443, 117 CR2d 155

Discussion:

See 5.33, 5.42

☐ Enter into stipulated protective order to protect confidential and privileged information.

Authority:

Cal Rules of Ct, Rule 3.724(8)(E), (F)

Discussion:

See 5.39

☐ Ask expert to sign stipulated protective order.

Discussion:

See 5.39

- ☐ If the other party will not sign a stipulated protective order, consider asking court to enter a protective order.

Discussion:

See 5.39

- ☐ Retain a neutral expert to extract data from electronic sources on site.

Authority:*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 130 CR2d 385***Discussion:**

See 5.40

- ☐ If counsel discovers that privileged (or attorney work product protected) electronically stored information was inadvertently produced in discovery, notify any party that received the information of privilege claim and basis for the claim.

Authority:*CCP § 2031.285(a)***Discussion:**

See 5.46[1]

- ☐ Upon receipt of anything in course of discovery that appears to be protected by attorney-client privilege or attorney work product, or any other privilege, if it is apparent that materials were provided or made available through inadvertence, take following steps:

- ☐ Refrain from examining the materials any more than is essential to ascertain whether they are privileged.
- ☐ Immediately notify the sender.
- ☐ Resolve the situation by agreement or with court assistance, if necessary.

Authority:*Rico v. Mitsubishi Motors Corp. (2007) 42 C4th 807, 68 CR3d 758, 171 P3d 1092***Discussion:**

See 5.46[2]

- ☐ If another party gives notice that privileged (or attorney work product protected) electronically stored information was produced in discovery, take following steps [*CCP § 2031.285*]:

- ☐ Immediately sequester the information and either:

- ☐ Return the information (and any copies), or
- ☐ Within 30 days, present the information to court conditionally under seal for determination of claim.
- ☐ Until resolution of claim, do not use or disclose the information.
- ☐ If recipient of information or recipient's attorney further disclosed the information before being notified of privilege claim, immediately take reasonable steps to retrieve the information.

Authority:

CCP § 2031.285(b), (c), (d)

Discussion:

See 5.46[1]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged Information



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Chapter 5 Discovery of Electronically Stored Information
VII. PROTECTING CONFIDENTIALITY AND PRIVILEGE

1-5 MB Practice Guide: CA Civil Discovery 5.38

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.38 Electronic Communications Do Not Automatically Lose Privilege.

A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by electronic means [*Evid Code* § 917(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPrivileged Information



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5.39 Stipulated Protective Order May Be Used to Protect Confidential and Privileged Information.

Disclosure and discovery activity may involve the production of confidential, proprietary, or private information for which special protection from public disclosure may be warranted. Often, parties will stipulate to and petition the court to enter into a stipulated protective order to maintain the confidentiality of such information. The parties are required to meet and confer 30 calendar days before the date set for the initial case management conference to consider, among other things, the method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings [*Cal Rules of Ct, Rule 3.724(8)(F)*].

Cross Reference:

"Meet and confer" requirement in e-discovery cases, see 5.06.

The responding party may have well-founded concerns about any confidential, proprietary or privileged information that an expert may recover. The responding party should ask the opponent to stipulate that any disclosure to the expert of privileged or otherwise protected information does not necessarily waive the responding party's right to protection. However, such an order generally does not confer blanket protections on all disclosures or responses to discovery, and the protection it affords extends only to the limited information or items that are entitled to treatment as confidential.



Strategic Points

- When drafting the order, counsel should review *Cal Rules of Ct, Rules 2.550-2.551* regarding sealed records.
- Consider allowing examination by the requesting party's attorney on an "attorney's eyes only" basis. The attorney is subject to the protective order and counsel can agree that privilege is not waived.
- In cases involving trade secrets, consider requesting a more restrictive "outside attorney's eyes only"

protective order, which prohibits disclosure of trade secret information to in-house counsel [*Brown Bag Software v. Symantec Corp.* (9th Cir 1992) 960 F2d 1465, 1469-1472].

- If the other party will not sign a stipulated protective order, consider asking the court to enter a protective order.

- If the parties want to retain a neutral expert to perform the data recovery, the expert should also sign the stipulated protective order to protect confidential information and prevent waiver of the privilege [*Playboy Enters. v. Welles* (SD Cal 1999) 60 F Supp2d 1050, 1055 n6].



Warning:

Although two parties to litigation may stipulate that, as between the two parties a privilege is not waived by virtue of an "attorney's eyes only" protective order, that agreement or protective order is not binding on third parties (including parties to the litigation who are not parties to the agreement) who may challenge the claim of privilege based on the disclosure to the requesting party's attorney. The general rule is that voluntary disclosure to a third party is a waiver of privilege unless the disclosure is necessary for the representation of the client. Facilitating discovery or the convenience of the parties, without more, is not a sufficient foundation to claim the privilege under a "joint interest" or "common interest" exception. The filing of a cross-complaint in an action in most cases is sufficient to preclude the assertion of a "joint interest" or "common interest" exception to the waiver doctrine. In actions in which cross-complaints have been filed, are contemplated, or are a reasonable possibility, counsel should be very cautious before entering into any stipulated protective orders between adverse or potentially adverse defendants. At a minimum, an attorney contemplating this type of arrangement should have the stipulation reduced to a protective order, and have the protective order entered as an order by the court before any documents or electronic information are exchanged. [see *Hopson v. Mayor & City Council of Baltimore* (D Md 2005) 232 FRD 228 (discussing risks that non-waiver agreements, such as "quick peek" and "claw-back" agreements, are not effective against third parties to the agreement); Fed R Evid 502(d), (e) (in federal court, non-waiver agreement is binding against third parties only if it is made part of a court order)].



Cross Reference:

Discussion of neutral experts, see 5.40.

Discussion of stipulated protective orders, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, Gathering and Producing Electronically Stored Information, 9.18.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil
ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders



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1-5 MB Practice Guide: CA Civil Discovery 5.40

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.40 Parties May Retain Neutral Expert for Data Recovery.

The parties may retain a neutral expert and have that expert conduct the recovery on-site, with supervision by the responding party. Courts are willing to appoint a neutral forensics expert to extract data from electronic sources [*see, e.g., Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1417, 130 CR2d 385*].



Warning:

Counsel should be sure to run a conflicts check before retaining any expert.

Discussion of use of experts in discovery of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, Planning E-Discovery, 4.11-4.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryPreservationCivil ProcedureDiscoveryMethodsExpert Witness Discovery



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.41 Work Product Doctrine May Provide Only Limited Protection If Protective Measures Are Not Utilized.

Because of the limited purpose of the work product doctrine [*CCP § 2018.010 et seq.*], courts may be reluctant to afford protection to information transmitted without the aid of encryption or other protective measures.



Strategic Point:

Avoid communicating work product information when the potential exists that a third party could potentially retrieve the correspondence either by monitoring or by forensic recovery.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryPrivileged MattersWork Product



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.42 Privacy Only Applicable If There Is a Reasonable Expectation of Privacy.

A person's right to privacy is grounded in the California Constitution. However, the responding party's privacy objections will not survive if there is no reasonable expectation of privacy [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 445, 452, 117 CR2d 155 (there is a diminished expectation of privacy in a company-owned computer, despite existence of personal information)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryPrivileged
MattersComputer & Internet LawPrivacy & SecurityCompany Communications



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1-5 MB Practice Guide: CA Civil Discovery 5.43

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.43 Privacy May Be Waived by Consent.

There is no expectation of privacy when an employee consents to monitoring by his or her employer [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 445, 117 CR2d 155] . However, an employee's waiver of privacy rights does not necessarily give third parties the right to inspect the computer. Even in litigation with the employer, the court may issue an appropriate protective order to limit the inspection and copying of information on the computer to that which is directly relevant to the issues in the litigation and prohibit the unnecessary dissemination of information having no rational bearing on the case [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 454, 117 CR2d 155] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationComputer & Internet LawPrivacy &
SecurityCompany Communications



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.44 Privacy May Be Waived by Failure to Object.

Failure of a party to seek a protective order waives the privacy rights to the information on the hard drive [*R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 CA4th 486, 498, 89 CR2d 353 ; CCP §§ 2031.060(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryProtective Orders



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.45 Protections for Electronic Communications and Internet Anonymity.

5.45[1] E-mail Contents Are Protected From Disclosure. The Stored Communications Act [18 USC § 2701-2712] provides that, subject to certain conditions and exceptions, a person or entity providing an electronic communication service to the public may not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service [18 USC § 2702(a)(1)]. Similarly, but subject to certain additional conditions, a person or entity providing remote computing service to the public may not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service [18 USC § 2702(a)(2)].

Example:

A computer hardware and software manufacturer brought an action alleging that unknown persons caused the wrongful publication in an online news magazine of the manufacturer's secret plans to release a new device. The trial court granted the manufacturer authority to issue civil subpoenas to the publishers of the websites where the information appeared and to the e-mail service provider for one of the publishers. Noting that the Stored Communications Act makes no exception for civil discovery, the appellate court concluded that the subpoenas seeking to compel the e-mail service provider to disclose the contents of e-mails stored on their facilities was unenforceable under the Act [*O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1442-1447, 44 CR3d 72] .

5.45[2] Anonymity of Internet Speech Is Protected. When a plaintiff in a libel action seeks to discover the identity of an anonymous Internet poster responsible for the allegedly libelous comments, the plaintiff must make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity [*Krinsky v. Doe 6* (2008) 159 CA4th 1154, 1164-1165, 72 CR3d 231 (statements on financial message board attacking corporate officers were crude, satirical hyperbole rather than actionable assertions of fact; therefore subpoena to message board host seeking to discover identity of posters should have been quashed)].

In an action arising from the moving party's exercise of free speech rights on the Internet, when a subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service, if the moving party

prevails, the court is required to award reasonable expenses, including reasonable attorney's fees, incurred in making the motion for an order to quash or modify a subpoena for personally identifying information from a California court for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, unless the respondent makes a prima facie showing of a cause of action [*CCP* § 1987.2(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryDisclosuresCivil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationComputer & Internet LawPrivacy & SecurityInvasion of Privacy



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.46 Inadvertent Production of Privileged Electronically Stored Information.

5.46[1] Responding Party May Retrieve Privileged Electronically Stored Information That Was Inadvertently Produced During Discovery.

5.46[1][a] Party That Produced Information May Notify Other Party That Information Was Privileged. If a party discovers that privileged (or attorney work product protected) electronically stored information was produced in discovery, the party making the claim may notify any party that received the information of the privilege claim and the basis for the claim [CCP § 2031.285(a), (d)(1)].

5.46[1][b] Receiving Party Must Sequester Information. After being notified, the receiving party must immediately sequester the information and either [CCP § 2031.285(b)]:

- Return it (and any copies), or
- Within 30 days present the information to the court conditionally under seal for a determination of the claim.

Until resolution, the receiving party must preserve the information and keep it confidential and is precluded from using or disclosing the information [CCP § 2031.285(c), (d)(2)]. If a party disclosed the information before being notified of the privilege claim, the party must immediately take reasonable steps to retrieve the information [CCP § 2031.285(c)(2)].

These rules apply also to subpoenas [CCP § 1985.8(i)].



Warning:

It is vitally important that a party review any responsive documents for privileged information to avoid risking attorney-client privilege waivers. If the court determines that a party's privilege review was not

reasonable, it may reject a claim that production was inadvertent and conclude that the privilege has been waived. See *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D Md 2008) 250 FRD 251, 262 (attorney-client privilege waived when defendants failed to demonstrate that their keyword search for privileged documents was reasonable); Fed R Evid 502(d) (in federal court, inadvertent disclosure does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error).

➤ **Cross Reference:**

Detailed discussion of inadvertent disclosure under CCP § 2031.285, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, Ethical Issues for Attorneys in E-Discovery, 3.14.

5.46[2] Duties of Counsel Who Receive Inadvertently Disclosed Privileged Information. When a lawyer receives materials subject to attorney-client privilege, and it is reasonably apparent that they were inadvertently disclosed by another attorney, the recipient attorney must refrain from examining them any more than is essential to ascertain whether they are privileged. The recipient should then immediately notify the sender. The parties should resolve the situation by agreement or with court assistance, if necessary. An attorney who violates this rule by using the privileged information faces possible disqualification [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 68 CR3d 758, 171 P3d 1092] .

➤ **Cross Reference:**

Detailed discussion of ethical obligations of counsel who receives inadvertently disclosed privileged ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, Ethical Issues for Attorneys in E-Discovery, 3.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryPrivileged Matters



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Chapter 5 Discovery of Electronically Stored Information
VIII. USING FORENSICS EXPERTS

1-5 MB Practice Guide: CA Civil Discovery 5.47

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.47 CHECKLIST: Using Forensic Experts.

☐ Consider using computer forensic expert to recover deleted data, analyze recovered data, and piece together the "who, what, when, where, and how" of the device's use.

☐ Expert must understand the legal requirements for admissibility of evidence.

☐ Expert should be certified or trained on a variety of hardware and software.

☐ Expert's report should cover the system configuration, including hardware and software, how and where the file was found, and what tools expert used to locate and extract data.

☐ Expert should be able to show that document is what it purports to be.

☐ Perform a conflicts check before engaging a forensics expert or consultant.

☐ Ask requesting party to stipulate to having expert or consultant sign any protective orders in the case and agree that disclosure to the expert does not constitute a waiver of the privilege.

☐ If only a few items are in dispute, such as the date particular documents were prepared, consider asking opposing party to stipulate to jointly retaining an "independent" expert who will simply examine the system to determine the date the documents at issue were prepared or that documents have not been modified.

Authority:

Playboy Enters. v. Welles (SD Cal 1999) 60 F Supp2d 1050, 1055 n6 ; *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 CA4th 1414, 1421, 130 CR2d 385

Discussion:

See 5.36, 5.37

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic
DiscoveryDiscoverabilityEvidenceTestimonyExperts



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5.48 Computer Forensics Experts Can Be Useful in Proving Case.

Computer forensics experts may be able to recover deleted information from electronic storage units. Forensics experts can often analyze the recovered data and piece together the "who, what, when, where, and how" of that device's use. Thus, forensics experts can play a key role in reconstructing events. A computer forensics expert can help confirm the transmission of a client's trade secrets to a competitor or the unauthorized transfer of confidential and proprietary information. A forensic analysis may be able to uncover whether the computer user downloaded files to a peripheral storage unit, such as a floppy disk or Zip drive, or if they deleted critical evidence and when. The forensics expert also can recover deleted files and e-mail, determine (using the metadata) who received a copy of the files or e-mail (even if the recipient was blind copied), and can establish when the document was created, edited, or deleted [see *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161 (forensic expert recovered deleted data)].

Having the expert perform his or her analysis on site may provide for limited disruption of the responding party's business. An on-site analysis also will foster a more secure environment for confidential, trade secret or private information by permitting the responding party to supervise the expert's activity.



Warning--Perform Conflicts Check:

Before engaging a forensics expert or consultant, counsel should perform a conflicts check.



Warning--Protect Privileged Materials.

Attorney-client communications and attorney work product should be protected. Simply producing storage devices runs the risk of waiving the privilege on communications or work product contained on the hard drive or other device. Counsel should ask the requesting party to stipulate to having the expert or consultant sign any protective orders in the case and agree that disclosure to the expert does not constitute a waiver of the privilege [*Playboy Enters. v. Welles* (SD Cal 1999) 60 F Supp2d 1050, 1055 n6 ; *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley* (2003) 105 CA4th 1414, 1421, 130 CR2d 385] .



Warning--Be Alert for Evidence of Alternation or Destruction.

Authentication problems arise in electronic discovery because electronically stored information is easy to

alter or destroy. The expert must try to show whether or not the document has been altered. If counsel suspects that the opponent has destroyed or altered evidence, an expert's analysis may lead to confirmation of these suspicions and, potentially, to spoliation sanctions.



Cross Reference:

Detailed discussion of ethical obligations of counsel who receives inadvertently disclosed privileged ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, Ethical Issues for Attorneys in E-Discovery, 3.15.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryMethodsExpert Witness
DiscoveryEvidenceTestimonyExperts



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.49 Forensic Expert Must Understand Legal Requirements.

The expert must understand the legal requirements for the admissibility of evidence. Mishandling of the data can lead to exclusion of that evidence at trial. Counsel also should find an expert who is certified or trained on a variety of hardware and software. The expert's report should include the system configuration including hardware and software, how and where the file was found, and what tools the expert used to locate and extract the data. The expert also should be able to show that the document is what it purports to be.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityEvidenceTestimonyExperts



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Chapter 5 Discovery of Electronically Stored Information
IX. PROTECTING CLIENTS AND DATA BEFORE AND DURING LITIGATION

1-5 MB Practice Guide: CA Civil Discovery 5.50

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.50 CHECKLIST: Protecting Clients and Data.

☐ Advise client to take following steps to maintain, control and preserve its electronic data:

- ☐ Create and stringently follow an effective document retention policy.
- ☐ Learn who maintains or stores information.
- ☐ Maintain and keep updated an organization chart.
- ☐ Conduct annual survey of employees.
- ☐ Prepare a plan for erasing departing employees' hard drives and recycling or reallocating computer systems.
- ☐ Inform employees that company-owned equipment is to be used for company purposes only.
- ☐ Reserve right to monitor, review, and use information on the computer and any networks, including forensically retrieving data from the system after the employee leaves.
- ☐ Use a "click through" screen when logging onto computer and network to remind employees that use may be monitored.

- ☐ Include notices in employee manuals and on intranet websites.
- ☐ Have employees sign a Communications and Systems Use Policy indicating that they are aware that their computer equipment and any transmissions can and may be monitored.

Authority:*CCP § 2031.230***Discussion:***See 5.51[1]*

☐ Once litigation is foreseeable or under way:

- ☐ Suspend document retention policy with respect to potentially relevant documents.
- ☐ Make a forensic copy of all potentially relevant, known evidence.
- ☐ Meet and confer regarding preservation of electronically stored information.

Authority:*Cal Rules of Ct, Rule 3.724(8)***Discussion:***See 5.51[2]***Form:***See 5.66, 5.68***Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryElectronic DiscoveryPrivileged InformationCivil ProcedureDiscoveryProtective Orders



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1-5 MB Practice Guide: CA Civil Discovery 5.51

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.51 Client Should Establish ESI Policies and Practices.

5.51[1] Client Should Have ESI Retention and Destruction Policy in Place At All Times.

5.51[1][a] Client Should Establish Document Retention Policy and Follow It. Every company should have in place a specific and detailed policy governing the destruction and retention of documents, especially including electronically stored information such as documents and e-mail. A comprehensive document management policy is vital. Strict adherence to a policy that ensures periodic and systematic destruction of records will facilitate an efficient production when required. An effective and observed policy also will reduce storage costs.



Consider:

A destruction policy is a mixed bag. Discovery costs are minimized when such a policy exists. However, records relevant to prosecuting or defending a case may be destroyed in the process. An effective policy will balance these two interests.



Warning:

The Sarbanes-Oxley Act of 2002, *15 USC § 7201 et seq.*, and the Health Insurance Portability and Accountability Act of 1996, *42 USCS § 300gg-22*, may require more stringent retention practices.



Cross Reference:

Discussion regarding spoliation of evidence, see 5.52 -5.57.

Detailed discussion of preservation of client's ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferencing, and Case Management Conference, 5.06.

5.51[1][b] Destruction of Relevant Documents Other Than Pursuant to a Policy Can Result in Adverse Inferences. Adverse inferences may be drawn if potentially relevant documents are destroyed other than pursuant to a policy [*Evid Code* §§ 412, 413].



Strategic Point:

The policy should be suspended for those people reasonably likely to have relevant information when litigation is imminent or under way [*see* 5.51[2]]. Opposing counsel may be able to use the absence of documents to great advantage at trial. It is imperative that clients understand that the absence of documents and the implication that they have been deliberately destroyed can be fatal to their position.

5.51[1][c] Client Should Keep Track of Who Maintains Different Types of Information. One of the most time-consuming aspects of locating evidence is first learning who maintains or stores the information. A "diligent search and a reasonable inquiry" is required to comply with a demand for documents [*CCP* § 2031.230; *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1396, 115 CR2d 137] .

5.51[1][d] Client Should Maintain an Updated Organization Chart. Depending on the size of the client's organization, pinpointing the best sources for information can be extremely difficult without a current and accurate organization chart. Many software products are available to assist in the preparation and implementation of a comprehensive organization chart. The client should choose one that will integrate its existing databases to facilitate an efficient updating process.

5.51[1][e] Plan Should Cover Departing Employees. The client's plan should include erasing (or "scrubbing") departing employee hard drives and recycling or reallocating computer systems. This practice is an essential component of any retention policy. All company-owned equipment, including laptops and PDAs, should be retrieved from any departing employees. Departing employees' files should be deleted from networks and shared disks or should be assigned to someone else. Someone should be designated to keep track of where the data goes.

5.51[1][f] Company Should Reserve Right to Monitor Employees. The client should inform employees that company-owned equipment is to be used for company purposes only. The company should reserve the right to monitor, review, and use information on the computer and any networks, including forensically retrieving data from the system after the employee leaves. The company should use a "click through" screen when logging onto the computer and network to remind employees that use may be monitored. The company should include notices in employee manuals and on intranet websites. Employees should sign a communications and systems use policy indicating that they are aware that their computer equipment and any transmissions can and may be monitored.



Warning:

When an employee understands that his or her employer may monitor his or her computer and network use and the employee uses company-owned equipment to communicate with his or her attorney, those communications may lose protection from discovery [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 452, 117 CR2d 155] .

5.51[1][g] Have Client Take a Snapshot of Its Network or Computer Systems. Both attorney and client have a duty to preserve evidence. The best way to avoid a spoliation claim is to have a forensic copy of the client's network or computer system to preserve its integrity. Document clearly the chain of custody of the copy and ensure it is safely archived.

5.51[2] All Information Should Be Retained After Litigation Is Anticipated or Commenced.

5.51[2][a] Retention and Destruction Policy Should Be Suspended Once Litigation Is Likely. A party's duty to

preserve electronically stored information is triggered when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence might be relevant to litigation [*Zubulake v. UBS Warburg LLC* (SDNY 2003) 220 FRD 212, 216 ; see *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster Copyright Litig.)* (ND Cal 2006) 462 F Supp 2d 1060, 1069 (defendant's duty to preserve evidence attached when defendant "should reasonably have believed that litigation against it was probable")]. This duty ensures that potentially relevant evidence is not lost or destroyed [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511] .

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put a "litigation hold" in place to ensure the preservation of relevant documents [*Zubulake v. UBS Warburg LLC* (SDNY 2003) 220 FRD 212, 218 ; see *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)* (ND Cal 2006) 462 F Supp 2d 1060, 1070 (imposing sanctions against defendant for failing to stop its policy of deleting e-mails once the duty to preserve attached)]. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold [*Thompson v. United States HUD* (D Md 2003) 219 FRD 93, 100 (citations omitted)]. Any further destruction of documents could result in spoliation claims [*Thompson v. United States HUD* (D Md 2003) 219 FRD 93, 100-105] .

The duty to preserve extends to those employees likely to have relevant information--the "key players" in the case [*Zubulake v. UBS Warburg LLC* (SDNY 2003) 220 FRD 212, 218] .

A good way to preserve evidence is to make a forensic copy of all potentially relevant, known evidence. Doing so can allow for continued activity under the policy. However, if the claim is based on a continuing tort, preservation may remain an issue.



Strategic Points:

- Put any litigation hold in writing and communicate it to all employees who might be considered "key players" in actual or anticipated litigation.
- Periodically remind employees of need to continue to preserve relevant documents and electronically stored information.



Cross Reference:

Discussion regarding spoliation of evidence, see 5.52 -5.57.

Detailed discussion of advising client of duty to preserve ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferencing, and Case Management Conference, 5.07.

Form:

Sample Internal Memo Regarding Suspension of Retention Policy, see 5.66.

5.51[2][b] Meet and Confer Regarding Evidence Preservation. The parties are required to meet and confer regarding, among other things, the preservation of electronically stored information [*Cal Rules Ct, Rule 3.724(8)(A)*]. Informal resolution of any issues regarding preservation of electronically stored information will sufficiently preserve

the right to seek spoliation sanctions against an opponent if he or she breaches any agreements [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 497-498, 89 CR2d 353] .

Preservation orders should be specific enough to give the parties sufficient notice as to what should be preserved. If the orders are too general, they may be difficult to enforce or may lead to inadvertent violations.

If the preservation orders are implemented with the responding parties' business needs taken into consideration, the cost and disruption should be minimal [*Playboy Enters. v. Welles* (SD Cal 1999) 60 F Supp2d 1050, 1054] .

**Cross Reference:**

"Meet and confer" requirement in e-discovery, see 5.06

Form:

Sample Preservation Order, see 5.68.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservation



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Chapter 5 Discovery of Electronically Stored Information
X. SEEKING SANCTIONS FOR SPOILIATION OF ELECTRONICALLY STORED EVIDENCE

1-5 MB Practice Guide: CA Civil Discovery 5.52

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.52 CHECKLIST: Seeking Sanctions for Spoliation of Electronically Stored Evidence.

☐ Consider requesting sanctions if opponent has altered or destroyed evidence.

Authority:

CCP § 2023.030; Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 ; R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 CA4th 486, 495, 89 CR2d 353

Discussion:

See 5.53 -5.54

☐ Determine which sanctions are available:

- ☐ Monetary sanction.
- ☐ Issue sanction.
- ☐ Evidence sanction.
- ☐ Adverse inference.
- ☐ Terminating sanction.
- ☐ Contempt.

☐ Attorney discipline.

☐ Criminal penalties.

Authority:

See B&P Code § 6106 CCP § 2023.030; *Evid Code* §§ 412-413; *Pen Code* § 135;
Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d
511

Discussion:

See 5.57

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureSanctions



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.53 Spoliation of Evidence Is Sanctionable.

Destroying evidence in anticipation of a discovery request or in response to a discovery request constitutes a misuse of discovery in violation of *CCP §§ 2023.010 and 2023.030* [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 ; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 495, 89 CR2d 353 (affirming order resulting in terminating sanctions for forging contract and destroying evidence by use of computers in violation of stipulation not to use the computers pending examination by expert)].

Cross Reference:

Detailed discussion of sanctions in discovery actions generally, see Ch. 3, Sanctions.

Detailed discussion of sanctions for spoliation of evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 13, Seeking or Opposing Sanctions for Noncompliance, 13.04-13.08.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureSanctions



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.54 Destruction of Evidence May Be Intentional or Negligent.

5.54[1] Intentional Destruction Is a Misuse of the Discovery Process. Destroying evidence in response to a discovery request after litigation has commenced is a misuse of discovery within the meaning of *CCP § 2023.030*, as is destruction in anticipation of a discovery request [see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 (rejecting tort cause of action for first-party intentional spoliation of evidence in favor of existing remedies, and citing former *CCP § 2023(a)(4), (6), (b)* (now *CCP §§ 2023.010, 2023.030*)].

Example:

The court granted a terminating sanction, striking defendants' cross-complaints and answer and ordering defendants' default entered, after defendants repeatedly failed to comply with discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase emails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161, 1183-1184, 36 CR3d 663] .

5.54[2] Negligent Destruction May Be Sanctionable. Negligent destruction of documents also may result in sanctions. *CCP § 2023.030(a)* does not require a misuse of the discovery process to be willful before monetary sanctions may be imposed [*Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474 (interpreting former *CCP § 2023(b)(1)*)].

There is no tort remedy for first-party or third-party negligent spoliation of evidence [*Coprich v. Superior Court* (2000) 80 CA4th 1081, 1090, 95 CR2d 884] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryMisconduct



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.55 Sanctions Against Third-Party Spoliators Are Limited.

Most of the sanctions obtainable under *CCP* § 2023.030 cannot be used against a third-party spoliator because they are available only against a party to the underlying lawsuit [see *Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 482-483, 84 CR2d 852, 976 P2d 223 (issue, evidence, and terminating sanctions available only against party)]. Only monetary and contempt sanctions may be imposed against persons who flout the discovery process by suppressing or destroying evidence [*Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 477, 84 CR2d 852, 976 P2d 223] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryMisconductCivil
ProcedureSanctions



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.56 Safe Harbor Protects Good Faith Loss of Electronically Stored Information.

Absent exceptional circumstances, a court may not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [CCP § 2031.060(i); *see also* CCP §§ 1985.8(l); 2031.300(d), 2031.310(j); 2031.320(d)].

A similar safe harbor exists under federal law [*see* FRCP 37(e)]. Under that rule, the good faith requirement has been interpreted to mean "that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve" [*Keithley v. Home Store.com, Inc. (ND Cal 2008) 2008 US Dist LEXIS 61741* (quoting FRCP 37 Advisory Committee Notes (2006 Amendment))].

Courts have found that parties who fail to impose a litigation hold and continue to destroy electronic documents after receiving notice of litigation are not acting in good faith and cannot take advantage of the safe harbor [*see, e.g., Doe v. Norwalk Community College (D Conn 2007) 248 FRD 372, 379* (defendants' failure to place a litigation hold and to preserve e-mails and hard drives relevant to litigation was at least grossly negligent, if not reckless)].

Example:

The court ordered defendants to preserve and produce server log data that was temporarily stored only in defendants' servers' random access memory (RAM) but declined to impose evidentiary sanctions for defendants' failure to retain the data previously. In the absence of (1) prior precedent directly on point in the discovery context, (2) a specific request to preserve the data present solely in RAM, and (3) a violation of a preservation order, defendants were protected by FRCP 37's safe harbor because their failure to retain the data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not required [*Columbia Pictures Indus. v. Bunnell (CD Cal 2007) 2007 US Dist LEXIS 46364, *54-55*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureSanctions



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X. SEEKING SANCTIONS FOR SPOILIATION OF ELECTRONICALLY STORED EVIDENCE

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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.57 Various Types of Sanctions May Be Awarded for Spoliation.

5.57[1] Court May Award Monetary Sanction. The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*CCP* § 2023.030(a)]. The amount of the sanction is limited to the opposing party's expenses actually incurred [*see Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 262-263, 24 CR2d 501 (trial court erred in imposing additional sanction unrelated to actual expenses defendants incurred as a result of plaintiff's failure to cooperate with discovery)].

Prerequisite:

Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against the party's attorney require a finding that the attorney advised the misconduct [*CCP* § 2023.030(a); *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261, 24 CR2d 501 (citing *Corns v. Miller* (1986) 181 CA3d 195, 200, 226 CR 247, construing similar language in former *CCP* § 2034(b)(2)(D))].

Examples:

- In a patent infringement case, plaintiffs failed to produce more than 46,000 e-mails and documents that were requested in discovery and that they had agreed to produce. Finding that plaintiffs had not presented any evidence attempting to explain or justify their failure to produce the documents, and that the failure to produce the documents case significantly increased the scope, complexity and length of the litigation, the court ordered plaintiffs to pay defendants all of their attorney's fees and costs, which totaled more than \$8.5 million [*Qualcomm Inc. v. Broadcom Corp.* (SD Cal 2008) 2008 US Dist LEXIS 911, *33-63, vacated in part, *Qualcomm Inc. v. Broadcom Corp.* (SD Cal 2008) 2008 U.S. Dist. LEXIS 16897].

- In a copyright infringement case, defendants violated the court's preservation order by reinstalling

operating systems on three of their computers. Plaintiffs argued that the reinstallation showed willful disregard of the preservation order, but defendants claimed that the reinstallation was necessary for the testing and installation of new software. In addition, defendants failed to preserve a notebook computer that contained an employee's notes of his daily activities, which might have included information about the installation of the new software. Plaintiffs sought monetary and issue sanctions and an adverse inference instruction. The court declined to order the issue sanction or adverse inference instruction, but ordered monetary sanctions in the amount of the cost of analyzing the servers that had been copied but not yet analyzed, which would produce more precise information about the installation of the software. The court awarded additional monetary sanctions for the defendants' failure to preserve the notebook computer, in the amount of one-quarter of the costs incurred by plaintiff in bring the motion for sanctions, plus the cost of reviewing hundreds of defendants' e-mails for evidence of the software installation, which could have been reduced significantly or obviated entirely if the notebook included detailed records of such installation [*Creative Sci. Sys. v. Forex Capital Mkts., LLC (ND Cal 2006) 2006 US Dist LEXIS 20116, *19-24*] .

Cross Reference:

Detailed discussion of monetary sanctions, see *Ch. 3, Sanctions, 3.10[2]*.

5.57[2] Court May Impose Issue Sanction. A court may impose an issue sanction ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses [CCP § 2023.030(b); *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511*] .

Example:

In a trademark infringement action, the defendant failed to conduct an adequate search for internal e-mails, resulting in the loss of (1) evidence showing whether the defendant deliberately bid on its own competitors' trademarks, which supported plaintiff's unclean hands or estoppel claim, and (2) documents related to the strength of the claimed trademarks (one of the factors in establishing trademark infringement). The court ordered it judicially established that (1) the defendant bid on its competitors' trademarks to entice persons looking for the websites of those competitors to visit the defendant's website, and (2) the strength of trademark factor weighed in favor of the plaintiff [*Google Inc. v. Am. Blind & Wallpaper Factory, Inc. (ND Cal 2007) 2007 US Dist LEXIS 48309, *17-21*] .

Cross Reference:

Detailed discussion of issue sanctions in discovery actions generally, see *Ch. 3, Sanctions, 3.10[3]*.

5.57[3] Court May Impose Evidence Sanction. The court may prohibit the offending party from introducing designated matters into evidence [CCP § 2023.030(c); *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511*] .

Example:

In response to a request for production of documents in an insurance coverage action, the insurer represented to the insured and to the court that no daily activity logs or telephone record logs were created or maintained in connection with plaintiff's claim. In the following months, the insurer belatedly produced those records from a computerized database, causing depositions of claims examiners to be rescheduled. Based on the insurer's past failure to timely produce electronically stored information, and the insured's concern that additional responsive electronically stored information might be in the insurer's possession, the magistrate judge recommended to the district court that the insurer be precluded from relying on or introducing any documents, testimony, or expert witness testimony that relied on documents or electronically stored information that was requested by the insured but was not produced by the insurer by the discovery deadline [*R & R Sails, Inc. v. Ins. Co. (SD Cal 2008) 251 FRD 520*,

2008 US Dist LEXIS 44552, *24-25] .

Cross Reference:

Detailed discussion of evidence sanctions in discovery actions generally, see *Ch. 3, Sanctions*, 3.10[4].

5.57[4] Adverse Inference May Result from Spoliation. Spoliation may result in the evidentiary inference that evidence that a party has destroyed or rendered unavailable was unfavorable to that party [*Evid Code* §§ 412-413; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 11, 74 CR2d 248, 954 P2d 511] .

The standard California jury instruction on the inference is as follows: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party" [*Judicial Council of California Civil Jury Instructions*, CACI No. 204 (LexisNexis Matthew Bender)].

Examples:

- In a breach of warranty case brought by an automobile purchaser against the manufacturer, the court instructed the jury that it must determine what inference, if any, to draw from the defendant manufacturer's destruction of email records [*Doppes v. Bentley Motors, Inc.* (2009) 174 CA4th 967, 981-982, 94 CR3d 802] .

- In a patent infringement action in which defendants failed to preserve a database containing early versions of relevant source code, the court ordered that the jury be instructed that if plaintiffs proved infringement for later periods for which electronically stored information was available, the jury should infer that infringement occurred during the earlier period as well [*Keithley v. Home Store.com, Inc.* (ND Cal 2008) 2008 US Dist LEXIS 61741, at *50-54] .

- An adverse inference instruction was warranted against a defendant who was at a minimum grossly negligent in allowing relevant documents and e-mails of approximately 44 key players to be destroyed [*Gordon Partners, et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.)* (SDNY 2007) 244 FRD 179, 200-201] .

Jury Instruction:

Willful Suppression of Evidence, see *Judicial Council of California Civil Jury Instructions*, CACI No. 204 (LexisNexis Matthew Bender).

5.57[5] Court May Impose Terminating Sanction In Extreme Cases. The court may impose terminating sanctions that include striking part or all of the pleadings, staying further proceedings until an order for discovery is obeyed, dismissing part or all of the action, or granting a default judgment against the offending party [*CCP* § 2023.030(d)]. Terminating sanctions are to be used sparingly and only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 496, 89 CR2d 353] .

Examples:

- In a breach of warranty case brought by an automobile purchaser against the manufacturer, the trial court abused its discretion by not imposing terminating sanctions against the defendant manufacturer who, among other discovery abuses, failed to instruct employees to preserve emails until approximately two years after litigation began, and did not fully permit court-ordered data mining of e-mails [*Doppes*

v. Bentley Motors, Inc. (2009) 174 CA4th 967, 993-994, 94 CR3d 802] .

- The court granted a terminating sanction, striking defendants' cross-complaints and answer and ordering defendants' default entered, after defendants repeatedly failed to comply with discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy (2005) 134 CA4th 1161, 1183-1184, 36 CR3d 663]* .

- In a breach of contract case, plaintiffs incorporated a forged contract in their complaint. They then stipulated that certain computers would not be used until defendants' computer expert could examine them, but defendants' examination showed that they had been used and the hard drive wiped clean or replaced. Finally, plaintiffs refused to allow the completion of a deposition. The Court of Appeal held that the trial court was fully justified in dismissing plaintiffs' complaint as a sanction [*R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 CA4th 486, 496-498, 89 CR2d 353]* .

- In a copyright infringement case, defendant deleted e-mails related to the merits of the action that it was obligated to preserve and produce to plaintiffs. The district court concluded that although plaintiffs were prejudiced by the destruction of evidence, defendant's behavior did not constitute a pattern of deliberately deceptive litigation practices that were likely to continue as the action proceeded. The court therefore denied plaintiffs' request for a default sanction and awarded lesser sanctions [*UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (ND Cal 2006) 462 F Supp 2d 1060, 1077-1078]*] .

Cross Reference:

Detailed discussion of terminating sanctions in discovery actions generally, see *Ch. 3, Sanctions, 3.10[5]*.

5.57[6] Court May Impose Contempt Sanction. The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court [*CCP § 2023.030(e)*; see *Newland v. Superior Court (1995) 40 CA4th 608, 610, 47 CR2d 24* (in appropriate case, failure to pay ordered sanction is punishable as contempt)]. Although the statutory language authorizes use of the contempt power to enforce civil discovery, the use of that drastic sanction in this context is rare [see *In re De La Parra (1986) 184 CA3d 139, 143-145, 228 CR 864* (refusal to answer interrogatories did not warrant contempt sanction and imprisonment)].

Warning:

Although discovery sanctions against attorneys are generally exempt from the requirement of referring them to the State Bar, the exception does not apply to sanctions for contempt, even if they pertain to the misuse of discovery [see *B&P Code § 6086.7(a)(1), (3)*].

5.57[7] Attorney May Be Disciplined for Spoliation. An attorney may be subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence [*B&P Code § 6106* (act of moral turpitude, dishonesty or corruption is cause for disbarment or suspension); *Cal Rules Prof Conduct, Rules 5-200* (lawyer may not seek to mislead court by false statement of fact or law), 5-220 (lawyer may not suppress evidence that the lawyer or the lawyer's client has legal obligation to reveal or to produce), 3-210 (lawyer may not advise violation of any law)].

Example:

In a patent infringement case, plaintiff failed to produce more than 46,000 e-mails and documents that were requested in discovery and that plaintiff had agreed to produce. The court found that the plaintiff's outside attorneys had assisted their client in committing this incredible discovery violation by

intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that the plaintiff's document search was inadequate, and blindly accepting the plaintiff's unsupported assurances that its document search was adequate. The attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury. The court therefore referred the attorneys to the State Bar for potential discipline for violations of Rules 5-200 and 5-220 [*Qualcomm Inc. v. Broadcom Corp. (SD Cal 2008) 2008 US Dist LEXIS 911, *64* , vacated in part, *Qualcomm Inc. v. Broadcom Corp. (SD Cal 2008) 2008 U.S. Dist. LEXIS 16897*] .

5.57[8] Criminal Penalties Are Available for Willful Spoliation. Willfully destroying or concealing evidence with the intent thereby to prevent it from being produced is a misdemeanor [*Pen Code § 135*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureSanctions



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XI. ADMITTING ELECTRONICALLY STORED INFORMATION AT TRIAL

1-5 MB Practice Guide: CA Civil Discovery 5.58

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5.58 CHECKLIST: Admitting Electronically Stored Information at Trial.

- ☐ Computer printout or other output readable by sight and shown to reflect data accurately may be used to prove contents of writing.

Authority:

Evid Code §§ 255, 1400, 1401, 1520

Discussion:

See 5.60

- ☐ Original must be authenticated.

Authority:

Evid Code § 1401

Discussion:

See 5.60

- ☐ Content of writing may be proven by otherwise admissible secondary evidence.

Authority:

Evid Code §§ 1400

Discussion:

See 5.61

- ☐ Court must exclude secondary evidence if:

- ☐ There is a genuine dispute concerning material terms of the writing; and
- ☐ Justice requires exclusion.

Authority:

Evid Code § 1521

Discussion:

See 5.61

☐ Statutory presumptions:

- ☐ Computer printout is an accurate representation of computer information it purports to be.
- ☐ Printout of images stored on video or digital medium is an accurate representation of the images it purports to represent.

Authority:

Evid Code §§ 1552, 1553; People v. Hawkins (2002) 98 CA4th 1428, 1450, 121 CR2d 627

Discussion:

See 5.63

☐ Determine whether computer printouts fit within a hearsay exception, such as business records or official records.**Authority:**

People v. Lugashi (1988) 205 CA3d 632, 641-642, 252 CR 434 ; People v. Martinez (2000) 22 C4th 106, 126-134, 91 CR2d 687, 990 P2d 563

Discussion:

See 5.64

☐ For admissibility of computer-generated data, such as time of access and type of access, determine whether computer was operating properly at time printout was made,**Authority:**

Evid Code § 1552; People v. Hawkins (2002) 98 CA4th 1428, 1449-1450, 121 CR2d 627

Discussion:

See 5.54

☐ Proof of accuracy, maintenance, and reliability of computer hardware and software is not required for admission.**Authority:**

United States v. Catabran (9th Cir 1988) 836 F2d 453, 458 ; People v. Lugashi (1988) 205 CA3d 632,

638, 642, 252 CR 434

Discussion:

See 5.65

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceDemonstrative EvidenceComputer-Generated
EvidenceEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceWritingsSummaries



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Chapter 5 Discovery of Electronically Stored Information
XI. ADMITTING ELECTRONICALLY STORED INFORMATION AT TRIAL

1-5 MB Practice Guide: CA Civil Discovery 5.59

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.59 Evidence Code Will Determine Admissibility.

The Evidence Code governs admissibility of computer records at trial [see *Aguimatang v. California State Lottery* (1991) 234 CA3d 769, 797-798, 286 CR 57 ; *People v. Lugashi* (1988) 205 CA3d 632, 638-643, 252 CR 434] .



Strategic Point--Requesting Party:

When pursuing discovery of computer records, counsel must take steps to ensure that the electronic documents will be admissible at trial in accordance with the applicable Evidence Code provisions.



Warning:

Even if computer generated documents are otherwise admissible, the court may still exclude computer data that it considers unintelligible, pursuant to its power under *Evid Code* § 352 to exclude evidence that may confuse the issues or mislead the jury [*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 CA3d 278, 295-296, 136 CR 603] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceDemonstrative EvidenceComputer-Generated Evidence



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XI. ADMITTING ELECTRONICALLY STORED INFORMATION AT TRIAL

1-5 MB Practice Guide: CA Civil Discovery 5.60

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.60 Original May Be Used to Prove Contents of a Writing.

For admissibility purposes, a computer printout or other output readable by sight and shown to reflect data accurately is an original [*Evid Code* § 255]. An original may be used to prove the contents of a writing [*Evid Code* § 1520]. An original also must be authenticated to show that it is what the proponent says it is [*Evid Code* § 1401].

► **Cross Reference:**

Detailed discussion of authentication of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 15, Admissibility of Electronic Evidence at Trial, 15.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Discovery
Electronic Discovery
Evidence
Demonstrative Evidence
Computer-Generated Evidence
Evidence
Documentary Evidence
Writings



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XI. ADMITTING ELECTRONICALLY STORED INFORMATION AT TRIAL

1-5 MB Practice Guide: CA Civil Discovery 5.61

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.61 Secondary Evidence May Be Used to Prove Content.

Content of a writing may also be proved by otherwise admissible secondary evidence. The court must exclude secondary evidence if there is a genuine dispute concerning the material terms of the writing and justice requires exclusion or the admissibility of the secondary evidence would be unfair [*Evid Code* § 1521]. The secondary evidence rule is only applicable when seeking to prove the content of a writing and is intended to guard against unreliable, misleading and fraudulent secondary evidence of a writing [*Evid Code* § 1400].

Cross Reference:

Detailed discussion of use of secondary evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 15, Admissibility of Electronic Evidence at Trial, 15.26.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceDocumentary EvidenceBest Evidence Rule



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1-5 MB Practice Guide: CA Civil Discovery 5.62

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.62 Authentication Must Demonstrate Writing Is What Proponent Claims It Is.

Authentication of a writing means (1) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or (2) the establishment of those facts by any other means provided by law [*Evid Code* § 1400; *People v. Lugashi* (1988) 205 CA3d 632, 640, 252 CR 434] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceAuthenticationEvidenceDemonstrative
EvidenceComputer-Generated Evidence



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.63 Evidence Code Establishes Two Presumptions of Admissibility For ESI.

The Evidence Code provides two statutory presumptions:

- A computer printout is an accurate representation of the computer information it purports to be [*Evid Code* § 1552; *People v. Hawkins* (2002) 98 CA4th 1428, 1450, 121 CR2d 627] .
- A printout of images stored on video or digital medium is an accurate representation of the images it purports to represent [*Evid Code* § 1553].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceAuthenticationEvidenceInferences & PresumptionsPresumptions



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1-5 MB Practice Guide: CA Civil Discovery 5.64

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.64 Hearsay Issues in Admission of Electronically Stored Evidence.

5.64[1] Distinction Between Computer-Stored Information and Computer-Generated Data Exists for Purpose of Admissibility. Computer printouts fall into two categories: computer-stored information and computer-generated data. Computer-stored information is that information entered by human operators, such as word processing, spreadsheet, and presentation documents. Computer-generated data is created by the computer and generally records its internal operations, such as time of access and type of access.

5.64[3] Computer Printouts Are Admissible If They Fall Under Hearsay Exception. California cases have held computer printouts admissible when they fit within a hearsay exception such as business records [*People v. Lugashi* (1988) 205 CA3d 632, 641-642, 252 CR 434] or official records [*People v. Martinez* (2000) 22 C4th 106, 126-134, 91 CR2d 687, 990 P2d 563] .

5.64[4] Computer-Generated Data Is Not Hearsay. Computer-generated data is created by the computer and generally records its internal operations, such as time of access and type of access. A printout of the results of the computer's internal operations is not hearsay evidence. The Evidence Code does not contemplate that a machine can make a statement. The true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the regular course of business, but whether the computer was operating properly at the time of the printout [*Evid Code* § 1552; *People v. Hawkins* (2002) 98 CA4th 1428, 1449-1450, 121 CR2d 627] .

➡ Cross Reference:

Detailed discussion of overcoming hearsay objections to ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 15, Admissibility of Electronic Evidence at Trial, 15.27-15.33.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceHearsayGeneral Overview



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AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.65 Reliability of Computer Is Not a Prerequisite to Admission.

Courts have refused to require, as a prerequisite to admission of computer records, testimony on the acceptability, accuracy, maintenance, and reliability of computer hardware and software [*People v. Lugashi* (1988) 205 CA3d 632, 638, 252 CR 434] . Although mistakes can occur, such matters may be developed on cross examination and should not affect the admissibility of the record itself [*People v. Lugashi* (1988) 205 CA3d 632, 642, 252 CR 434] . Questions as to the accuracy of printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, affect only the weight of the printouts, not their admissibility [*United States v. Catabran* (9th Cir 1988) 836 F2d 453, 458] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryEvidenceDemonstrative EvidenceComputer-Generated Evidence



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XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.66

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.66 Sample Internal Memo Regarding Suspension of Retention Policy.

Sample Internal Memo Regarding Suspension of Retention Policy.

To: All Employees
From: Director, Litigation
Re: Suspension of Corporation's Retention Policy

Corporation is aware of a dispute related to _____ [*describe subject matter of dispute*].

Corporation needs to preserve evidence that it believes may be relevant to the plaintiff's claims and to our defenses. Our normal policy for handling documents and electronic data has been suspended in light of the threatened litigation.

Do not alter, destroy, remove, or throw away any of your paper files or records directly or indirectly relating to any aspect of the dispute as described above. Do not alter or delete electronic files, including electronic mail, word processing files, databases, spreadsheets, image files, presentations, multimedia, and engineering files relating to the subject matter of the dispute

The devices subject to this policy include, without limitation, any desktop or laptop computer used by you, regardless of where the computer is; network servers; shared servers; CDs and DVDs; PDAs; voice mail; backup tapes; and peripheral storage devices.

If you have any questions or concerns regarding the suspension of Corporation's Retention Policy, please call _____ [*name and contact information of responsible person*]

NOTES.

Authority:

Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218 ; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511

Drafting Internal Memo:

See 5.51[2][a]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservation



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1-5 MB Practice Guide: CA Civil Discovery 5.67

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.67 Sample Preservation Letter.

Sample Preservation Letter.

Date: _____
To: _____ [name]

You are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored information ("ESI") and other data or information generated by and/or stored on your computers and storage media (e.g., hard disks, CD-ROMs, floppy disks, backup media, etc.), and e-mail related to (1) _____ [subject matter of lawsuit]; (2) the events and causes of action described in Plaintiffs' Complaint; and (3) ESI and documents you may use to support any defenses you may claim to have in this action.

You should anticipate that much of the information subject to disclosure and responsive to discovery in this action is stored on your current or former computer systems and other media and devices (including personal digital or data assistants, voice-messaging or voice-mail systems, online repositories, and cell phones).

ESI should be afforded the broadest possible definition and includes, but is not limited to, all digital communications (e.g., e-mail, voice mail, instant messaging), word processed documents (e.g. Word and WordPerfect documents and drafts), spreadsheets and tables (e.g. Excel and Lotus 123 worksheets), accounting application data (such as QuickBooks, Money, or Peachtree), image and facsimile files (including PDF, TIFF, JPG, and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, Internet files, History, and Cookies), all presentations (including PowerPoint and Corel), all network access and server activity logs, all data created with the use of any Personal Data Assistant (PDA) or Pocket PC devices, including cellular phones, all CAD files, and all backup and archival files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

LITIGATION HOLD

You are requested to immediately initiate a litigation hold for potentially relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct any ESI. You should not pack, compress, purge, or dispose of any file or any part thereof.

You are further requested to immediately identify and modify or suspend features of your operations, information systems, and devices that, in routine operations, operate to cause the loss of documents, tangible items, or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity, or other criteria; using data or media wiping, disposal, erasure, or encryption utilities or devices; overwriting, erasing, destroying, or discarding backup media; re-assigning, re-imaging or disposing of systems, servers, devices, or media; running antivirus or other programs that alter metadata; using metadata stripper utilities; and destroying documents or any ESI by age or other criteria.

SERVERS

With respect to servers like those used to manage electronic mail and network storage, the entire contents of each user's network share and e-mail account should be preserved and not modified.

STORAGE

With respect to on-line storage and/or direct access storage devices attached to your mainframe computers and/or minicomputers, in addition to the above, you are not to modify or delete any ESI, "deleted" files, and/or file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for off-line storage, including magnetic tapes and cartridges, optical media, electronic media, and other media or combinations of media containing potentially relevant information, you are requested to stop any activity which may result in the loss of any ESI, including rotation, destruction, overwriting and erasure in whole or in part. This request is intended to cover all media used for data or information storage in connection with your computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, minicomputers, mainframes or other computers, and whether containing backup and/or archival ESI.

PERSONAL COMPUTERS

You should take immediate steps to preserve all ESI on all personal computers used by your officers, directors and

employees, including all secretaries and assistants, that in any way relate to the _____ [subject matter of action], and the events and causes of action described in the Complaint. As to fixed devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments; (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written; and (3) all such copies and listings are to be preserved until this litigation is ended. As to floppy diskettes, CDs, tapes, and other non-fixed media relating to this matter, they are to be collected and stored pending resolution of this litigation.

PORTABLE SYSTEMS

In addition to your immediate preservation of ESI, documents and tangible items in your business, on servers and workstations, you should also determine if any home or portable systems may contain potentially relevant data or information. To the extent that officers, board members, or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R discs, PDAs, smartphones, voice mailboxes, or other forms of ESI storage). Additionally, if any employees, officers, or directors used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

EVIDENCE CREATED OR ACQUIRED IN THE FUTURE

With regard to documents, tangible things, and ESI that are created or come into your custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is imposed by law.

NOTES.

Source of Form:

Form reproduced from Kiesel & Williams, "California E-Discovery: Analysis of the 2009 Legislation and Rules" (LexisNexis 2009), with acknowledgment to Steve Williams, Cotchett, Pitre & McCarthy, Burlingame, CA

Authority:

CCP § 2023.010; Cal Rules Ct, Rule 3.724(8)(A); *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511

Drafting Preservation Letter:

See 5.05

Related Form:

See 5.68

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservation



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XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.68

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.68 Sample Preservation Order.

Sample Preservation Order.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
[name],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	STIPULATION AND ORDER REGARDING PRE-
	)	SERVATION OF DOCUMENTS AND ELEC-
[name],	)	TRONIC DATA
Defendant.	)	
	)	
	)	
_____	)	

The Parties in the above-entitled action hereby stipulate as follows:

1. As used herein, the term "Document" means a writing as defined in *California Evidence Code Section 250*, and the terms "Electronic" and "Electronically Stored Information" are as defined in *California Civil Procedure Code Section 2016.020(d)* and *(e)*. The term "Party" includes Plaintiff and Defendant, including their agents, subsidiaries, employees, representatives.

2. During the pendency of this matter, no Party shall knowingly erase, delete, or otherwise destroy any Documents or Electronically Stored Information within its possession, custody, or control relating or referring to relevant evidence of which they are aware without first making a proper back up of electronic files. All backups shall be preserved and available for production in response to a legitimate discovery request. Electronic backups shall be retained as they are kept in the ordinary course of business.

3. No Party shall knowingly transfer, sell, or otherwise dispose of any computer equipment, including desktop and laptop computers, hard drives, or other electronic storage devices that contain electronic files. If a Party must transfer, sell, or otherwise dispose of said equipment, it must (1) back up the Electronic files, and (2) preserve and make available for production in response to a legitimate discovery request, or (3) immediately notify the other Party with enough notice to permit that Party to arrange to make a backup file.

ABC Law Firm.....

By: _____ [signature(s)]

Attorney[s] for Plaintiff

[typed name(s)]

Attorney[s] for Plaintiff

IT IS SO ORDERED.

Dated: _____

Honorable Judge of the Superior Court

NOTES.

Drafting Order:

See 5.51[2][b]

Related Form:

See 5.67

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryPreservation



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1-5 MB Practice Guide: CA Civil Discovery 5.69

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.69 Sample Electronically Stored Information Protocol.

Sample Electronically Stored Information Protocol.

ESI PRODUCTION PROTOCOL

1. **Obligation to Produce Electronically Stored Information.** The parties acknowledge and agree that to the extent they possess electronically stored information ("ESI") responsive to a document request, that ESI is within the scope of matters subject to discovery in this case.

2. **Load Files.** Except for ESI described in sections 3(b) and (c) below, ESI will be produced in electronic format, with files suitable for loading into a litigation support database. The load files will define document breaks, attachments and other information identified below.

(a) **Document Cross-Reference File.** The producing party will provide a cross-reference file that identifies the start and end of the document, its attachments and its corresponding metadata.

(b) **Cross-Reference or Linking File.** The producing party will also provide a cross-reference file that facilitates the linking of the produced image or native file with the litigation database. This cross-reference file will contain fields such as the unique document ID (i.e., BegBates) and the file path of the corresponding image or native file. The producing party may provide this information either in a litigation database format or as a standard delimited ASCII text file.

3. **Categories of Production of ESI.** ESI will be produced as follows, depending on its classification.

(a) **Production of ESI as TIFF Images With Metadata and Extracted Text.** Documents created in standard office automation file formats (including but not limited to Microsoft Word or WordPerfect

documents) and ESI that can practicably be converted into TIFF format will be produced as single-page TIFF Group IV images, with any available fielded metadata and text searchable information extracted from the native documents.

(i) **Bates Numbering.** The producing party will brand all TIFF images in the lower right-hand corner with its corresponding Bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(ii) **File Names.** Image file names will be identical to the corresponding Bates numbered images, with a ".tif" file extension.

(iii) **Confidentiality Endorsements.** The producing party will brand any confidentiality or similar endorsements in a corner of the TIFF image. Those endorsements must be in a consistent font type and size, and must not obscure any part of the underlying image or Bates number.

(iv) **Production of Extracted Full Text.** The producing party will provide extracted full text (i.e., text extracted from ESI) for all material originating as ESI in a text file corresponding to a single page of a document. The full text file name will be composed of the Bates number of the associated document, with a ".txt" file extension. When a party is unable to produce extracted full text, it will provide an explanation of that inability with its document production.

(v) **Production of Metadata.** The producing party will provide the following metadata, as applicable, for all ESI: start bates, end bates, start attachment, end attachment, custodian or source, original file path, original file name, file type/file extension, MD-5 hash value, title, creation date, creation time, page count, last modification date, last modification time, and last saved by name.

(vi) **Metadata for E-Mail.** In addition to the metadata to be produced for all ESI, for all e-mail, the producing party will also produce the following as fielded metadata: subject, author, recipients, from, to, copyees, blind copyees, date sent, time sent, date received, time received, MD-5 hash value, attachment file name, begin attachment, and end attachment. Family relationships among e-mail and attachments will be maintained by ensuring that attachments immediately follow their parent e-mail, and setting the "begin attachment" and "end attachment" metadata fields appropriately.

(vii) **Explanation of Inability to Produce Metadata.** When a party is unable to produce metadata for a particular field, it will provide an explanation of that inability with its document production.

(viii) **Redaction.** If a file that originates in ESI needs to be redacted before production, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, the producing party will still provide searchable text for those portions of the document that have not been redacted.

(b) **Production of Native Format Documents That Are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF may be produced using one of the two following methods, which method will be subject to meet and confer between the parties.

(i) **Spreadsheets that are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF (for example, spreadsheets) may be produced in electronic format suitable for loading to a litigation support database with links to the native files.

(A) **Identification.** ESI produced in native file format will be assigned a unique DocID number within the litigation database.

(B) **File Names.** File names will be identical to the DocID number, followed by the original file name and file extension.

(C) **Authentication.** The producing party will provide a litigation database load file with separately fielded data, which will contain, as one of the fields, the MD-5 hash value of each file produced in native format.

(ii) **ESI That Is Impractical to Produce with Links to a Database.** The parties understand and acknowledge that certain categories of ESI are structurally complex and do not lend themselves to production as native format documents with links to a litigation database. For example, in some instances renaming and/or linking a native document composed of subparts will render the document unusable. After meet and confer, the parties may agree to produce these types of documents in native form, accompanied with a Bates number and MD-5 hash value, but separate from a litigation support database. In those instances, if a propounding party or its experts lack access to proprietary software needed to review the producing party's ESI in native format, the parties will meet and confer to obtain a resolution which allows that party to view the affected documents.

(iii) **Encrypted or Password-Protected ESI.** For any ESI that exists in encrypted format or is password-protected, the producing party will provide the propounding party a means to gain access to those native files (for example, by supplying passwords).

(c) **Reports in Lieu of Native Production.** If a party believes that it would be impractical to produce ESI in native format because of complexities associated with certain scheduling programs (such as Primavera), accounting systems, mapping systems, and/or other databases (such as MS Access, Oracle, and Microsoft SQL Server), it will so notify the propounding party and will inform the propounding party whether it has generated reports in the normal course of business using those programs or systems. In any such instance, the parties will meet and confer concerning the manner of production of those reports.

(d) **Production of Pictures/Images.** Any photographic images created and/or maintained in electronic format will be produced in that format.

4. **Production Media.** The producing party will use the appropriate electronic media (CD, DVD, or hard drive) for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. The producing party will label the physical media with the producing party, production date, media volume name, and document number range.

5. **Avoidance of Duplicate Production.** Each producing party will take all reasonable steps to reduce duplication of ESI. De-duplication will be performed within a custodian. The producing party will maintain references to all removed duplicate files.

NOTES.

Source of Form:

Form reproduced from Kiesel & Williams, "California E-Discovery: Analysis of the 2009 Legislation

and Rules" (LexisNexis 2009), with acknowledgment to Steve Williams, Cotchett, Pitre & McCarthy, Burlingame, CA

Authority:

Cal Rules of Ct, Rule 3.724(8)

Drafting Protocol:

See 5.06, 5.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 5 Discovery of Electronically Stored Information
XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.70

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.70 Sample Interrogatories.

Sample Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

PLAINTIFF CORP.,	)	
Plaintiff,	)	CASE NO. _____
v.	)	PLAINTIFF CORP.'S FIRST
CORPORATION, INC.,	)	SET OF SPECIAL
Defendant.	)	INTERROGATORIES TO
	)	DEFENDANT CORPORATION, INC.
	)	

PROPOUNDING PARTY: PLAINTIFF CORP.

RESPONDING PARTY: CORPORATION, INC.

SET NO.: ONE

TO DEFENDANT CORPORATION, INC. AND ITS COUNSEL OF RECORD:

Pursuant to *California Code of Civil Procedure Section 2030.010 et seq.*, Plaintiff requests that Corporation answer the following special interrogatories separately and fully, in writing, and under penalty of perjury, within 30 days after

service.

DEFINITIONS

The following definitions apply to these interrogatories:

1. "PERSON" and/or INDIVIDUAL means, unless otherwise specified, any natural PERSON, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement, and government and government agency of every nature or type.
2. "CORPORATION" means CORPORATION, INC., and all predecessors, affiliates, managing agents, officers, and directors.
3. "YOU," "YOUR," and/or "CORPORATION" means DEFENDANT CORPORATION, INC., and any other PERSON representing it or acting on its behalf.
4. "PLAINTIFF" means Plaintiff Corp., and its directors, officers, parents, subsidiaries, predecessors, successors, assigns, agents, servants, employees, investigators, attorneys, and all other persons and entities representing it or acting on its behalf.
5. "ELECTRONIC STORAGE DEVICE" means any disk, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, backup tape, voice mail, temporary files, and PDAs, whether currently on CORPORATION'S premises or otherwise (e.g., at an employee's home or remote office).
6. "ELECTRONIC DATA" means any information, including files, documents, images, video, metadata or any combination thereof stored, created or used on ANY CORPORATION ELECTRONIC STORAGE DEVICE.
7. The term "EVIDENCE" or any variant thereof, including, but not limited to, the term "evidencing," when applied to the content of any document, shall be understood to apply if the document directly or indirectly mentions, discusses, constitutes, concerns, supports, contradicts, refers to or in any other way deals with the subject matter described in the interrogatory in which the term appears.
8. "AND" and "or" have both conjunctive and disjunctive meanings; "all" and "any" means both "each" and "every"; the plural shall include the singular and vice versa.
9. "ANY" shall be understood to include and encompass "all." As used herein, the singular shall always include the plural and the present tense shall also include the past tense. The words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of this demand all DOCUMENTS or things that might otherwise be construed to be outside its scope.
10. To "IDENTIFY" a DOCUMENT means (a) to refer to the DOCUMENT'S identification or exhibit number if the DOCUMENT has been previously produced or used in discovery; or (b) to state the DOCUMENT'S title, authors, recipients, and date of creation.

If you object to any of the interrogatories, you must state the grounds for the objection(s).

If you object to only part of an interrogatory, you must state the objection and answer the remainder of the interrogatory.

SPECIAL INTERROGATORIES**INTERROGATORY NO. 1:**

Describe every policy implemented by YOU to retain ELECTRONIC DATA.

INTERROGATORY NO. 2:

Describe every policy implemented by YOU to destroy ELECTRONIC DATA.

INTERROGATORY NO. 3:

Describe in detail CORPORATION'S use and maintenance of its ELECTRONIC STORAGE DEVICES.

INTERROGATORY NO. 4:

IDENTIFY ALL ELECTRONIC DATA CORPORATION destroyed, altered or moved, including timing and circumstances of such destruction, alteration, or movement.

INTERROGATORY NO. 5:

IDENTIFY ALL individuals responsible for implementation of any policies RELATED to storage and/or retention of DOCUMENTS.

Dated: _____

LAW FIRM NAME

Attorneys for Plaintiff

Plaintiff Corp.

NOTES.

Authority:

CCP § 2030.010 et seq.

Drafting Interrogatories:

See 5.08[1]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedureDiscoveryMethodsInterrogatories



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Chapter 5 Discovery of Electronically Stored Information
XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.71

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.71 Sample Person Most Knowledgeable Deposition Questions.

Sample Person Most Knowledgeable Deposition Questions.

A. Understanding the System

1. Describe the types of computer system(s) used by your company in the course of business.
2. Describe/identify the types of software used on your computer system(s).
3. Identify the person(s) responsible for the ongoing operation, maintenance, expansion, and repair of your system(s).
4. What type of information security does Corporation have?
 - a. Are passwords required?
 - b. User Authentication?
5. Do different groups or departments share network servers? For example, does your Marketing Department have its own shared server? And Engineering?
6. How do Corporation's employees access the company network?
7. Does Corporation issue PDAs to its employees?
 - a. If so, does Corporation have any policies related to them?

- b. Are they backed up?
- c. Is the information contained on them treated any differently?

8. Does Corporation have a Disaster Recovery Program?

- a. Describe generally how it works.
- b. Who oversees the program?

B. Retention and Destruction Policy

1. Does Corporation have a Document Retention Policy?

2. Who (name or title) implements the policy?

3. Has the policy been suspended?

- a. Since when?
- b. If no, then why not?

4. Please describe generally how the policy operates.

5. What medium does Corporation use to back up electronic data?

6. Does Corporation have a naming convention for its backups?

7. Is a full backup performed each night/week, etc.?

- a. If no, how often is a complete backup performed?

8. Are incremental backups performed nightly?

9. Does the backup discriminate by file type? For example, does it skip OS, URL or program files?

10. Are the backups performed automatically?

11. Are there any circumstances under which a file or e-mail would not be backed up? For example, if the file was created and deleted before the back up took place.

12. Does Corporation rotate backup tapes?

- a. If so, how often?

13. Are files ever deleted from the backup tapes/network?

14. Where are the tapes stored?

- a. Is the storage location secure (is it locked)?
 - b. Who has access to the backup tapes?
15. What procedures would you use to locate a specific file?
- a. What information would you need to know about a file to find it?
 - b. Can you perform a word search in the archive?
16. Does Corporation have a destruction schedule? For example, are certain, more critical documents treated differently from other less important files?

C. Authentication

1. What procedures does Corporation follow for inventory and assignment of computers? That is, how does Corporation keep track of who has which computer(s)?
2. Does Corporation have a password selection protocol?
3. Are hard drives "wiped" after an employee terminates?
 - a. What program does Corporation use?
 - b. To what extent does it erase information from the hard drive?
4. What procedures does Corporation follow in reformatting and recycling computers?
 - a. Are hard drives backed up before being erased and reformatted?
 - b. Are department managers asked to review the contents and retrieve critical information?
5. If a computer is broken, does Corporation make any attempt to salvage data from it?
6. Have you used outside contractors to upgrade either hardware or software? If so, please identify
7. Are changes or modifications made to software recorded in any way?

NOTES.

Authority:

CCP § 2025.230(a)(3), (4)

Goals and Topics for Person Most Knowledgeable Deposition:

See 5.08[2]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsOral DepositionsCivil

ProcedureDiscoveryMethodsWritten Depositions



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Chapter 5 Discovery of Electronically Stored Information
XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.72

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.72 Sample Demands for Inspection and Copying of Documents.

Sample Demands for Inspection and Copying of Documents.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

PLAINTIFF CORP.,	)	
Plaintiff,	)	NO. _____
v.	)	
CORPORATION, INC.,	)	PLAINTIFF CORP.'S FIRST DEMAND FOR IN-
Defendant.	)	SPECTION TO DEFENDANT CORPORATION,
	)	INC.
	)	

DEMANDING PARTY: PLAINTIFF CORP.

RESPONDING PARTY: CORPORATION, INC.

SET NO.: ONE

TO DEFENDANT CORPORATION, INC. AND ITS COUNSEL OF RECORD:

Pursuant to *California Code of Civil Procedure Section 2031.010 et seq.*, Plaintiff Corp. hereby demands that Defendant Corporation, Inc. respond to and thereafter produce for inspection and copying all of the documents within

Corporation's possession, custody, or control as called for in the following categories of documents, within the time permitted by the statute. In addition, Plaintiff requests that the documents be organized and labeled to correspond with the categories in the Demand.

The originals of the documents to be produced shall be made available for inspection and copying at the offices of _____, within thirty (30) days after service of this Demand. A personal appearance is not required if Corporation produces copies of all of the original documents, together with a verification under penalty of perjury that the Demand.

DEFINITIONS

1. "PLAINTIFF" means Plaintiff Corp., and its directors, officers, predecessors, assigns, agents, servants, employees, investigators, and attorneys.
2. "PERSON" and/or "Individual" means, unless otherwise specified, any natural person, firm, entity, corporation, partnership, proprietorship, association, joint venture, other form of organization or arrangement, and government and government agency of every nature or type.
3. "YOU," "YOUR," and/or "CORPORATION" means Defendant Corporation, Inc., and any other PERSON representing it or acting on its behalf.
4. "ELECTRONIC STORAGE DEVICE" means any disk, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, backup tape, voice mail, temporary files, and PDAs, whether currently on CORPORATION'S premises or otherwise (e.g., at an employee's home or remote office).
5. "ELECTRONIC DATA" means any information, including files, documents, images, video, metadata, or any combination thereof stored, created or used on ANY CORPORATION ELECTRONIC STORAGE DEVICE.
6. "RELATE," or any variant thereof, including, but not limited to, the term "relating to," shall be understood to apply if the data or information evidences, mentions, constitutes, contains, summarizes, describes, concerns, refers to (directly or indirectly), supports, contradicts, addresses in any way or otherwise deals with the subject matter described in the Demand in which the term "relate," or any variant thereof, appears.
7. "EVIDENCE" or any variant thereof, including, but not limited to, the term "evidencing," shall be understood to apply if the data or information directly or indirectly mentions, discusses, constitutes, concerns, supports, contradicts, refers to or in any other way deals with the subject matter described in the Demand in which the term appears.
8. "DOCUMENT" means a writing as defined by *Evidence Code Section 250*, and shall include, without limitation, the original (and absent the original then a copy thereof), all file copies and copies not identical to the original of any writing or record of every type, form, and description that is in the possession, custody, or control of the responding party, or which no longer is in the responding party's possession but of which the responding party still has knowledge, whether or not said writings or records are claimed to be privileged or otherwise immune from discovery including by way of illustration and not limitation, the following items: notes, correspondence, communications of any nature (including intra-company communications and correspondence), electronic mail messages, telegrams, cables, memoranda (including internal memoranda), notebooks of any nature, including laboratory and engineering reports; summaries, minutes and records of telephone conversations, personal conversations, or interviews; diaries, routing slips or memoranda, reports (including tests and analysis reports), books, manuals, publications, invoices, specifications, shipping papers, purchase orders, shop instrument output, plans, patterns, drawings, flow charts, schematics, diagrams, photographs of any nature, artists' drawings, sketches, blueprints, minutes or recordings of meetings and conferences,

including lists of persons attending meetings or conferences; transcripts of oral testimony or statements; reports and/or summaries of interviews; reports and/or summaries of investigations; opinions or reports of consultants; opinions of counsel; forecasts; reports of patent searches; patent opinions, analyses or appraisals; agreements and contracts (including all modifications or revisions thereof); reports and/or summaries of negotiations; court papers, labels, tags, placards, fliers, counter cards, brochures, pamphlets, advertisements, advertising layouts, circulars, trade letters, press releases, and translations; presentations, including boards, transparencies, storybooks and/or scripts; drafts of original or preliminary notes on, and marginal comments appearing on, any DOCUMENTS; whether said writings or records are on paper, magnetic disk, tape or other computer or digital storage medium, microfilm, microfiche, floppy, or any other storage or recording medium.

9. "ANY" shall be understood to include and encompass "all." As used herein, the singular shall always include the plural and the present tense also shall include the past tense. The words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of this Demand all documents or things that might otherwise be construed to be outside its scope.

10. To the extent that the documents requested herein are not produced as they are kept in the usual course of business, then as to each document produced, indicate the number or numbers of the Demands below to which the document is responsive.

11. If any document requested herein is withheld pursuant to any objection based upon privilege, identify each document for which the privilege is claimed and state:

- a. The type of document (letter, report, memoranda, etc.), including any title or identifying number thereon;
- b. Its date of origin or preparation;
- d. The name of its addressee(s), if any;
- e. A brief summary of its substance; and
- f. A factual and legal basis upon which a privilege is claimed sufficient to permit the Court to adjudicate the validity of the claim.

If any document requested to be produced herein was in your possession, custody, or control, but has since been disposed of, lost, discarded, destroyed, or otherwise has become unavailable within four years of the date of this Demand, please identify which documents were destroyed and state further the identity of the person who ordered them destroyed and the reason for their destruction.

All demands are continuing in nature to the present.

DOCUMENTS DEMANDED:

DEMAND NO. 1:

A copy of each version of CORPORATION'S policy RELATED to the retention or destruction of ELECTRONIC DATA.

DEMAND NO. 2:

All DOCUMENTS EVIDENCING policies, guidelines or practices RELATED to CORPORATION'S retention or

destruction policies.

DEMAND NO. 3:

A copy of each version of CORPORATION'S guidelines or practices RELATED to its backup systems.

DEMAND NO. 4:

All DOCUMENTS discussing or describing the destruction of ELECTRONIC DATA, including directories and network logs, since _____

DEMAND NO. 5:

All DOCUMENTS EVIDENCING the storage of ELECTRONIC DATA since _____

DEMAND NO. 6:

All logs or records concerning access to CORPORATION'S computer network since _____

DEMAND NO. 7:

All DOCUMENTS describing the configuration or design of CORPORATION'S internal computer networks.

DEMAND NO. 8:

All policies RELATED to storage allocation for individuals, departments or divisions.

DEMAND NO. 9:

All policies RELATED to computer or network use.

DEMAND NO. 10:

All electronic mail policies.

Dated: _____

Attorneys For Plaintiff

Plaintiff Corp.

NOTES.

Authority:

CCP § 2031.010(b)

Drafting Demands for Inspection and Copying of Documents:

See 5.08[5]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsRequests for
Production & Inspection



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Chapter 5 Discovery of Electronically Stored Information
XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.73

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.73 Demand for Production of Electronically Stored Information.

Demand for Production of Electronically Stored Information.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
[name],	)	
Plaintiff,	)	NO. _____
vs.	)	
_____	)	DEMAND FOR PRODUCTION OF ELECTRONIC-
[name],	)	ALLY STORED INFORMATION FOR INSPEC-
Defendant.	)	TION [AND FOR _____ (COPYING
	)	and/or TESTING and/or SAMPLING]]
	)	

Demanding Party: _____ [Identify, e.g., Plaintiff] _____ [name].

Set no. _____ [specify].

Responding party: _____ [Identify, e.g., Defendant] _____ [name].

To _____ [Identify, e.g., defendant] _____ [name] and to _____
[name], his/her attorney of record:

_____ [Identify party serving demand, e.g., Plaintiff] [name] demands that you produce and permit the inspection and _____ [specify, e.g., copying and/or testing and/or sampling] by or on behalf of himself/herself of the items described below.

_____ [Identify party serving demand, e.g. Plaintiff] [name] demands that the items described below be produced on _____ [date], at _____ [time], at _____ [specify, e.g., the law offices of _____ (name of law firm)] located at _____ [street address], _____ [city], California, for the purpose of inspection [and _____ (specify, e.g., copying, testing or sampling, the manner in which the activity will be performed, and whether it will permanently alter or destroy the item or items)].

DEFINITIONS

1. "ELECTRONIC" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
2. "ELECTRONICALLY STORED INFORMATION" means information that is stored in an ELECTRONIC medium, including without limitation disks, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, backup tape, voice mail, and PDAs, whether currently on your premises or otherwise (e.g., at an employee's home or remote office).

INSTRUCTIONS

When a demand specifically seeks ELECTRONICALLY STORED INFORMATION, such ELECTRONICALLY STORED INFORMATION shall be produced (i) with a load file suitable for loading the data into a litigation database that defines document breaks, attachments, metadata, and other information (identified below) and (ii) with a cross-reference file that facilitates the linking of the produced TIFF or native file with a litigation database; specifically, production to be as follows:

- (a) Spreadsheets--To be produced (i) as a native file, and (ii) with a load file suitable for linking it to a litigation support database that (for authentication) identifies the MD-5 hash value of each file.
- (b) Standard Office File Forms (e.g., E-mails, Word Processing Documents, Presentations)--To be produced (i) in TIFF format, and (ii) with metadata and text searchable information extracted from the native file and produced as fielded metadata. Family relationships among e-mail and attachments are to be maintained.

When any such ELECTRONICALLY STORED INFORMATION cannot be provided in one of the above manners, as in the case of certain scheduling, accounting, contact management, and database programs (e.g., Primavera, MS Access, Oracle, Microsoft SQL Server), or if Plaintiffs and each Defendant otherwise agree, Plaintiffs and each Defendant will determine another acceptable electronic form for production.

DEMANDS FOR INSPECTION

1. All ELECTRONICALLY STORED INFORMATION that relates or refers to [describe subject of dispute].
Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [demanding party's status and name]

NOTES.

Authority:

CCP §§ 2031.010, 2031.030

Drafting Demand:

See 5.09 -5.10

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsRequests for
Production & Inspection



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Chapter 5 Discovery of Electronically Stored Information
XII. FORMS

1-5 MB Practice Guide: CA Civil Discovery 5.74

AUTHOR: I. Neel Chatterjee, Esq. Theresa A. Sutton, Esq. 2009 Revisions by Publisher's Editorial Staff

5.74 Response to Demand for Production of Electronically Stored Information.

Response to Demand for Production of Electronically Stored Information.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
[name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____	)	RESPONSE TO DEMAND FOR PRODUCTION
[name],	)	OF ELECTRONICALLY STORED INFORMA-
Defendant.	)	TION FOR INSPECTION [AND FOR
	)	_____ (COPYING and/or TESTING
	)	and/or SAMPLING]]

Demanding Party: _____ [Identify, e.g., Plaintiff], _____ [name]

Set no. _____ [specify]

Responding party: _____ [Identify, e.g., Defendant], _____ [name]

To _____ [identify party who served demand, e.g., plaintiff] _____ [name] and to
his/her attorney of record: _____ [Identify responding party, e.g., Defendant] _____ [

name] responds as follows to _____ [identify demanding party, e.g., plaintiff]
 _____'s [name] [supplemental] demand for production of electronically stored information for
 _____ [inspection, copying, testing, and sampling] served on _____ [specify date
 served by mail as indicated on proof of service of demand or date personally served]:

[EITHER, for those things being produced, respond separately to each item, or category of item, with the following]

1. The production, inspection, and related activity demanded in Item No. _____ will be allowed _____
 [in whole or specify to what extent inspection, copying, testing and sampling will be allowed]. The _____
 [specify electronically stored information demanded, e.g., hard drives, backup tapes] are in the _____
 [possession or custody or control] of _____ [identify responding party, e.g., defendant]
 _____ [name], and will be included in this production.

[OR, if unable to comply with demand for inspection of particular item or category of item]

1. Is unable to comply with Item No. _____ because _____ [specify, e.g., the backup tapes no longer
 exist]. A diligent search and a reasonable inquiry has been made in an effort to comply with this demand.

[OR, if objecting to entire item(s) or category(ies), state for each item or category]

1. Objects to Item No. in its entirety on the ground that _____ [state ground for objection, e.g., it seeks
 electronically stored information from a source that is not reasonably accessible because of undue burden or expenset].

[OR, if objecting to part of item or category, state for each portion objected to]

1. Objects to _____ [specify, e.g., producing e-mails in native format. Pursuant to Code Civ. Proc. §
 2031.280(c), Defendant will produce e-mails in PDF format]. [The remainder of Item No. _____ will be produced in
 native format.]

[CONTINUE]

2. [Set forth, in successive paragraphs, similar responses bearing the same number, and in the same sequence, as each
 corresponding item or category in the demand.]

Dated: _____

[EITHER, attorney signs if response contains one or more objections]

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [demanding party's status and name]

[AND/OR, party, its agent or officer signs and verifies, unless response contains only objections]

VERIFICATION

I, _____ [name], _____ [certify or declare] under penalty of perjury under the laws of the State of California that the foregoing responses are true and correct [*if declarant answering on behalf of corporation or other entity, add: based on such information as is available to _____ (name of party), a _____ (specify type of entity, e.g., corporation), which designated me as its agent to respond to the foregoing demands*].

_____ [date]

_____ [signature]

NOTES.

Authority:

CCP §§ 2031.210, 2031.280

Drafting Response:

See 5.13 -5.21

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 6 Oral Depositions in California

1-6 MB Practice Guide: CA Civil Discovery 6.syn

§ 6.syn Synopsis to Chapter 6: Oral Depositions in California

6.01 Scope.

6.02 Objective and Strategy.

6.02[1] Depositions Are Powerful Information Gathering Tool.

6.02[2] Understanding Specific Objective of Deposition and Planning Are Crucial.

6.02[3] Consider Video Recording Depositions.

6.02[4] Documents Used to Refresh Recollection Will Have to Be Produced.

6.03 CHECKLIST: Giving Notice of Oral Depositions.

6.04 Options and Strategies for Party Seeking Discovery.

6.04[1] Consider Early Notice of Deposition.

6.04[2] Consider Motion to Shorten Time for Scheduling Deposition.

6.05 Scope of Depositions.

6.05[1] May Be Taken of Any Person, Including Any Party.

6.05[2] Must Relate to Matters Relevant and Not Privileged.

6.05[3] May Require Attendance and Testimony.

6.05[4] May Require Production of Documents or Tangible Things.

6.05[5] Subject to Protective Orders.

6.05[6] Subject to Court Order on Sequence and Timing.

6.05[7] May Be Taken of Prisoners in Civil Actions.

6.05[7][a] Court Order Is Required.

6.05[7][b] Motion Must Be Accompanied by Affidavit.

6.05[8] May Be Taken in California for Actions Pending Outside of California.

6.06 Effect of Notice of Taking Deposition.

6.06[1] Notice Must Be in Writing.

6.06[2] Notice Is Sufficient to Require Attendance, Testimony, and Production by Party Deponent.

6.06[3] Notice to Nonparty Deponent Also Requires Service of Deposition Subpoena.

6.06[4] Deposition Subpoena Serves As Notice to Nonparty Deponent When Attendance and Testimony Are Not Required.

6.07 Number of Depositions Is Regulated.

6.07[1] Subsequent Depositions of Natural Persons Are Limited.

6.07[2] Court May Grant Leave or Parties May Stipulate to Take Subsequent Deposition.

6.07[3] Depositions of Opposing Counsel Are Severely Restricted.

6.07[4] Specific Restrictions Apply in Limited Civil Cases.

6.07[4][a] Civil Cases Are Classified As Limited or Unlimited.

6.07[4][b] Only One Deposition of Each Adverse Party Is Allowed.

6.07[4][c] Party May Move to Withdraw Case From Restrictions.

6.07[4][d] Party May Move to Allow Additional Discovery.

6.07[4][e] Parties May Stipulate to Additional Discovery.

6.08 Parties May Stipulate to Modification of Deposition Procedures.

6.09 Timing of Deposition Notices.

6.09[1] Plaintiff May Serve Deposition Notice Without Leave of Court After Service of Summons or Appearance.

6.09[1][a] General Rule Is 20 Days After.

6.09[1][b] May Serve Earlier Notice With Leave of Court.

6.09[2] Defendant May Serve Deposition Notice at Any Time.

6.09[3] Deposition Must Begin and Any Motions Be Heard by Discovery Cut-Off Date.

6.10 Requirements for Deposition Notice and Travel Limits.

6.10[1] Specify Address Where Deposition Will Be Taken.

6.10[1][a] Travel Limits for Deponent Who Is a Natural Person.

6.10[1][b] Travel Limits for Party Deponent That Is an Organization.

6.10[1][c] Travel Limits for Nonparty Deponent That Is an Organization.

6.10[1][d] Party Seeking Discovery May Move to Increase Travel Limits for Party Deponent.

6.10[1][e] Factors to Be Considered by Court in Increasing Travel Limits.

6.10[1][f] Sanctions Against Losing Party Are Generally Mandatory.

6.10[1][g] Deposition May Be Taken by Telephone or Other Electronic Means.

6.10[2] Specify Date and Time of Deposition.

6.10[2][a] General Rule Is at Least 10 Days After Service of Notice.

6.10[2][b] Exception: At Least 20 days After Issuance of Subpoena to Produce Consumer or Employee Records.

6.10[2][c] Exception: Five Days in Unlawful Detainer.

6.10[2][d] Exception: Time Shortened or Extended by Court.

6.10[3] Identify Deponent.

6.10[4] Describe Materials to Be Produced.

6.10[5] State Intention to Use Audio or Video Technology.

6.10[6] State Intention to Reserve Right to Use Video of Physician or Expert at Trial.

6.10[7] Describe Matters to Be Covered at Deposition, If Deponent Is Not a Natural Person.

6.10[8] List All Parties on Whom Notice Will Be Served.

6.11 Service of Notice of Deposition.

6.11[1] Serve Notice on All Appearing Parties.

6.11[2] Serve Notice With Copy of Deposition Subpoena If Requiring Attendance and Testimony of Nonparty Deponent.

6.11[3] Serve Notice on Consumer/Employee If Subpoenaing Consumer/Employee Records.

6.11[3][a] Consumer or Employee Receives Notice and Opportunity to Object If Records Relating to Consumer or Employee Are Subpoenaed From Witness.

6.11[3][b] Records Held by Medical Providers, Veterinarians, Financial Institutions, Insurance Companies, Escrow Agents, Attorneys, Accountants, Telephone Companies, and Schools May Be Consumer Records.

6.11[4] Serve Notice on Deposition Officer If Using Instant Visual Display of Testimony.

6.12 CHECKLIST: Using a Deposition Subpoena.

6.13 Options and Strategy.

6.14 Scope of Deposition Subpoena.

6.14[1] May Command Attendance and Testimony of a Nonparty at a Deposition.

6.14[2] May Command Production of Business Records for Copying.

6.14[3] May Command Attendance, Testimony, and Production.

6.14[4] Subject to General Subpoena Provisions.

6.15 Issuance of Deposition Subpoena.

6.15[1] May Be Issued by Clerk of Court.

6.15[2] May Be Issued by Attorney of Record.

6.16 Format of Deposition Subpoena to Command Only Attendance and Testimony.

6.16[1] Specify Time and Place of Deposition.

6.16[2] Summary of Nature of Deposition, Rights and Duties of Deponent, and Penalties for Disobedience.

6.16[3] Indicate Intention to Use Audio or Video Technology.

6.16[4] State Matters to Be Covered, If Deponent Is an Organization.

6.16[5] Advise Deponent Organization of Duty to Designate Agent.

6.17 Format of Deposition Subpoena to Command Only Production of Business Records for Copying.

6.17[1] Describe Each Item or Category of Item.

6.17[2] Affidavit Showing Good Cause Is Not Required.

6.17[3] Direct Deposition Subpoena to Custodian of Records or Other Qualified Person.

6.17[4] Specify Date for Production.

6.17[5] Specify Manner of Production.

6.17[5][a] Nonparty Records May Be Made Available to Subpoenaing Party's Attorney at Witness's Business Address.

6.17[5][b] Records May Be Delivered to Deposition Officer.

6.17[6] Specify Deposition Officer to Whom Delivery Must Be Made.

6.17[6][a] Qualifications of Deposition Officer.

6.17[6][b] Objections to Qualifications Waived If Not Timely Made.

6.17[6][c] Duty of Deposition Officer to Deliver Copies.

6.17[7] Include Proof of Service on All Parties.

6.17[8] Include Proof of Service of Notice on Consumer/Employee or Written Authorization for Release of Records, If Subpoenaing Consumer or Employee Records.

6.18 Format of Deposition Subpoena to Command Attendance, Testimony, and Production.

6.18[1] Specify Time and Place of Deposition.

6.18[2] Summary of Nature of Deposition, Rights and Duties of Deponent, and Penalties for Disobedience.

6.18[3] Indicate Intention to Use Audio or Video Technology.

6.18[4] State Matters to Be Covered, If Deponent Is an Organization.

6.18[5] Advise Deponent Organization of Duty to Designate Agent.

6.18[6] Describe Each Item or Category of Item to Be Produced.

6.18[7] Specify Any Testing or Sampling Being Sought.

6.18[8] Affidavit Showing Good Cause Not Required.

6.18[9] Include Proof of Service of Notice on Consumer/Employee or Written Authorization for Release of Records, If Subpoenaing Consumer or Employee Records.

6.19 Service of Deposition Subpoena.

6.19[1] Serve in Sufficient Time for Compliance.

6.19[1][a] Subpoena for Production Only Must Be Served at Least 15 Days Before Date for Production.

6.19[1][b] Subpoena Commanding Production Must Allow Deponent Reasonable Opportunity to Locate and Produce Records.

6.19[1][c] Subpoena Requiring Attendance Must Allow Reasonable Travel Time.

6.19[2] Serve by Personal Delivery.

6.19[3] Provide Witness Fee.

6.19[3][a] For Deponent Whose Attendance Is Required.

6.19[3][b] For Production of Business Records Only.

6.19[4] Serve Copies on All Other Parties.

6.20 Effect of Personal Service of Deposition Subpoena.

6.21 Punishment for Disobeying Deposition Subpoena.

6.22 CHECKLIST: Responding to Notice of Deposition/Deposition Subpoena.

6.23 Options and Strategy.

6.24 Objection to Errors or Irregularities in Notice of Deposition.

6.24[1] Must Be Made in Writing.

6.24[2] Waived Unless Made at Least Three Days Prior to Deposition.

6.24[3] Must Be Served on Party Noticing Deposition and All Parties Served With Notice.

6.24[4] Must Be Personally Served on Party Noticing Deposition If Made Three Days Before.

6.25 Effect of Objecting to Errors or Irregularities in Notice of Deposition.

6.26 Motion to Stay Deposition and Quash Deposition Notice.

6.26[1] Grounds.

6.26[2] Declaration Showing Attempt at Informal Resolution Is Required.

6.26[3] Motion Papers.

6.26[4] Sanctions Against Losing Party Are Generally Mandatory.

6.27 Motion to Quash or Modify Deposition Subpoena.

6.27[1] Grounds.

6.27[2] Motion Papers.

6.27[3] Award of Fees and Expenses.

6.27[4] Deposition Subpoena for Consumer or Employee Records.

6.27[4][a] Consumer or Employee Who Is Party May Move to Quash.

6.27[4][b] Consumer or Employee Who Is Not Party May Serve Written Objection; Motion to Quash Not Required.

6.28 Motion for Protective Order.

6.28[1] Persons Entitled to Move for Protective Order.

6.28[2] Objective and Grounds.

6.28[3] Relief Available.

6.28[4] Procedure.

6.28[4][a] When Motion May Be Made.

6.28[4][b] Declaration Showing Attempt at Informal Resolution Is Required.

6.28[4][c] Motion Papers.

6.28[5] Court May Qualify Denial of Motion.

6.28[6] Sanctions Against Losing Party Are Generally Mandatory.

6.29 CHECKLIST: Conducting an Oral Deposition.

6.30 Oral Deposition by Telephone, Video Conference, or Other Remote Electronic Means.

6.30[1] Requirements for Party Taking Deposition.

6.30[2] Requirements for Other Parties to Attend by Telephone or Other Electronic Means.

6.30[3] Party Deponent Must Appear in Person.

6.30[4] Court May Allow Nonparty Deponent to Appear by Telephone or Other Electronic Means.

6.30[5] Court May Make Other Appropriate Orders.

6.31 Qualifications and Services of Deposition Officer.

6.31[1] Must Be Authorized to Administer Oath.

6.31[2] Can Have No Financial Interest or Personal Relationship.

6.31[3] Must Offer Services and Products to All Parties.

6.31[3][a] General Requirements.

6.31[3][b] Offers of Instant Visual Display or Rough Draft Transcripts.

6.31[4] Cannot Provide Information About Participants.

6.31[5] Party May Request Statement on Record Concerning Services and Products.

6.31[6] Objections to Qualifications Are Waived Unless Timely Made.

6.31[7] Civil Penalty for Violation of Requirements.

6.32 Procedure for Deposition.

6.32[1] Oath Is Administered to Deponent.

6.32[2] Testimony Is Taken Stenographically.

6.32[3] Examination and Cross-Examination Proceed As at Trial.

6.32[4] Other Parties May Transmit Written Questions.

6.32[5] When Audio or Video Technology May Be Used.

6.32[5][a] Stated in Deposition Notice or Agreed to by All Parties.

6.32[5][b] On Notice by Any Other Party.

6.32[6] Requirements for Use of Audio or Video Technology.

6.32[6][a] Surroundings Must Be Suitable for Recording.

6.32[6][b] Qualifications of Operator.

6.32[6][c] No Distortion of Demeanor or Appearance.

6.32[6][d] Beginning of Recording Must Identify Participants.

6.32[6][e] Counsel Must Identify Themselves.

6.32[6][f] Administration of Oath Must Be Recorded.

6.32[6][g] Beginning and Ending of Each Recording Unit Must Be Announced.

6.32[6][h] Conclusion of Deposition Must Be Announced.

6.32[7] Notice of Intention to Offer Audio or Video Recording of Deposition in Evidence.

6.33 Effect of Objections During Deposition.

6.33[1] Objections Based on Privilege or Work Product Waived If Not Timely Made.

6.33[2] Objections Based on Errors or Irregularities Waived If Not Timely Made.

6.33[3] Objections As to Competency, Relevancy, Materiality, or Admissibility Are Not Waived.

6.34 Effect of Failure of Deponent to Answer or Produce Materials.

6.35 Suspension of Taking of Testimony.

6.36 CHECKLIST: Objecting to the Conduct of an Oral Deposition.

6.37 Motion for Monetary Sanction for Noticing Party's Failure to Attend or Proceed With Deposition.

6.37[1] Grounds.

6.37[2] Motion Papers.

6.37[3] Sanction Is Generally Mandatory.

6.38 Motion for Monetary Sanction for Noticing Party's Failure to Serve Required Deposition Subpoena on Nonappearing Deponent.

6.38[1] Grounds.

6.38[2] Motion Papers.

6.38[3] Sanction Is Generally Mandatory.

6.39 Objections to Qualifications of Deposition Officer.

6.40 Objections to Examination Based on Privilege or Work Product.

6.41 Objections Based on Errors or Irregularities.

6.41[1] Waived If Not Timely Made.

6.41[2] Specific Forms of Question.

6.41[2][a] Legal Contention Questions Improper.

6.41[2][b] Requests for Reenactment and Other Nonverbal Responses During Video Recorded Deposition Allowed.

6.42 Objections As to Competency, Relevancy, Materiality, or Admissibility.

6.43 Motion for Protective Order.

6.43[1] Party or Deponent May Demand Deposition Officer Suspend Taking Testimony.

6.43[2] Grounds.

6.43[3] Declaration Showing Attempt at Informal Resolution Is Required.

6.43[4] Motion Papers.

6.43[5] Court May Terminate or Limit Examination.

6.43[6] Sanctions Against Losing Party Are Generally Mandatory.

6.44 CHECKLIST: Compelling Attendance, Testimony, or Production.

6.45 Motion to Compel Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Materials.

6.45[1] Grounds.

6.45[2] Motion Must Show Good Cause Justifying Production.

6.45[3] Declaration Showing Attempt at Informal Resolution or Inquiry About Nonappearance Is Required.

6.45[4] Motion Papers.

6.45[5] Sanctions Against Deponent Are Generally Mandatory If Motion Granted.

6.45[6] Sanctions Against Deponent Are Available On Motion of Any Other Attending Party.

6.45[7] Sanctions Are Available for Failure to Comply With Order.

6.45[8] Sanctions Are Available Even If No Opposition to Motion.

6.46 Motion to Compel Party or Nonparty Deponent to Answer Question or Produce Materials.

6.46[1] Grounds.

6.46[2] Must Be Made No Later Than 60 Days After Completion of the Deposition Record.

6.46[3] Declaration Showing Attempt at Informal Resolution Is Required.

6.46[4] Notice of Motion May Be Given Orally at Deposition or Subsequently in Writing.

6.46[5] Notice and Motion Must Be Personally Served on Nonparty Deponent.

6.46[6] Moving Party Must Lodge Certified Copy of Relevant Parts of Transcript.

6.46[7] Motion Papers.

6.46[8] Order.

6.46[9] Sanctions Against Losing Party Are Generally Mandatory.

6.46[10] Failure of Deponent to Comply Is Considered Contempt of Court.

6.46[11] Further Sanctions Available Against Party or Party-Affiliated Deponent.

6.46[12] Sanctions Are Available Even If No Opposition to Motion.

6.47 CHECKLIST: Obtaining Copies of and Reviewing the Transcript.

6.47[1] Deponent's Checklist.

6.47[2] Noticing Party's Checklist.

6.47[3] Checklist for Other Parties to Action.

6.48 Obtaining Copies of Transcript.

6.48[1] Deposition Recorded Stenographically Must Be Transcribed.

6.48[2] Party Noticing Deposition Bears Cost of Transcription.

6.48[3] Any Other Party or Deponent May Obtain Copy at Own Expense.

6.48[4] Deposition Officer Must Make Copies Available to All Parties at Same Time.

6.48[5] Deposition Officer Must Retain Stenographic Notes.

6.48[6] Copies of Any Audio or Video Recordings Made by Any Party Must Be Made Available to All Parties.

6.48[7] Stenographic Transcript Is Official Record.

6.48[8] Availability of Transcript or Recording to Other Persons.

6.48[8][a] Any Person May Request Copy.

6.48[8][b] Deposition Officer Must Notify Participants of Request.

6.48[8][c] Copy to Be Provided Unless Subject to Protective Order Within 30 Days.

6.48[8][d] Applicable Only As to Depositions On or After January 1, 1998.

6.49 Procedure for Review of Transcript by Deponent.

6.49[1] Deposition Officer Must Give Notice When Transcript Is Available.

6.49[2] Deponent Has 30 Days to Review and Make Changes to Transcript.

6.49[3] Deponent May Indicate Changes, Approval, or Disapproval in Letter.

6.49[4] Court May Shorten 30-Day Period for Review.

6.49[5] Deposition Officer Must Indicate Deponent's Actions on Transcript.

6.49[6] Deposition Officer Must Notify Parties of Changes Made in Person.

6.49[7] Effect of Deponent's Failure or Refusal to Approve Transcript.

6.50 Procedure for Review of Audio or Video Recording by Deponent.

6.50[1] Deposition Officer Must Give Notice of Availability of Audio or Video Recording When No Stenographic Transcription.

6.50[2] Deponent Has 30 Days to Change Answer to Any Question.

6.50[3] Deposition Officer Must Put Deponent's Actions in Writing.

6.50[4] Effect of Deponent's Failure or Refusal to Identify Deposition As His/Her Own.

6.51 Certification and Storage of Deposition.

6.51[1] Deposition Officer Must Certify Official Record of Deposition.

6.51[2] Rough-Draft Transcript May Not Be Certified, Cited, or Used.

6.51[3] Certified Record of Deposition Is Not Filed With Court.

6.51[4] Requirements for Retention of Certified Transcript.

6.51[4][a] Deposition Officer Must Transmit Transcript to Noticing Party's Attorney.

6.51[4][b] Attorney Must Retain Until Six Months After Action.

6.51[5] Requirements for Retention of Audio or Video Record.

6.51[5][a] Operator Must Retain and Store Recording.

6.51[5][b] Operator Must Make Recording Available to Parties.

6.51[5][c] Operator Must Retain Until Six Months After Action.

6.52 CHECKLIST: Using Depositions.

6.52[1] Checklist for Party Intending to Use Deposition.

6.52[2] Checklist for Party Seeking to Prevent Use of Deposition.

6.53 Admissibility of Deposition.

6.53[1] May Be Used Against Any Party.

6.53[2] May Be Used to the Extent Admissible.

6.54 Purposes for Which a Deposition May Be Used.

6.54[1] Any Party May Use for Impeachment of Deponent As a Witness.

6.54[2] Adverse Party May Use Deposition of Party for Any Purpose.

6.54[3] Any Party May Use for Any Purpose When Court Has Made Certain Findings.

6.54[3][a] Deponent Resides More Than 150 Miles From Trial.

6.54[3][b] Deponent Cannot Testify for Specific Reasons.

6.54[3][c] Exceptional Circumstances Exist.

6.55 Motion to Suppress Deposition.

6.55[1] Grounds.

6.55[2] Declaration Showing Attempt at Informal Resolution Is Required.

6.55[3] Motion Papers.

6.55[4] Sanctions Against Losing Party Are Generally Mandatory.

6.56 Use of Video Recording of Physician or Expert Witness.

6.57 Notice of Intent to Offer an Audio or Video Recording in Evidence.

6.57[1] Party Intending to Offer Must Give Notice to Court and All Parties in Writing.

6.57[2] Notice Must Be Made Within Sufficient Time for Objections and Editing.

6.57[3] Objections Must Be Made in Writing.

6.57[4] Court May Order Suppression of Portions or Editing of Recording.

6.57[5] Original Recording Must Be Preserved.

6.57[6] Recording Must Be Accompanied by Stenographic Transcript.

6.58 Offering Parts of a Deposition Relevant to Parts Previously Introduced.

6.59 Effect of Substitution of Parties.

6.60 Use of Depositions in Subsequent Action.

6.60A CHECKLIST: Taking Deposition in California in Connection With Out-of-State Action.

6.60B Party to Out-of-State Action May Depose Persons In California.

6.60B[1] Interstate and International Depositions and Discovery Act Governs.

6.60B[2] Deponent May Be Organization or Natural Person.

6.60C Obtaining Subpoena in California.

6.60C[1] Court May Issue Subpoena.

6.60C[2] California Attorney May Issue Subpoena.

6.60C[3] Personal Service of Subpoena Is Required.

6.60D General Discovery Rules Apply.

6.60E Petition for Relief May Be Filed in California In Event of Dispute.

6.60E[1] Petition Must Comply With Applicable California Rules or Statutes.

6.60E[2] Petition and Response Must Contain Specified Information.

6.60E[3] Response to Petition for Relief May Be Filed.

6.60E[4] Subsequent Petition May Be Filed in Same Court if Another Dispute Arises.

6.60E[5] Appellate Review Is Available by Extraordinary Writ.

6.61 Notice of Motion and Motion for Leave to Increase Travel Limits for Deposition of Party or Party-Affiliated Deponent.

6.62 Notice of Taking Oral Deposition.

6.63 Notice of Motion and Motion for Order Authorizing Deposition of Prisoner.

6.64 Judicial Council Form SUBP-015 Deposition Subpoena for Personal Appearance.

6.65 Judicial Council Form SUBP-020 Deposition Subpoena for Personal Appearance and Production of Documents and Things.

6.66 Judicial Council Form SUBP-010 Deposition Subpoena for Production of Business Records.

6.67 Judicial Council Form SUBP-025 Notice to Consumer or Employee and Objection.

6.68 Written Authorization of Consumer or Employee for Release of Records.

6.69 Objections to Errors or Irregularities in Notice of Deposition.

6.70 Notice of Motion and Motion to Stay Deposition and Quash Deposition Notice.

6.71 Notice of Motion and Motion to Quash or Modify Deposition Subpoena.

6.72 Notice of Motion and Motion for Protective Order.

6.73 Order on Motion for Protective Order.

6.74 Notice of Motion and Motion for Monetary Sanction for Noticing Party's Failure to Serve Required Deposition Subpoena on Nonappearing Deponent.

6.75 Notice of Motion and Motion for Protective Order for Deposition in Progress.

6.76 Notice of Motion and Motion to Compel Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Materials.

6.77 Notice of Motion and Motion to Compel Further Response from Party or Nonparty Deponent.

6.78 Separate Statement of Questions and Answers in Dispute.

6.79 Notice of Intent to Offer Audio or Video Recording in Evidence.

6.80 Notice of Motion and Motion to Suppress Deposition.

6.81 Notice of Motion and Motion for Protective Order After Deposition.

6.82 Judicial Council Form SUBP-030, Application for Discovery Subpoena in Action Pending Outside California.

6.83 Judicial Council Form SUBP-035, Subpoena for Production of Business Records in Action Pending Outside California.

6.84 Judicial Council Form SUBP-040, Deposition Subpoena for Personal Appearance in Action Pending Outside California.

6.85 Judicial Council Form SUBP-045, Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California.

6.86 Judicial Council Form SUBP-050, Subpoena for Inspection of Premises in Action Pending Outside California.



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Chapter 6 Oral Depositions in California
I. STRATEGY

1-6 MB Practice Guide: CA Civil Discovery 6.01

6.01 Scope.

This chapter covers:

- Objectives and strategy for obtaining discovery through the use of oral depositions and deposition subpoenas in California [see 6.02].
- Scope of depositions [see 6.05].
- Number of depositions [see 6.07] and modification of procedures [see 6.08].
- Giving notice of oral depositions in California [see 6.06, 6.09 -6.11; Forms: see 6.61 -6.63].
- Using a deposition subpoena to obtain discovery from a nonparty, whether or not the attendance and testimony of the deponent at a deposition is required [see 6.12 -6.21; Forms: see 6.64 -6.68].
- Responding to a notice of deposition and/or deposition subpoena [see 6.22 -6.28], including written objections to errors or irregularities in the notice [see 6.24, 6.25; Form: see 6.69], motions to quash the deposition notice and/or deposition subpoena [see 6.26, 6.27; Forms: see 6.70, 6.71], and motions for protective orders [see 6.28; Forms: see 6.72, 6.73].
- Conducting [see 6.29 -6.35] and objecting to the conduct of [see 6.36 -6.43; Forms: see 6.74, 6.75] an oral deposition.
- Motions to compel attendance, testimony, or production of documents and things at a deposition [see 6.44 -6.46; Forms: see 6.76 -6.78].
- Obtaining copies of and reviewing the transcript of a deposition [see 6.47 -6.51].
- Using or preventing the use of depositions [see 6.52 -6.60; Forms: see 6.79 -6.81], including motions to suppress depositions [see 6.55; Form: see 6.80].

Core Statutes:

CCP §§ 2020.010-2020.510 (deposition subpoenas), 2025.010-2025.620 (oral depositions in California)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral Depositions



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Chapter 6 Oral Depositions in California
I. STRATEGY

1-6 MB Practice Guide: CA Civil Discovery 6.02

6.02 Objective and Strategy.

6.02[1] Depositions Are Powerful Information Gathering Tool. The taking of an oral deposition is a discovery method used to obtain testimony from parties, persons affiliated with parties, and nonparties through oral examination before trial. Deponents may also be required to produce documents and other tangible evidence for inspection at an oral deposition.

Depositions are also used to gather leads about additional potential witnesses and documents that should be pursued.

Oral depositions are important both as a discovery tool to collect information and for potential use on summary judgment/adjudication and ultimately during trial. At trial, depositions may be critically important to impeach or contradict the testimony of a witness. They are also important to capture the testimony of witnesses who live over 150 miles from the place of trial or otherwise cannot be compelled to testify at trial. Depositions also preserve testimony should the deponent die, become physically or mentally incapacitated, or otherwise be unable to testify at trial [CCP § 2025.210(b)].



Strategic Point--Defendant:

Generally the party that notices a deposition first is entitled to conduct the deposition before the other side initiates a deposition. Because the plaintiff cannot initiate discovery until 20 days after service of summons or until after the defendant appears [CCP § 2025.210(b)], the defendant often can conduct discovery, including depositions, simultaneously with the defendant's appearance and before the plaintiff has an opportunity to initiate discovery. "[T]he party who secures discovery first may derive advantages by securing information from his adversary before he is required to reciprocate by divulging information to him." [*Rosemont v. Superior Court* (1964) 60 C2d 709, 714, 36 CR 439, 388 P2d 671].



Strategic Point:

You may learn a great deal about the case from the opposing party's deposition of your client. The

opposing party's questioning may take the client in some directions you had not anticipated and uncover facts the client did not provide to you and for which you had not probed. For the first time, you are hearing your client address pieces of the story under oath, and issues and facts may surface that did not appear when the client was spinning the story to you in your office. The line of questioning may also offer some clues as to opposing counsel's theory of the case and information opposing counsel has that you have yet to discover.



Finding and Investigating Witnesses and Leads Using Online Resources:

Many resources are available online for investigating witnesses. These resources can help you find general information or leads for developing more focused inquiries. For example, helpful resources at *lexis.com* include:

- Public Records tab > Public Records--State Group Files > CA Public Records, Combined



Sample Search: To find basic information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.



Sample Search: To find basic information for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.



Strategic Points--Party Opposing Discovery:

Depositions are powerful discovery tools particularly because of their potential use at trial [see 6.54]. A party opposing the deposition of a particular deponent should consider what manner of opposition is appropriate under the circumstances and what the effect of that opposition will be. For example, objecting to errors or irregularities in a notice of deposition does not prevent the deposition from going forward, unless the objecting party also moves to stay the deposition and quash the deposition notice [CCP § 2025.4310; see 6.25]. Similarly, objecting to the examination during a deposition will not suspend the taking of testimony, unless the objecting party demands suspension and moves for a protective order [CCP § 2025.470; see 6.43].

Oral depositions in California are governed by *CCP* §§ 2025.010-2025.620. Deposition subpoenas are governed by *CCP* §§ 2020.010-2020.510.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 193, Discovery: Depositions (Matthew Bender).



Cross References:

DeMeo, California Deposition and Discovery Practice, Ch. 51, Oral Depositions; Ch. 53, Deposition of Nonparty (Matthew Bender).

Hogan & Weber, California Civil Discovery, Ch. 2, Oral Depositions in California (Matthew Bender 5th ed.).

Depositions in federal cases, see Moore's Federal Practice, Ch. 30, Depositions Upon Oral Examination; Ch. 32, Use of Depositions in Court Proceedings (Matthew Bender 3d ed.); or 11 Bender's Forms of

Discovery Treatise, Ch. 2, Depositions (Matthew Bender).

Oral depositions in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

6.02[2] Understanding Specific Objective of Deposition and Planning Are Crucial. Planning is important to maximize the value of a deposition. Because depositions may be extensively relied on in showing the existence of a disputed fact on a summary judgment/adjudication motion and potentially at trial, the deposition must show the deponent's personal knowledge of the matter on which the deponent is testifying [see *CCP* §§ 437c(b)(2), (3), 2025.620; *Evid Code* § 702]. Similarly, counsel must ensure that any document on which the action or a defense relies is properly authenticated by a deponent if the deposition will or may be used to prove the document [*Evid Code* § 1400 *et seq.*].



Strategic Points--Party Seeking Discovery:

Always ask yourself prior to starting a deposition. "What is the goal of this deposition?" "What information do I need to obtain from this witness?" Develop a strategy for each and every deposition that is taken.

Preparation is important because subsequent depositions of natural persons are limited [*CCP* § 2025.610; see 6.07[1]]. If the potential deponent is a party to the action, the deposing party should consider using other discovery methods first, such as a demand for inspection of documents [see *CCP* § 2031.010 *et seq.*; for discussion, see Ch. 10, Inspection of Documents, Tangible Things, and Land], prior to the deposition to better focus the oral examination. Similarly, the deposing party should consider obtaining business records from a nonparty through a deposition subpoena [see 6.17], so that documents can be reviewed and analyzed before oral examining a deponent concerning their contents.

A party seeking discovery should consider taking the deposition of an entity (a deponent that "is not a natural person" under *CCP* § 2025.230). An entity deposition allows a party to question a witness on designated matters of interest without exhausting the party's "one shot" at a particular natural person deponent [*CCP* § 2025.610(a); see 6.07[1]]. Another advantage of taking the deposition of an entity is that the deposition testimony will be binding on the entity and not just the individual witness.



Strategic Points--Both Parties:

Counsel should distinguish between witnesses likely to be available for trial and those unlikely to be available for trial. While an in-state deposition often can be appropriately treated simply as opportunity to conduct discovery to learn facts, an out-of-state deposition often must be treated as if the questioning were occurring at trial. If a deposition is taken of a witness who resides out of state and is likely to be unavailable for trial, the defending lawyer must be careful to assert all objections as to the form of the questions, or the objections will be waived and the testimony will likely be admissible at trial. Similarly, the questioning lawyer must be careful to listen to objections as to the form of questions and be sure to cure any defects in the form of the questions or risk having favorable testimony excluded at trial. Although counsel ordinarily will not ask questions of a witness with aligned interests, if the witness is not likely to be available for trial, the deposition will be the only opportunity to ask questions to clarify or to cure potentially harmful testimony elicited at the deposition. A failure to ask those questions may require the party to incur the cost and potential risks of bringing the witness to trial to clarify or cure the

harmful testimony.

Judge's Perspective:

Much of today's civil litigation consists of a myriad of pre-trial motions. Specifically, motions for summary adjudication/judgment are brought in virtually every case. With respect to those motions, counsel for both plaintiffs and defendants rely heavily on deposition testimony in either opposing the motion or in bringing of the motion in the first instance. Accordingly, depositions have become the single most sought after and utilized discovery device in the Civil Discovery Act. Hence, it is wise to heed the rules permitting its use so that the testimony elicited can be properly used to support the intended result.



Warning:

Before the deposition, find out how long it will take the deposition officer to prepare the transcript to be sure it will be timely for your purposes, allowing time for the deponent's review under *CCP* §§ 2025.520 and 2025.530 [see 6.49]. Conversely, planning may save the extra expense of paying for expedited preparation of the manuscript when, in fact, you will not need it for weeks or months.

6.02[3] Consider Video Recording Depositions. A video can be a very powerful tool for preserving not just the testimony, but also the appearance of the deponent. A video record can, at times, keep opposing counsel on his or her best behavior; failing that, it demonstrates the behavior for the judge if the behavior is extreme enough to lead to a motion for a protective order under *CCP* §§ 2025.420 and 2025.470.

Video recording also allows reenactment or demonstration of an event as well as showing nonverbal responses [*Emerson Elec. Co. v. Superior Court* (1997) 16 C4th 1101, 1111-1112, 68 CR2d 883, 946 P2d 841].

Thus, you should consider video recording most of your depositions if warranted by the value of the case and the importance of the witness to the case.



Strategic Point:

A cold stenographic transcript reports only words spoken at the deposition. It misses all the nonverbal communication inherent in facial expressions, the inflection and intonation of the voice, gestures, and body language, as well as notes between counsel and the deponent. That nonverbal communication may express a message to those present at the deposition that does not appear on the written transcript. For example, if a deponent is accused of having committed a murder and responds incredulously, "I killed Harry?" the typed transcript could reflect a totally inaccurate statement because it does not report the inflection [see *Riley v. Murdock* (EDNC 1994) 156 FRD 130, 131 n3].



Warning:

If you expect to rely on the deponent's testimony, you know the deponent does not present an impressive appearance, and the deposition will be usable in lieu of the deponent appearing at trial [see *CCP* § 2025.620], you may prefer not to record the deposition. For example, in the case of a prisoner, you might prefer to have the deposition read into evidence.



Strategic Point:

Consider regularly including in your deposition notice the statement that you reserve the right to take the deposition by video recording it. Without that notice you will be unable to record the deposition [see

CCP § 2025.330]. By including it, you will keep your options open and can choose whether or not you want to video.



Cross References:

Discussion of protective orders, see 6.43.

Discussion of giving notice of video recording, see 6.18[3], 6.32[5].

6.02[4] Documents Used to Refresh Recollection Will Have to Be Produced. If a witness testifies that in preparation for the deposition he or she had looked at documents belonging to a party to assist in remembering past events, the party will be obligated to produce the documents under *Evid Code* § 771 [*International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1372, 282 CR 783 (former employee of corporate party had reviewed papers provided by party's attorney)]. If the witness reviewed a number of documents to refresh his or her memory and cannot differentiate between those documents that did and did not refresh his recollection, the questioning lawyer is entitled to all of the documents reviewed by the witness in preparation for the deposition [*International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1372-1373, 282 CR 783].

Refreshing a witness's recollection with confidential reports about conditions surrounding an accident waives the privilege [*Kerns Constr. Co. v. Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74 (attorney client privilege waived when party's employee's testimony relied on internal reports prepared for use of company attorneys)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral Depositions



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6.03 CHECKLIST: Giving Notice of Oral Depositions.



Determine timing:

- ☐ Plaintiff may serve deposition notices on any date 20 days after either:
 - ☐ Service of summons on any defendant, or
 - ☐ Appearance by any defendant.

Exception:

If, on a motion with or without notice and on a showing of good cause, plaintiff may obtain an order to notice deposition at an earlier time.

Authority:

CCP § 2025.210(b)

Discussion:

See 6.09[1]



Defendant may serve notice of deposition at any time after earlier of having been served or having appeared in the action.

Authority:

CCP § 2025.210(a)

Discussion:

See 6.09[2]

☐ Determine whether to file noticed motion or ex parte application to shorten time for scheduling deposition.

☐ Deposition must be scheduled:

☐ At least 10 days after service of deposition notice.

☐ At least 20 days after, if subpoenaing consumer or employee records.

☐ At least five days in unlawful detainer action or other summary proceeding involving possession of real property.

Authority:

CCP § 2025.270

Discussion:

See 6.10[2]

☐ Determine whether to request party or party-affiliated deponent to attend deposition at place more distant than otherwise permitted.

☐ Make reasonable, good-faith effort to resolve issue.

☐ If unable to resolve issue, prepare motion to increase travel limits.

☐ Draft:

☐ Notice of motion and motion for leave to increase travel limits for deposition of party or party-affiliated deponent.

☐ Supporting declaration.

☐ Supporting memorandum.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

Authority:

CCP §§ 2025.250, 2025.260

Discussion:

See 6.10[1]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Form:

See 6.61

☐ If noticing deposition of nonparty, determine whether attendance and testimony of nonparty deponent is required.

☐ If requesting production of business records only, and attendance and testimony are not required:

☐ Prepare deposition subpoena, without accompanying notice of deposition.

☐ If attendance and testimony are required, without or in addition to production of documents and/or things:

☐ Prepare deposition subpoena, to be served with notice of deposition.

Authority:

CCP §§ 2020.010, 2020.020, 2020.310, 2020.510, 2025.280(b)

Discussion:

See 6.06[3], [4]; 6.17 et seq. (using a deposition subpoena)

Forms:

See 6.64 -6.66 (deposition subpoenas)

☐ Prepare notice of taking deposition.

☐ Check format:

☐ Specify address where deposition will be taken.

☐ Specify date and time of deposition.

☐ Identify deponent.

☐ Describe material to be produced, if any.

☐ State intention to use audio or video technology.

☐ State intention to reserve right to use video of physician or expert at trial.

☐ Describe matters to be covered at deposition, if deponent is not a natural person.

☐ List all parties, in notice or in accompanying proof of service, on whom notice will be served.

Authority:

CCP §§ 2025.220-2025.240

Discussion:

See 6.10

Form:

See 6.62

☐ Serve notice on:

- ☐ All parties who have appeared in action.
- ☐ Nonparty deponent, with deposition subpoena.
- ☐ Consumer or employee, with notice of privacy rights, if subpoenaing consumer or employment records.
- ☐ Deposition officer, if using instant visual display of testimony.

Authority:

CCP §§ 2025.220-2025.240

Discussion:

See 6.11

Form:

See 6.67 (notice to consumer or employee)

☐ Retain original notice and proof of service until six months after final disposition of case.

Authority:

Cal Rules Ct, Rule 3.250(b)

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.04 Options and Strategies for Party Seeking Discovery.

6.04[1] Consider Early Notice of Deposition. Because a defendant may serve a deposition notice without leave of court any time, the issue of whether to move for leave to serve an early notice of deposition is a consideration only for the plaintiff [see *CCP* § 2025.210]. Requesting leave to serve an early notice may be advisable when it appears that the deponent may soon become unable to testify; in such a case, a prompt deposition may be necessary to preserve the deponent's testimony.



Strategic Point--Party Seeking Discovery:

If circumstances warrant an early notice of deposition to preserve the deponent's testimony, the party seeking discovery should combine the request for early notice with a motion to shorten the time required for scheduling the deposition itself [see *CCP* § 2025.270]. This may be necessary, for example, in seeking discovery before a hearing on a temporary restraining order.



Cross Reference:

Discussion, see 6.09.

6.04[2] Consider Motion to Shorten Time for Scheduling Deposition. On motion or ex parte application, the court may shorten the time between noticing and scheduling a deposition for good cause [*CCP* § 2025.270(d)]. The party noticing the deposition should consider moving to shorten the time for scheduling if the deponent is likely to become unable or unavailable to testify. A motion to shorten time also may be appropriate to begin the deposition before the discovery cut-off date.



Cross References:

Discussion of time requirements for scheduling, see 6.10.

Discussion of cut off dates, see *Ch. 1, Strategy and Planning, 1.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.05 Scope of Depositions.

6.05[1] May Be Taken of Any Person, Including Any Party. Any party may obtain discovery by taking the oral deposition in California of any person, including any party to the action [CCP § 2025.010]. The person deposed may be [CCP § 2025.010]:

- A natural person,
- An organization such as a public or private corporation, a partnership, or an association, or
- A governmental agency.



Finding & Investigating Witnesses Using Online Resources:

Many resources are available online for finding and investigating witnesses. For example, helpful resources at *lexis.com* include:

- Public Records tab > Public Records > Find a Person > EZFIND Combined Person Locator Nationwide



Sample Search: To find witnesses to an event that occurred at a known location, e.g., the 500 block of Santa Monica Blvd., Santa Monica, CA, try this ADDRESS segment search: *ADDRESS (5** pre/5 santa monica boulev! and santa monica /5 ca).*

6.05[2] Must Relate to Matters Relevant and Not Privileged. An oral deposition may be used to obtain discovery regarding any non-privileged matter that is [CCP § 2017.010]:

- Relevant to the subject matter of the pending action, or to the determination of any motion made in the action, and

- Admissible in evidence, or reasonably calculated to lead to the discovery of admissible evidence.



Finding Real Estate Holdings and Investigating Witnesses Using Online Resources:

Many resources are available online for finding and investigating witnesses. These resources can help you obtain information about relevant present or past real estate holdings of a witness or a witness's present or former spouse. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > CA Deed Transfers, Tax Assessors Records and Mortgage Records--Selected Counties

- Sample Search: To find basic property-holdings information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.

- Sample Search: To find basic property-holdings information for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.



Cross Reference:

Discussion, see *Ch. 2, Scope of Discovery, 2.03* et seq.

6.05[3] May Require Attendance and Testimony. A party seeking to obtain discovery by oral deposition may require the deponent to attend the deposition and testify [CCP § 2025.280].



Cross Reference:

Discussion, see 6.06[2], [3].

6.05[4] May Require Production of Documents or Tangible Things. A party seeking to obtain discovery by oral deposition may require the deponent to produce any document or tangible thing for inspection and copying at the deposition [CCP § 2025.280]. If the documents to be produced are consumer or employee records, the party giving notice of the deposition may need to give additional notice to the consumer or employee who is the subject of the records [see CCP §§ 1985.3, 1985.6, 2020.410(d)].



Strategic Point:

Consider including in the notice of deposition a request for all documents reviewed in preparation for the deposition. Those documents are subject to discovery, at least if they refreshed the recollection of the deponent [see *Evid Code* § 771; 6.02[4]]. Such a request helps to avoid the problem that can arise when the deposition witness testifies that he or she does not remember what documents he or she reviewed and does not remember any documents that refreshed his or her recollection. Generally, when the documents are requested, a witness will acknowledge that the documents that were reviewed refreshed the witness' recollection, at least to the extent that they "jog his or her memory" regarding names, timing, and events.

Distinguish--Methods of Obtaining Production:

A party may also require another party to produce documents, without an oral deposition, by serving a demand for inspection of documents or things [CCP §§ 2031.010-2031.320]. A party must use a deposition subpoena to obtain production from a nonparty, even when attendance and testimony is not required [CCP § 2020.010(b)].

➤ **Cross References:**

Discussion, see 6.06, 6.11, 6.14.

Discussion of demands for inspection, see Ch. 10, Inspection of Documents, Tangible Things, and Land.

6.05[5] Subject to Protective Orders. Oral depositions may be the subject of protective orders when the discovery sought is unreasonably cumulative, duplicative, or unduly burdensome or expensive [*CCP* §§ 2019.030, 2025.420].

➤ **Cross Reference:**

Discussion, see 6.28.

6.05[6] Subject to Court Order on Sequence and Timing. Oral depositions may be subject to a court order establishing the sequence and timing of discovery for the convenience of the parties and witnesses and in the interests of justice [*CCP* §§ 2019.020, 2025.010].

➤ **Cross References:**

Discussion, see *Ch. 1, Strategy and Planning*, 1.08[4].

DeMeo, California Deposition and Discovery Practice, § 51.14 (Matthew Bender).

6.05[7] May Be Taken of Prisoners in Civil Actions.

6.05[7][a] Court Order Is Required. A prisoner who is a witness in a civil action may be deposed if the party seeking discovery obtains a court order for the deposition [*see CCP* §§ 1995-1997 (deposition of prisoner in jail); *Pen Code* § 2623 (deposition of prisoner in state prison)].

The motion must be made to [*CCP* § 1995; *Pen Code* § 2623]:

- The court in which the action is pending, unless it is pending in small claims court, or
- The superior court of the county in which the action is pending, if the action is in small claims court, or before a judge or other person out of court.

6.05[7][b] Motion Must Be Accompanied by Affidavit. A motion for an order to depose a prisoner must be accompanied by an affidavit showing [*CCP* § 1996; *Pen Code* § 2623]:

- The nature of the action or proceeding,
- The testimony expected from the witness, and
- The materiality of the testimony.

➤ **Cross References:**

Form, see 6.63.

Discussion, see *California Forms of Pleading and Practice*, Ch. 193, Discovery: Depositions (Matthew Bender); or

DeMeo, California Deposition and Discovery Practice, 50.13[5] (Matthew Bender).

6.05[8] May Be Taken in California for Actions Pending Outside of California. Pursuant to the Interstate and International Depositions and Discovery Act [*CCP* §§ 2029.010-2029.390], a party to an action pending outside of California may take the deposition in California of either an organization or a natural person [*CCP* § 2029.200(c)].



Cross Reference:

Procedure for taking deposition in California under Interstate and International Depositions and Discovery Act, see 6.60A -6.60E.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.06 Effect of Notice of Taking Deposition.

6.06[1] Notice Must Be in Writing. A party desiring to take the oral deposition of any person must give notice in writing of the taking of the deposition [CCP § 2025.220(a)].



Cross Reference:

Form, see 6.62.

6.06[2] Notice Is Sufficient to Require Attendance, Testimony, and Production by Party Deponent. The service of a deposition notice is effective to require any party or party-affiliated deponent to [CCP § 2025.280(a)]:

- Attend and testify; and
- Produce any document or tangible thing for inspection and copying.

A party or party-affiliated deponent is one who is [CCP § 2025.280(a)]:

- A party to the action;
- An officer, director, or managing agent of a party; or
- An employee of a party.

Distinguish:

In a civil action brought by the People of the state of California, nonparty state agencies could not be considered officers, directors, managing agents, or employees of the state; thus a defendant seeking testimony or documents from nonparty state agencies was required to serve subpoenas directly on the agencies under CCP §§ 2020.010-2020.510 [*People ex rel. Lockyer v. Superior Court* (2004) 122 CA4th 1060, 1076-1077].

**Warning:**

A notice of deposition is sufficient to compel attendance, testimony, and/or production only by parties and persons currently affiliated with parties. Former officers, directors, managing agents, or employees must be served with a deposition subpoena as well as a notice of deposition [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398, 115 CR2d 137]. However, opposing counsel may be willing to produce, without a subpoena, witnesses formerly affiliated with a party and it is worth considering obtaining agreement for the production of witnesses.

6.06[3] Notice to Nonparty Deponent Also Requires Service of Deposition Subpoena. The party noticing the deposition must also serve the deponent with a deposition subpoena if the deponent is not a party or affiliated with a party to the action [CCP § 2025.280(b)]. The deposition subpoena may require the nonparty deponent to attend and testify, as well as to produce documents and tangible things [CCP §§ 2020.010, 2020.020].

**Trap:**

If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, any other party who attended, in the expectation that the deponent's testimony would be taken, is entitled to move for a monetary sanction against the party who noticed the deposition [CCP § 2025.440].

**Cross References:**

Discussion, see 6.14 (scope of deposition subpoena), 6.38 (motion for monetary sanction for failure to serve deposition subpoena).

Forms, see 6.64, 6.65 (deposition subpoenas), 6.74 (motion for monetary sanction).

6.06[4] Deposition Subpoena Serves As Notice to Nonparty Deponent When Attendance and Testimony Are Not Required. A party may use a deposition subpoena to require a nonparty to produce business records for inspection and copying, without requiring attendance and testimony of the deponent [CCP §§ 2020.020(b), 2020.410-2020.440]. If only the production of business records from a nonparty deponent is sought, the deposition subpoena serves as the written notice [CCP § 2025.220(b)].

**Cross Reference:**

Discussion, see 6.14, 6.17.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.07 Number of Depositions Is Regulated.

6.07[1] Subsequent Depositions of Natural Persons Are Limited. Once any party has taken the deposition of any natural person, including that of a party to the action, neither the party who gave, nor any other party who has been served with, a deposition notice may take a subsequent deposition of that deponent [CCP § 2025.610].

Exception:

One subsequent deposition may be taken of a natural person who previously has been examined either [CCP § 2025.610]:

- As a result of that person's designation to testify on behalf of an organization; or
- Pursuant to a court order for the limited purpose of discovering the identity, location, and value of property in which the deponent has an interest [see CCP § 485.230].

Strategic Point--Party Seeking Subsequent Deposition:



The limit on subsequent depositions applies to the party who took the original deposition and the parties who received notice of that deposition [CCP § 2025.610]. A party making a later appearance in the action is arguably not precluded from deposing the same deponent if the previous deposition was noticed before that party's later appearance.

Strategic Point--Party Opposing Subsequent Deposition:



If a later-appearing party gives notice to take a subsequent deposition and if a valid basis exists, a person opposing the taking of that deposition might consider seeking a motion for a protective order to prevent or limit the deposition. However, it must be kept in mind that if the later appearing party has had no opportunity to examine the deponent, a motion for a protective order in all likelihood will not be

successful. The later-appearing party will be afforded the right to conduct discovery on that person or entity. If there is a second deposition, the parties who participated in the earlier deposition will have an unlimited right to participate in the subsequent deposition. Therefore, to avoid giving anyone a second bite of the apple, if a party appears after the deposition notice but before the deposition, the party who noticed the deposition may want to anticipate the potential problem and offer to reschedule. A party appearing after a deposition has already occurred will have a right to an additional deposition. Thus, when the later appearance of a party is likely, consider waiting to notice the deposition until that time (or until the likelihood disappears).

If all parties are not yet present in the case, seek an agreement to delay the deposition of your own client until proper notice can be given to all parties. If no agreement can be reached, consider seeking a protective order to prevent the possibility that your client will be subjected to multiple depositions.

Strategic Point--All Parties:



Because depositions generally can only harm, not help, the party affiliated with the witness, and a person can only be deposed once, the goal of the lawyer defending the deposition will be to have the deposition concluded as early as possible (usually with questioning lawyer confirming that he/she has "no further questions"). In contrast, the questioning lawyer may wish to have the deposition continued, not concluded, so the deposition questioning can be resumed after other facts are discovered and strategies are further developed. It is very important that the party affiliated with the witness has produced all documents that have been requested by the questioning lawyer, or there will be an automatic right to reopen the deposition.

Although a party cannot take a subsequent deposition of a natural person (*CCP* § 2025.610(a)), a party may take the deposition of the natural person that was produced as the witness for the entity as a corporate "person most knowledgeable" ("PMK") designee. Because of the bar against deposing the same natural person twice, it often is desirable to take the deposition of the entity early in the discovery process to learn more about the facts surrounding an issue before taking the depositions of the involved natural persons. The party noticing the entity deposition cannot use the procedure to require the deposition of a particular corporate officer or employee because that would be inconsistent with statutory bar against successive depositions of natural persons [see Ables, "Corporate Depositions in State and Federal Court," 29 *L.A. Lawyer* 31 (2006)].

The corporation has the duty to designate the person most qualified to testify on its behalf regarding the matters described in the notice and the obligation to assure that the person has become familiar not just with his or her own knowledge of the facts, but all facts reasonably known or accessible to the entity. More than one person can be designated to testify regarding the matters described in the deposition notice. Although there is no obligation by an entity to produce a former employee as the deponent, the entity may designate a former employee or any other agent most qualified to testify on the entity's behalf. Because of the binding nature of the testimony on the corporation and the risk of possible sanctions if the witness is not able to adequately testify about what is known to the corporation, it may be advisable to object to the deposition notice if the matter is not specified with "reasonable particularity." At the deposition, counsel representing the witness should object to any questioning beyond the scope of the matters designated in the notice, and may want to assert the position that questioning beyond the scope of the matters designated will constitute the one deposition of the natural person permitted by statute.

Judge's Perspective:

It is of critical importance that a witness testifying on behalf of an entity not answer questions that are

beyond the scope of subject areas designated in the deposition notice. The testimony of a deponent appearing on behalf of an entity is binding on the entity and the answers of an unprepared or ill-prepared witness may be used against the entity at trial or in motion practice with devastating results. If a witness testifying on behalf of an entity is asked questions outside of the scope of the deposition notice which the witness is not prepared to answer, counsel should place an objection in the record stating that the question is outside of the scope of the topic areas designated in the deposition notice and offer to produce a witness on the requested topic area at a future date in response to an amended or subsequent deposition notice. If the opposing counsel continues to insist that a question or questions outside of the scope of the deposition notice be answered, then counsel defending the deposition should consider moving for a protective order on the record pursuant to *CCP* §§ 2025.420(a) and 2025.470 and suspending the deposition pending a judicial determination of the propriety of the pending question or questions. Offer to meet and confer with opposing counsel on the record before making a motion for a protective order during a deposition in order to comply with meet and confer requirements and to avoid the potential for the imposition of monetary sanctions if the protective order is denied by the court.

6.07[2] Court May Grant Leave or Parties May Stipulate to Take Subsequent Deposition. A subsequent deposition may be taken if [*CCP* § 2025.610]:

- On motion, for good cause shown, the court has granted leave to take a subsequent deposition; or
- The parties have stipulated, with the consent of the deponent, if not a party, to the taking of a subsequent deposition.

Examples:

- If a preliminary deposition of a records custodian is necessary to identify records, because of a party's refusal to provide information through less formal procedures, leave to take a second deposition of the same person may be appropriate after the records have been examined [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 222-223, 61 CR2d 567].
- Plaintiff's desire to have an expert witness offer opinions at trial that he had not given at his deposition was not good cause for delaying a trial to take a second deposition of the expert [*McCoy v. Gustafson* (2009) 180 CA4th 56, 98, 103 CR3d 37] .



Strategic Point:

When documents are not produced prior to a deposition, counsel will probably need time to review the documents to identify issues and formulate questions arising out of the documents. At the conclusion of the deposition at which the documents are produced, counsel may want to seek a stipulation that the deposition is concluded except for issues relating to the documents.

6.07[3] Depositions of Opposing Counsel Are Severely Restricted. Taking the deposition of opposing counsel is severely restricted and permitted only on a showing of extremely good cause [*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 CA4th 1558, 1562, 50 CR3d 129] .

Opposing counsel may be deposed only when the following circumstances exist [*Spectra-Physics, Inc. v. Superior Court* (1988) 198 CA3d 1487, 1496, 244 CR 258]:

- No other means exist to obtain the information;

- The information sought is relevant and not privileged; and
- The information is crucial to the preparation of the case.

The party seeking to take the deposition has the burden of proof to establish the predicate circumstances for the first and third circumstances listed above, but the party opposing discovery has the burden of establishing the applicability of the attorney-client privilege or work product doctrine [*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 CA4th 1558, 1563, 50 CR3d 129] .

Examples:

- **Deposition Allowed:** Counsel for the insured in a bad-faith action against an insurer could be deposed because he was the only witness, other than the employees of the insurer, to facts concerning the attempted negotiation of the insured's claim from which the bad-faith allegations derived [*Fireman's Fund Ins. Co. v. Superior Court* (1977) 72 CA3d 786, 789-790, 140 CR 677].

- **Deposition Not Allowed:**

- Attempting to depose opposing counsel was improper when the information sought was not peculiarly within the attorney's personal knowledge and could be elicited with properly drafted interrogatories [*Estate of Ruchti* (1993) 12 CA4th 1593, 1600-1601, 16 CR2d 151].

- Plaintiffs could not depose opposing counsel to discover information she had compiled regarding staffing ratios at a nursing facility because they had access to the same underlying documentation as defendants, such information was not crucial to their case, and the information sought was protected work product [*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 CA4th 1558, 1564-1565, 50 CR3d 129] .

6.07[4] Specific Restrictions Apply in Limited Civil Cases.

6.07[4][a] Civil Cases Are Classified As Limited or Unlimited. Cases in California trial courts are classified as unlimited or limited civil cases. Limited civil cases, generally, involve disputes in which the amount or value of property in controversy is \$25,000 or less. In addition, certain types of relief, such as a permanent injunction, are not available in limited civil cases unless otherwise authorized by statute [see CCP §§ 85-86.1, 580(b)]. All other cases are unlimited civil cases [see CCP § 88].

Most limited civil cases are subject to the economic litigation rules in CCP §§ 90-100. These rules include restrictions on the number of discovery requests [see CCP §§ 94, 95].

Cross Reference:

For detailed discussion of what constitutes a limited civil case, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

6.07[4][b] Only One Deposition of Each Adverse Party Is Allowed. In limited civil cases, a party may use, as a discovery tool, only one oral or written deposition as to each adverse party [CCP § 94(b)]. A deposition of an organization is treated as a single deposition even though more than one person may be designated or required to testify pursuant to CCP § 2025.230 [CCP § 94(b)].

Distinguish--Unlimited Civil Cases:

In unlimited civil cases, generally only one deposition of a natural person is allowed [CCP § 2025.610]. However, there is no other specific limit on the number of depositions allowed in an action, and a party may depose more than one party-affiliated deponent, such as managers, directors, or employees, of an opposing party.

6.07[4][c] Party May Move to Withdraw Case From Restrictions. A party may make a noticed motion to withdraw a limited civil case from the restrictions on discovery on the ground that it is impractical to prosecute or defend the action within the limitations of the economic litigation rules of CCP §§ 90-100 [CCP § 91(c)].

Distinguish:

Short of withdrawing the case from the restrictions altogether, a party may seek additional discovery under CCP § 95, discussed in 6.07[4][d].

Drawback:

Withdrawing the case from the economic litigation provisions will free *all* parties from the restrictions on pleadings and discovery. The party's needs and potential for the other party or parties to run up costs should be evaluated to ensure that this will not ultimately work to the disadvantage of the moving party. It may be more useful to move for additional discovery on a case-by-case basis under CCP § 95.

**Cross References:**

Discussion, see *Ch. 1, Strategy and Planning, 1.13*.

Form, see *California Forms of Pleading and Practice, Ch. 345A, Limited Civil Cases, § 345A.102 (Matthew Bender)*.

6.07[4][d] Party May Move to Allow Additional Discovery. A party in a limited civil case may seek authority to conduct further discovery by noticed motion. The grounds should be that the party will be unable to prosecute or defend the action effectively without the additional discovery [CCP § 95].

Distinguish:

Complete withdrawal from the limitations applicable to limited civil cases under CCP §§ 90-100, discussed in 6.07[4][c].

**Cross Reference:**

Discussion/form, see *Ch. 1, Strategy and Planning, 1.13, 1.20*.

6.07[4][e] Parties May Stipulate to Additional Discovery. The parties in limited civil cases may stipulate to additional discovery [CCP § 95(b)].

**Cross Reference:**

Discussion, see *Ch. 1, Strategy and Planning, 1.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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Chapter 6 Oral Depositions in California
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6.08 Parties May Stipulate to Modification of Deposition Procedures.

Unless the court orders otherwise, the parties may stipulate, in writing, to the taking of depositions [CCP § 2016.030]:

- Before any person;
- At any time or place;
- On any notice; and
- In any manner.

The parties may also provide that depositions taken according to the stipulation may be used like other depositions [CCP § 2016.030].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.09 Timing of Deposition Notices.

6.09[1] Plaintiff May Serve Deposition Notice Without Leave of Court After Service of Summons or Appearance.

6.09[1][a] General Rule Is 20 Days After. A plaintiff may serve a deposition notice without leave of court on any date that is 20 days after the service of the summons on, or appearance by, any defendant [CCP § 2025.210(b)].



Warnings:

- Although the plaintiff is entitled to serve a deposition notice after service on, or appearance by, "any" defendant, a later-served or later-appearing party may be entitled to take a subsequent deposition of the same deponent if that party has not been served with notice of the previous deposition; if the deponent is a nonparty, the deponent must consent [see CCP § 2025.610].

- The 20-day "hold" period on noticing depositions also applies to deposition subpoenas seeking only the production of business records [*California Shellfish, Inc. v. United Shellfish Co. (1997) 56 CA4th 16, 25, 64 CR2d 797*].



Cross References:

Discussion of subsequent depositions, see 6.07[1].

Discussion of deposition subpoenas for production of business records only, see 6.17.

6.09[1][b] May Serve Earlier Notice With Leave of Court. A plaintiff may move, with or without notice, for leave of court to serve a deposition notice at an earlier date [CCP § 2025.210(b)]. The plaintiff must demonstrate good cause [CCP § 2025.210(b)].

Example--Lack of Good Cause:

Good cause was not shown when the requested early discovery was manifestly a "fishing expedition" to identify potential defendants since no defendant had been named in the complaint [*Pearlson v. Does 1 to 646* (1999) 76 CA4th 1005, 1011-1012].

6.09[2] Defendant May Serve Deposition Notice at Any Time. A defendant may serve a deposition notice without leave of court at any time after that defendant has been served or has appeared in the action, whichever occurs first [CCP § 2025.210(a)].

6.09[3] Deposition Must Begin and Any Motions Be Heard by Discovery Cut-Off Date. Discovery must be completed on or before the 30th day prior to the date initially set for trial. All motions regarding discovery must be heard on or before the 15th day prior to the date *initially* set for trial [CCP § 2024.020(a)]. Discovery is "complete" on the day a response is due or on the day a deposition begins [CCP § 2024.010].

Exception:

Discovery has an earlier imposed cut-off date if the case is judicially arbitrated [CCP § 2024.040(a)].

**Cross Reference:**

Further discussion, see *Ch. 1, Strategy and Planning, 1.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.10 Requirements for Deposition Notice and Travel Limits.

6.10[1] Specify Address Where Deposition Will Be Taken.

6.10[1][a] Travel Limits for Deponent Who Is a Natural Person. Unless the court orders otherwise, the notice of deposition of a natural person must specify a place where the deposition will be taken that is either [CCP § 2025.250(a)]:

- Within 75 miles of the deponent's residence; or
- Within the county where the action is pending and within 150 miles of the deponent's residence.

The party giving notice of the deposition may select either of these options [CCP § 2025.250(a)].

6.10[1][b] Travel Limits for Party Deponent That Is an Organization. The notice of deposition of an organization that is a party to the action must specify a place where the deposition will be taken that is either [CCP § 2025.250(b)]:

- Within 75 miles of the organization's principal executive or business office in California; or
- Within the county where the action is pending and within 150 miles of that office.

The party giving notice of the deposition may select either of these options [CCP § 2025.250(b)].

6.10[1][c] Travel Limits for Nonparty Deponent That Is an Organization. The notice of deposition of an organization that is not a party to the action must specify a place where the deposition will be taken that is within 75 miles of the organization's principal executive or business office in California, unless the organization consents to a more distant place [CCP § 2025.250(c)].

Exception:

If the organization has not designated a principal executive or business office in California, the

deposition must be taken at a place that is, at the option of the party giving notice of the deposition, either [CCP § 2025.250(c)]:

- Within the county where the action is pending; or
- Within 75 miles of any executive or business office in California.

6.10[1][d] Party Seeking Discovery May Move to Increase Travel Limits for Party Deponent. A party seeking to take the deposition of a natural person who is a party to the action, or an officer, director, managing agent, or employee of a party, may make a motion for an order requiring the deponent to attend a deposition at a place that is more distant than the travel limits otherwise allowed [CCP § 2025.260(a)].

Prerequisite:

The motion must be accompanied by a declaration showing that the party filing the motion has made a reasonable and good-faith attempt at informal resolution of the travel limit issue [CCP § 2025.260(a)].



Strategic Point--Party Seeking Discovery:

A motion to increase travel limits may be used to obtain an order to depose a party or party-affiliated deponent who is an out-of-state resident in California [*Glass v. Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690].

Example:

Foreign corporation sued petitioners, California residents, in California. Petitioners were not required to depose corporation's management team, residents of Indiana, in Indiana. Petitioners could move to increase travel limits for the party-affiliated deponents to require them to attend depositions in California [*Glass v. Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690].



Cross Reference:

Form, see 6.61.

6.10[1][e] Factors to Be Considered by Court in Increasing Travel Limits. The court must exercise its discretion when deciding to grant or deny a motion to increase the travel limits for a party or party-affiliated deponent [CCP § 2025.260(b)]. The court must take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent to attend a deposition at a more distant place [CCP § 2025.260(b)].

The factors to be considered include, but are not limited to [CCP § 2025.260(b)]:

- Whether the moving party selected the forum;
- Whether the deponent will be present to testify at the trial of the action;
- The convenience of the deponent;
- The feasibility of conducting the deposition by written questions, or of using a discovery method other than a deposition;
- The number of depositions sought to be taken at a place more distant than that usually permitted;

- The expense to the parties of requiring the deposition to be taken within the usual travel limits; and
- The whereabouts of the deponent at the time for which the deposition is scheduled.

Example:

Travel limits were increased for party-affiliated deponents who were out-of-state residents, requiring them to be deposed in California, because of the following factors [*Glass v. Superior Court* (1988) 204 CA3d 1048, 1053, 251 CR 690]:

- Party with whom deponents were affiliated had chosen the California forum;
- Party seeking discovery offered to schedule depositions when deponents were otherwise in California on business;
- Depositions at issue were the only depositions to be taken at a distant place;
- Depositions were a preferred method of discovery under the circumstances of the case; and
- It was less expensive to conduct the depositions in California while the deponents were there on business than for other parties to travel to their state of residence.

**Strategic Point:**

The court may condition an order increasing the travel limit for a deponent on the advance payment by the moving party of the reasonable expenses and costs to the deponent for travel to the place of deposition [CCP § 2025.260(c)]. The party seeking to take the deposition should consider whether it would be more cost-effective for counsel to travel to a place within the usual travel limits for the deponent, instead of seeking an order requiring deponent to travel.

Conversely, if the witness is willing to do so, consider an agreement among the parties to divide the travel expense for the witness to come to a location convenient to counsel; this can often save significant fees incurred by multiple counsel traveling to the witness's residence.

6.10[1][f] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under CCP § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to increase the travel limits for a party deponent, unless the court finds that [CCP § 2025.260(d)]:

- The one subject to the sanction acted with substantial justification, or
- Other circumstances make the imposition of a sanction unjust.

6.10[1][g] Deposition May Be Taken by Telephone or Other Electronic Means. Any party may take an oral deposition by telephone, video conference, or other remote electronic means [CCP § 2025.310(a); Cal Rules Ct, Rule 3.1010(a)].

Notice of taking the deposition by telephone, video conference, or other remote electronic means is served with the notice of deposition or deposition subpoena [Cal Rules Ct, Rule 3.1010(a)(1)].

**Cross Reference:**

Discussion, see 6.30.

6.10[2] Specify Date and Time of Deposition.

6.10[2][a] General Rule Is at Least 10 Days After Service of Notice. An oral deposition must be scheduled at least 10 days after service of the deposition notice [CCP § 2025.270(a)]. If service is made by mail, the 10-day period is extended by the additional time periods provided by CCP § 1013.

6.10[2][b] Exception: At Least 20 days After Issuance of Subpoena to Produce Consumer or Employee Records. If the party giving notice of an oral deposition serves a deposition subpoena commanding the deponent to produce personal records of a consumer, the deposition must be scheduled at least 20 days after the issuance of the subpoena [CCP § 2025.270(c); see CCP §§ 1985.3, 1985.6] or employment records of an employee.

Cross Reference:

Discussion of consumer records, see 6.11[3].

6.10[2][c] Exception: Five Days in Unlawful Detainer. In an unlawful detainer action or other summary proceeding involving possession of real property, an oral deposition must be scheduled at least five days after service of the deposition notice, but not later than five days before trial [CCP § 2025.270(b)].

Cross Reference:

Timing of deposition in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][b].

6.10[2][d] Exception: Time Shortened or Extended by Court. On motion or ex parte application of any party or deponent, the court may shorten or extend the time for scheduling a deposition, or may stay its taking until a motion for a protective order is granted or denied [CCP § 2025.270(d)]. The moving party must demonstrate good cause for the order [CCP § 2025.270(d)].

Cross Reference:

Discussion of protective orders, see 6.28.

6.10[3] Identify Deponent. The deposition notice must state the name of the deponent and, if the deponent is not a party, the address and telephone number of the deponent, if known [CCP § 2025.220(a)(3)].

If the name of the deponent is not known, the deposition notice must set forth a general description sufficient to identify the person or particular class to which the person belongs [CCP § 2025.220(a)(3)].



Strategic Point:

When the specific name of a party-affiliated deponent is not known, the party noticing the deposition may describe the person desired, *e.g.*, "supervisor of Defendant's claims department," or have the deponent organization designate and produce an individual. However, to more accurately identify the individual from whom discovery is sought, the noticing party should consider using interrogatories to obtain information such as names, titles, and job responsibilities, before noticing the deposition.

If the deponent named is not a natural person, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the deponent will have to designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters described in the notice of deposition, to the extent of any information known or reasonably available to the

deponent [*CCP* § 2025.230; see *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1395-1397, 115 CR2d 137 (discussing duty of corporate deponent to gather responsive documents)].



Strategic Point:

The designee of an entity is testifying as a representative of the entity, not an individual. The entity is obligated to prepare the designee to give binding answers. If the designee testifies that the entity does not know the answer to a question, the entity will not be allowed, in effect, to change its answer by introducing evidence during trial [see *Ierardi v. Lorillard Inc.* (ED Pa 1991) 1991 US Dist LEXIS 11320].

6.10[4] Describe Materials to Be Produced. The deposition notice must specify, with reasonable particularity, any materials or category of materials to be produced by the deponent [*CCP* § 2025.220(a)(4)].

6.10[5] State Intention to Use Audio or Video Technology. The deposition notice must state any intention by the party noticing the deposition to record the testimony [*CCP* § 2025.220(a)(5)]:

- By audio or video technology, in addition to recording stenographically; or
- By stenographic method through the instant visual display of testimony.

6.10[6] State Intention to Reserve Right to Use Video of Physician or Expert at Trial. The deposition notice must state any intention to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or of any expert witness [*CCP* § 2025.220(a)(6)].

6.10[7] Describe Matters to Be Covered at Deposition, If Deponent Is Not a Natural Person. If the deponent named is not a natural person, the deposition notice must describe with reasonable particularity the matters on which examination is requested [*CCP* § 2025.230].



Strategic Point:

Care should be taken in describing the matters on which examination is requested. Although the limit of one deposition per natural person in *CCP* § 2025.610 does not apply to deponents that are not natural persons, the other side can be expected to object to successive depositions of an entity.

6.10[8] List All Parties on Whom Notice Will Be Served. The deposition notice, or accompanying proof of service, must list all parties or attorneys for parties on whom it is served [*CCP* § 2025.240(a); see also *CCP* § 1013a (required contents of proof of service by mail)].

The common practice is for deposition notices to contain a generic description of the parties and the attorneys for the parties, and not to identify each party and each attorney for the parties by name. In contrast, the proof of service must contain the correct name of the party or attorney served and address of service, or the proof of service will be defective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.11 Service of Notice of Deposition.

6.11[1] Serve Notice on All Appearing Parties. The deposition notice must be served on every other party who has appeared in the action [*CCP* § 2025.240(a)].



Strategic Point:

Although the noticing party is only required to serve the notice on every other party who has appeared in the action, the notice should be served on any other party who has been served with summons, to avoid having a later-appearing party assert that he or she is entitled to take a subsequent deposition of the same deponent because of a lack of notice of the original deposition. This will help prevent the "new" party from retaking the proposed deposition [*see CCP* § 2025.610].

The deposition notice may be served by mail, Express Mail or another method of overnight delivery. If the parties agree in writing, service also may be made by facsimile transmission [*CCP* §§ 1013, 2016.050]. If served by mail, the deposition notice may be served by an attorney but may not be served by a party to the action [*CCP* § 1013a].

Distinguish:

A deposition subpoena compelling attendance of a nonparty deponent at a deposition must be personally served, but it may be served by any person, including a party [*CCP* § 2020.220(b)].



Cross Reference:

Discussion of service of deposition subpoena, see 6.19.

6.11[2] Serve Notice With Copy of Deposition Subpoena If Requiring Attendance and Testimony of Nonparty Deponent. If the party noticing the deposition is commanding the attendance of a nonparty deponent with a deposition subpoena, an identical copy of the deposition subpoena must be served with the notice of deposition [*CCP* § 2025.240(c)].

 Cross Reference:

Discussion of deposition subpoena, see 6.14 -6.21.

6.11[3] Serve Notice on Consumer/Employee If Subpoenaing Consumer/Employee Records.

6.11[3][a] Consumer or Employee Receives Notice and Opportunity to Object If Records Relating to Consumer or Employee Are Subpoenaed From Witness. If the party giving notice of an oral deposition serves a deposition subpoena commanding the deponent to produce personal records of a consumer or the employment records of an employee, the party noticing the deposition must serve the consumer or employee with [CCP § 2025.240(b)]:

- The notice of deposition;
- A notice of privacy rights [see CCP §§ 1985.3(e) (consumer), 1985.6(e) (employee)]; and
- A copy of the deposition subpoena.

The consumer or employee will be able to authorize disclosure of records relating to himself or herself or to object to the disclosure of the records by the witness to the subpoenaing party [see CCP §§ 1985.3(e), 1985.6(e)].



Timing:

If the deponent is commanded to produce personal records of a consumer or employment records of an employee, the deposition must be scheduled for at least 20 days after issuance of the deposition subpoena [CCP § 2025.270(c)]. The papers noted above must be served on the consumer not less than 10 days prior to the date for production specified in subpoena and at least five days before service on the custodian of the records (with times extended for service by mail as provided in CCP § 1013) [CCP §§ 1985.3(b)(2), 1985.6(b), 2025.270]. Service on the witness must, in turn, allow the witness a reasonable amount of time to locate and produce the records or copies, defined as no earlier than the later of [CCP §§ 1985.3(d), 1985.6(b), 2020.410(c)]:

- 20 days after the issuance of the deposition subpoena; or
- 15 days after the service of the deposition subpoena.

 Cross Reference:

Form for notice to consumer or employee of privacy rights, see 6.67.

6.11[3][b] Records Held by Medical Providers, Veterinarians, Financial Institutions, Insurance Companies, Escrow Agents, Attorneys, Accountants, Telephone Companies, and Schools May Be Consumer Records.

Consumer records are personal records related to individuals, partnerships of five or fewer persons, associations or trusts and maintained by any of the following with whom the consumer has done business [see CCP § 1985.3(a)(1)]:

- Physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, psychotherapist as defined in *Evid Code* § 1010, pharmacist, pharmacy, hospital, medical center clinic, radiology or MRI center, clinical or diagnostic laboratory;
- Veterinarian, veterinary hospital or clinic;
- State or national bank, state or federal association defined in *Fin Code* § 5102, state or federal credit

union, trust company, anyone authorized by the State of California to make or arrange loans secured by real property, security brokerage firm;

- Insurance company, title insurance company, underwritten title insurance company, escrow agent licensed under *Fin Code* § 17000 or exempt from licensing under *Fin Code* § 17006;

- Attorney;

- Accountant;

- Institution of Farm Credit System as specified in *12 USCS* § 2002;

- Telephone corporation that is a public utility as defined in *PU Code* § 216; and

- Private or public preschool, elementary school, secondary school, or postsecondary school as described in *Ed Code* § 76244 (relating to community colleges).

6.11[4] Serve Notice on Deposition Officer If Using Instant Visual Display of Testimony. If the deposition will be conducted using instant visual display, a copy of the deposition notice must also be given to the deposition officer [*CCP* § 2025.220(a)(5)].



Warning:

If you are requesting instant visual display, inform the provider how many participants are expected at the deposition so that the provider can arrange to have adequate equipment for all to connect [see *CCP* § 2025.220(a)(5) (service must be made available to all in attendance at deposition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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Chapter 6 Oral Depositions in California
III. USING A DEPOSITION SUBPOENA TO OBTAIN DISCOVERY FROM A NONPARTY

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6.12 CHECKLIST: Using a Deposition Subpoena.

☐ Determine whether deposition subpoena is required:

☐ Deposition subpoena is not required if deponent is:

☐ A party.

☐ A current officer, director, managing agent, or employee of a party.

☐ Deposition subpoena is required if deponent is:

☐ A nonparty, including:

☐ A former officer, director, managing agent, or employee of a party.

Authority:

CCP §§ 2020.010, 2025.280

Discussion:

See 6.06, 6.13

☐ Determine scope of deposition subpoena, which may command:

☐ Attendance and testimony of deponent at oral deposition,

☐ Production of business records for copying, without attendance and testimony of deponent, or

- ☐ Attendance, testimony, and production by deponent at oral deposition.

Authority:

CCP § 2020.020

Discussion:

See 6.14

- ☐ If commanding only attendance and testimony of deponent, prepare deposition subpoena:

- ☐ Specify time and place of deposition.

- ☐ If deponent is not a natural person, select box on form advising deponent of duty to designate agent.

- ☐ Indicate intention to use audio or video technology.

- ☐ If deponent is a treating or consulting physician or expert witness, indicate possible intention to use video recording at trial.

- ☐ If witness is a representative of an organization, state matters to be covered at deposition.

Authority:

CCP § 2020.310

Discussion:

See 6.16

Form:

See 6.64

- ☐ If commanding production of business records only, prepare deposition subpoena:

- ☐ Direct deposition subpoena to custodian of records or other person qualified to certify records.

- ☐ Specify deposition officer to whom production must be made.

- ☐ Specify date and time for production.

- ☐ Indicate manner of delivery.

- ☐ Describe each item or category of item to be produced.

Authority:

CCP § 2020.410(a)

Discussion:

See 6.17

Form:

See 6.66

☐ If commanding attendance, testimony, and production of documents or things by deponent, prepare deposition subpoena:

- ☐ Specify time and place of deposition.
- ☐ If deponent is not a natural person, select box on form advising deponent of duty to designate agent.
- ☐ Indicate intention to use audio or video technology.
- ☐ If deponent is a treating or consulting physician or expert witness, indicate possible intention to use video recording at trial.
- ☐ Describe each item or category of item to be produced and any testing or sampling sought.
- ☐ If witness is a representative of an organization, state matters to be covered at deposition.

Authority:

CCP §§ 2020.310, 2020.510

Discussion:

See 6.18

Form:

See 6.65

☐ Serve deposition subpoena on deponent by personal delivery.

- ☐ Include proof of service of notice to consumer or employee of privacy rights, if subpoenaing consumer or employee records, or written authorization for release of records.
- ☐ Include witness fee, unless payment will be made at the time deponent attends deposition.

☐ Serve copies on all other parties to action.

Authority:

CCP §§ 2020.220, 2020.230, 2020.510, 2025.220-2025.240

Discussion:

See 6.19

Forms:

See 6.67 (notice to consumer or employee of privacy rights), 6.68 (written authorization for release of records)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.13 Options and Strategy.

A party may obtain discovery from a nonparty within California through [CCP § 2020.010(a)]:

- An oral deposition;
- A written deposition; or
- A deposition for the production of business records and things.

The process by which a nonparty is required to provide discovery is a deposition subpoena [CCP § 2020.010(b)].

Exception:

The service of a deposition notice, without a deposition subpoena, is effective to obtain discovery from a deponent who is affiliated with a party as an officer, director, managing agent, or employee of the party [CCP § 2025.280(a)].



Warning:

A notice of deposition is sufficient to compel attendance, testimony, and/or production only by parties and persons currently affiliated with parties. Former officers, directors, managing agents, or employees must be served with a deposition subpoena as well as a notice of deposition [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398, 115 CR2d 137]. However, opposing counsel may be willing to produce, without a subpoena, witnesses formerly affiliated with a party and consideration should be given to obtaining agreement re the production of witnesses.



Cross Reference:

Discussion of written depositions, see Ch. 8, Depositions on Written Questions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production &

Inspection



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6.14 Scope of Deposition Subpoena.

6.14[1] May Command Attendance and Testimony of a Nonparty at a Deposition. A deposition subpoena may command the attendance and testimony of a nonparty deponent at a deposition [CCP § 2020.020(a)].



Cross Reference:

Form, see 6.64.

6.14[2] May Command Production of Business Records for Copying. A deposition subpoena may command only the production of business records for copying, without requiring the attendance and testimony of the deponent at a deposition [CCP § 2020.020(b)].



Investigating and Obtaining Business Records Using Online Resources:

Many resources are available online for investigating and obtaining business records. These resources can help you find general information or leads for developing more focused inquiries. For example, helpful resources at *lexis.com* include:

- Public Records tab > People, Business & Asset Locators > Business Locator > Combined Business & Corporation Information



Sample Search: To find basic information about a company's corporate status when the exact company name is unknown, try: *automotive /3 pete!*.

"Business record" means an item, collection, or grouping of information about a business entity; it does not include documents that are the product of a business entity [*Urban Pac. Equities Corp. v. Superior Court* (1997) 59 CA4th 688, 692-693, 69 CR2d 635].

Example:

A party deponent could not use a deposition subpoena for business records, directed to a reporter service,

to obtain a copy of his own deposition transcript and thereby avoid paying the clearly excessive copying fees charged by the service to provide additional copies [*Urban Pac. Equities Corp. v. Superior Court* (1997) 59 CA4th 688, 692-693, 69 CR2d 635].

➡ **Cross Reference:**

Form, see 6.66.

6.14[3] May Command Attendance, Testimony, and Production. A deposition subpoena may command both the attendance and testimony of the deponent, as well as the production of business records, other documents, and tangible things, at a deposition [CCP § 2020.020(c)].

➡ **Cross Reference:**

Form, see 6.65.

6.14[4] Subject to General Subpoena Provisions. Except as modified by CCP §§ 2020.010-2020.510, the Code of Civil Procedure and Evidence Code provisions concerning subpoenas for civil trials also apply to deposition subpoenas [CCP § 2020.030; see CCP §§ 1985-1997; Evid Code §§ 1560-1566].

➡ **Cross Reference:**

Detailed discussion of general subpoena provisions, see California Forms of Pleading and Practice, Ch. 535, Subpoena (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.15 Issuance of Deposition Subpoena.

6.15[1] May Be Issued by Clerk of Court. A party may request the clerk of the court in which the action is pending to issue a deposition subpoena [CCP § 2020.210(a)]. The clerk must issue the subpoena signed and sealed, but otherwise in blank [CCP § 2020.210(a)]. The party requesting the deposition subpoena must fill it in before service [CCP § 2020.210(a)].

6.15[2] May Be Issued by Attorney of Record. In lieu of a court-issued deposition subpoena, an attorney of record for the party seeking discovery may sign and issue a deposition subpoena [CCP § 2020.210(b)]. If an attorney issues the deposition subpoena [CCP § 2020.210(b)]:

- The deposition subpoena need not be sealed.
- A copy of the deposition subpoena may be served on the deponent.
- The attorney may retain the original deposition subpoena.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.16 Format of Deposition Subpoena to Command Only Attendance and Testimony.

6.16[1] Specify Time and Place of Deposition. A deposition subpoena that commands only the attendance and testimony of the deponent must specify the time and place for the deposition [CCP § 2020.310(a)].

6.16[2] Summary of Nature of Deposition, Rights and Duties of Deponent, and Penalties for Disobedience. A deposition subpoena that commands only the attendance and testimony of the deponent must set forth a summary describing [CCP § 2020.310(b)]:

- The nature of a deposition.
- The rights and duties of the deponent.
- The penalties for disobedience of a deposition subpoena [see CCP § 2020.240].

A summary satisfying this requirement is included on Judicial Council Form SUBP-015, the mandatory form of deposition subpoena.



Cross Reference:

Form, see 6.64.

6.16[3] Indicate Intention to Use Audio or Video Technology. If the deposition will be recorded using audio or video technology, the deposition subpoena must state that it will be recorded in that manner [CCP § 2020.310(c)]. If the deposition testimony will be conducted using instant visual display, the deposition subpoena must state that it will be conducted in that manner [CCP § 2020.310(d)].

6.16[4] State Matters to Be Covered, If Deponent Is an Organization. If the deponent is an organization, the deposition subpoena must describe with reasonable particularity the matters on which the examination is requested [CCP § 2020.310(e)].

6.16[5] Advise Deponent Organization of Duty to Designate Agent. If the deponent is an organization, the

deposition subpoena must advise the organization of its duty to designate employees or agents who will attend the deposition [*CCP* § 2020.310(e); see *CCP* § 2025.230].

A statement satisfying this requirement is included on Judicial Council Form SUBP-015, the mandatory form of deposition subpoena.

 Cross Reference:

Form, see 6.64.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.17 Format of Deposition Subpoena to Command Only Production of Business Records for Copying.

6.17[1] Describe Each Item or Category of Item. A deposition subpoena that commands only the production of business records for copying must designate the business records to be produced either by [CCP § 2020.410(a)]:

- Specifically describing each individual item, or
- Reasonably particularizing each category of item.

Specific information identifiable only to the deponent's record system, such as a policy number or the date the consumer interacted with the witness, is not required [CCP § 2020.410(b)].

Reasonable Particularity:

The requirement that the party seeking discovery "reasonably particularize" each category of item means that the categories must be reasonably particularized from the standpoint of the person who is subjected to the burden of producing the materials [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 222, 61 CR2d 567].

6.17[2] Affidavit Showing Good Cause Is Not Required. If a deposition subpoena commands only the production of business records for copying, an affidavit or declaration showing good cause for the production of the business records is not required [CCP § 2020.410(c); see *Terry v. SLICO* (2009) 175 CA4th 352, 358, 95 CR3d 900 (provisions of CCP §§ 1985 and 1987.5 requiring affidavit do not apply to deposition subpoenas)].

6.17[3] Direct Deposition Subpoena to Custodian of Records or Other Qualified Person. A deposition subpoena commanding only the production of business records for copying must be directed to the custodian of those records or another person qualified to certify the records [CCP § 2020.410(c)]. The custodian of records or other qualified witness must be able to attest to various attributes of the records relevant to their authenticity and trustworthiness, including the identity of the records, their mode of preparation and their preparation in the ordinary course of business at or near the time of the event [*Cooley v. Superior Court* (2006) 140 CA4th 1039, 1044-1045, 45 CR3d 183 (district attorney's office was not custodian of business records maintained by it but generated by other entities); see *Evid Code* § 1561(a)].

6.17[4] Specify Date for Production. A deposition subpoena commanding only the production of business records for copying must specify a date for the production that is no earlier than the later of [CCP § 2020.410(c)]:

- 20 days after the issuance of the deposition subpoena, or
- 15 days after the service of the deposition subpoena.

The custodian of records cannot deliver to the deposition officer the records prior to the date specified in the deposition subpoena [CCP § 2020.430(d)].

Exception:

The parties may stipulate to an earlier date [CCP § 2020.430(d)]. If the production involves consumer or employee records, the stipulation of the consumer or employee is also required [CCP § 2020.430(d)].

6.17[5] Specify Manner of Production.

6.17[5][a] Nonparty Records May Be Made Available to Subpoenaing Party's Attorney at Witness's Business Address. A deposition subpoena seeking records from a business that is neither a party to the action nor the location where a cause of action is alleged to have arisen may direct the custodian of records or other qualified witness to make the records available for inspection and copying by the subpoenaing party's attorney or that attorney's representative at the witness's business address during normal business hours [CCP § 2020.430(e); see Evid Code § 1560(b), (e)].

On at least five business days advance notice by the attorney or attorney's representative, the witness must designate a time period of at least six consecutive hours on a specific date when the subpoenaed records may be copied [see Evid Code § 1560(b), (e)].

6.17[5][b] Records May Be Delivered to Deposition Officer. A deposition subpoena may direct the custodian of records to deliver the records to the deposition officer specified in the subpoena by [CCP § 2020.430]:

- Delivering a copy of the business records to the deposition officer at the deposition officer's address;
- Delivering a copy of the business records to the deposition officer at the witness's business address, on payment of the reasonable costs of preparing the copy; or
- Allowing the deposition officer to make a copy of the original records at the witness's business during normal business hours.

6.17[6] Specify Deposition Officer to Whom Delivery Must Be Made.

6.17[6][a] Qualifications of Deposition Officer. If a deposition subpoena commands only the production and copying of business records, the deposition officer specified in the subpoena must be [CCP § 2020.420]:

- A registered professional photocopier [see B&P Code § 22450]; or
- A person exempted from those registration requirements [see B&P Code § 22451].

The deposition officer cannot be [CCP § 2020.420]:

- Financially interested in the action; or

- A relative or employee of any attorney of the parties.

6.17[6][b] Objections to Qualifications Waived If Not Timely Made. Any objection to the qualifications of the deposition officer is waived unless made before [CCP § 2020.420]:

- The date of production; or
- As soon after the production as the ground for that objection becomes known or could be discovered by reasonable diligence.

6.17[6][c] Duty of Deposition Officer to Deliver Copies. Promptly on or after the deposition date, and after obtaining the copy of the business records, the deposition officer must provide that copy to the subpoenaing party [CCP § 2020.440].

The deposition officer must also provide a copy of the records to any other party to the action who then or subsequently, within a period of six months following the settlement of the case, notifies the deposition officer that the party desires to purchase a copy of the records [CCP § 2020.440].

6.17[7] Include Proof of Service on All Parties. Notice of a deposition must be given to every other party who has appeared in the action [CCP § 2025.240(a)]. When a deposition subpoena commands only the production of business records for copying, the deposition subpoena serves as the notice of deposition [CCP § 2025.220(b)]. The deposition subpoena must be accompanied by a proof of service listing all the parties or attorneys for parties on whom it is served [CCP § 2025.240(a)].

6.17[8] Include Proof of Service of Notice on Consumer/Employee or Written Authorization for Release of Records, If Subpoenaing Consumer or Employee Records. If the deposition subpoena commands the production of consumer or employee records, the subpoena must be accompanied by either [CCP § 2020.410(d)]:

- A copy of the proof of service of the notice to the consumer or employee [see CCP §§ 1985.3(c)(1), 1985.6(c)(1)]; or
- The consumer's or employee's written authorization to release personal records [see CCP §§ 1985.3(c)(2), 1985.6(c)(2)].

Cross Reference:

Forms, see 6.67 (notice to consumer or employee), 6.68 (written authorization for release of records).

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.18 Format of Deposition Subpoena to Command Attendance, Testimony, and Production.

6.18[1] Specify Time and Place of Deposition. A deposition subpoena that commands both the attendance and testimony of the deponent, as well as the production of documents and things, must specify the time and place for the deposition [CCP §§ 2020.310, 2020.510].

6.18[2] Summary of Nature of Deposition, Rights and Duties of Deponent, and Penalties for Disobedience. A deposition subpoena that commands both the attendance and testimony of the deponent, as well as the production of documents and things, must set forth a summary describing [CCP §§ 2020.310, 2020.510]:

- The nature of a deposition.
- The rights and duties of the deponent.
- The penalties for disobedience of a deposition subpoena [see CCP § 2020.240].

A summary satisfying this requirement is included on Judicial Council Form SUBP-015, the mandatory form of deposition subpoena.



Cross Reference:

Form, see 6.65.

6.18[3] Indicate Intention to Use Audio or Video Technology. If the deposition will be recorded using audio or video technology, the deposition subpoena must state that it will be recorded in that manner [CCP §§ 2020.310, 2020.510]. If the deposition testimony will be conducted using instant visual display, the deposition subpoena must state that it will be conducted in that manner [CCP §§ 2020.310, 2020.510].

6.18[4] State Matters to Be Covered, If Deponent Is an Organization. If the deponent is an organization, the deposition subpoena must describe with reasonable particularity the matters on which the examination is requested [CCP §§ 2020.310, 2020.510].

6.18[5] Advise Deponent Organization of Duty to Designate Agent. If the deponent is an organization, the deposition subpoena must advise the organization of its duty to make a designation of employees or agents who will attend the deposition [CCP §§ 2020.310, 2020.510; see CCP § 2025.230].

A statement satisfying this requirement is included on Judicial Council Form SUBP-015, the mandatory form of deposition subpoena.

 Cross Reference:

Form, see 6.65.

6.18[6] Describe Each Item or Category of Item to Be Produced. The deposition subpoena must designate the business records, documents, and tangible things to be produced either by [CCP § 2020.510(a)(2)]:

- Specifically describing each individual item; or
- Reasonably particularizing each category of item.

Reasonable Particularity:

The requirement that the party seeking discovery "reasonably particularize" each category of item means that the categories must be reasonably particularized from the standpoint of the person who is subjected to the burden of producing the materials [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 222, 61 CR2d 567].

6.18[7] Specify Any Testing or Sampling Being Sought. The deposition subpoena must specify any testing or sampling that is being sought [CCP § 2020.510(a)(3)].

6.18[8] Affidavit Showing Good Cause Not Required. An affidavit or declaration showing good cause for the production of the documents and things designated is not required [CCP § 2020.510(b); see *Terry v. SLICO* (2009) 175 CA4th 352, 358, 95 CR3d 900 (provisions of CCP §§ 1985 and 1987.5 requiring affidavit do not apply to deposition subpoenas)].

6.18[9] Include Proof of Service of Notice on Consumer/Employee or Written Authorization for Release of Records, If Subpoenaing Consumer or Employee Records. If the deposition subpoena commands the production of business records that are consumer or employee records, the subpoena must be accompanied by either [CCP §§ 2020.510(c), (d), 2025.240(b)]:

- A copy of the proof of service of the notice to the consumer or employee [see CCP §§ 1985.3(c)(1), 1985.6(c)(1)]; or
- The consumer's or employee's written authorization to release personal records [see CCP §§ 1985.3(c)(2), 1985.6(c)(2)].

 Cross Reference:

Forms, see 6.67 (notice to consumer or employee), 6.68 (written authorization for release of records).

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.19 Service of Deposition Subpoena.

6.19[1] Serve in Sufficient Time for Compliance.

6.19[1][a] Subpoena for Production Only Must Be Served at Least 15 Days Before Date for Production. A deposition subpoena commanding only the production of business records for copying must be served at least 15 days before the date for production specified in the subpoena [CCP § 2020.410(c); see CCP § 2020.220(a)].



Warnings:

- The date for the production must also be at least 20 days after the issuance of the deposition subpoena [CCP § 2020.410(c)].
- The 20 day "hold" period on noticing depositions, which provides that a plaintiff may serve a notice of deposition any time at least 20 days after service of summons on, or appearance by, any defendant [CCP § 2025.210(b)], also applies to deposition subpoenas seeking only the production of business records [*California Shellfish, Inc. v. United Shellfish Co. (1997) 56 CA4th 16, 25, 64 CR2d 797*].

6.19[1][b] Subpoena Commanding Production Must Allow Deponent Reasonable Opportunity to Locate and Produce Records. Service of a deposition subpoena must allow a sufficient time in advance of the deposition to provide the deponent a reasonable opportunity to locate and produce any designated business records, documents, or tangible things [CCP § 2020.220(a)].

6.19[1][c] Subpoena Requiring Attendance Must Allow Reasonable Travel Time. If the deposition subpoena commands the attendance of the deponent, service of the subpoena must allow the deponent a reasonable time to travel to the place of deposition [CCP § 2020.220(a)].

6.19[2] Serve by Personal Delivery. If the deponent is a natural person, any person may effect service by personally delivering a copy of the deposition subpoena to that person [CCP § 2020.220(b)(1)].

If the deponent is an organization, any person may effect service by personally delivering a copy of the deposition subpoena [CCP § 2020.220(b)(2)]:

- To any officer, director, or custodian of records; or
- To any agent or employee authorized by the organization to accept service of a subpoena.

Distinguish:

A deposition subpoena must be personally served, but it may be served by any person, including a party to the action. A deposition notice compelling attendance of a party deponent may be served by mail, but service by mail must be made by a nonparty [CCP §§ 1013, 1013a].

6.19[3] Provide Witness Fee.

6.19[3][a] For Deponent Whose Attendance Is Required. If the deposition subpoena requires the personal attendance of the deponent, the party noticing the deposition must pay to the deponent, in cash or by check, the same witness fee and mileage required for attendance and testimony before the court in which the action is pending [CCP § 2020.230(a); see *Gov Code § 68070 et seq.* (witness fees)].

Whether or not demanded by the deponent, payment must be made, at the option of the party noticing the deposition, either [CCP § 2020.230(a)]:

- At the time of service of the deposition subpoena; or
- At the time the deponent attends for the taking of testimony.

6.19[3][b] For Production of Business Records Only. If the deposition subpoena commands the production of business records only, the witness fee must be paid in cash or by check, whether or not demanded by the deponent, at the time the deposition subpoena is served [CCP § 2020.230(b); see *Evid Code § 1563(b)(6)* (witness fee for production of business records)].

6.19[4] Serve Copies on All Other Parties. If the deposition subpoena commands the attendance of the deponent, an identical copy of the deposition subpoena must be served with the notice of deposition on all parties who have appeared in the action [CCP § 2025.240(a), (c)].

If the deposition subpoena commands only the production of business records, a separate notice of deposition is not required [CCP § 2025.220(b)]. A copy of the deposition subpoena, with accompanying proof of service, must be served on all parties who have appeared [see CCP § 2025.240(a)].

Cross Reference:

Further discussion of service of notice of deposition, see 6.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.20 Effect of Personal Service of Deposition Subpoena.

Personal service of any deposition subpoena is effective to require any deponent who is a resident of California at the time of service [*CCP* § 2020.220(c)]:

- To personally attend and testify, if the subpoena so specifies;
- To produce any specified item for production, inspection, testing, and sampling; and
- The deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to comply with the subpoena.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.21 Punishment for Disobeying Deposition Subpoena.

A deponent who disobeys a deposition subpoena in any manner may be punished for contempt without the necessity of a prior order of court directing compliance by the witness [*CCP* § 2020.240; *see CCP* § 2023.030(e) (contempt sanction for misuse of discovery process)].

A deponent who disobeys a deposition subpoena is also subject to a monetary penalty and the payment of damages to the party aggrieved by his disobedience [*CCP* § 2020.240; *see CCP* § 1992 (penalty for disobedience of subpoena)]. In the alternative, the court may issue a warrant for the arrest of the witness or person who fails to appear [*CCP* § 1993(a)(1); *see CCP* §§ 1993(a)(2), (b), 1993.1-1993.2].

Cross Reference:

Detailed discussion of contempt proceedings and penalties for disobedience of a subpoena, *see* California Forms of Pleading and Practice, Ch. 135, Contempt and Ch. 535, Subpoena (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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IV. RESPONDING TO A NOTICE OF DEPOSITION AND/OR DEPOSITION SUBPOENA

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6.22 CHECKLIST: Responding to Notice of Deposition/Deposition Subpoena.

☐ Review deposition notice and/or deposition subpoena to determine basis for opposing discovery, if any:

- ☐ Objection to errors or irregularities in notice.
- ☐ Objection to discovery sought or manner in which deposition will be conducted.

Authority:

CCP §§ 1987.1, 2025.410, 2025.420

Discussion:

See 6.23

☐ If not objecting to errors or irregularities in notice of deposition, consider:

- ☐ Giving notice of intention to make audio or video record of deposition.



Timing:

Serve notice not less than three calendar days before date scheduled for deposition on party who noticed deposition, all parties who received that notice, and if attendance compelled by deposition subpoena, on deponent.

Authority:

CCP § 2025.330

Discussion:

See 6.32[5][b]

☐ If objecting to errors or irregularities in notice of deposition:

☐ Serve written objection:

☐ On all parties served with notice.

☐ On party noticing deposition.



Timing:

Must be promptly served, at least three days prior to the date for which the deposition is scheduled, or objection is waived. Service on noticing party must be by personal service if three calendar days before deposition.

Authority:

CCP § 2025.410

Discussion:

See 6.24

Form:

See 6.69 (objections to errors or irregularities in notice of deposition)

☐ Make reasonable, good-faith attempt to resolve issue.

☐ If unable to resolve issue, prepare motion to stay deposition and quash deposition notice.

☐ Draft:

☐ Notice of motion and motion to stay deposition and quash deposition notice;

☐ Supporting declaration; and

☐ Supporting memorandum.

Content Note:

The declaration must show a reasonable and good-faith attempt at informal resolution.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

Authority:

CCP § 2025.410

Discussion:

See 6.26

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.70

☐ If objecting to manner or substance of discovery being sought from nonparty:

☐ Prepare motion to quash or modify deposition subpoena:

☐ Draft:

☐ Notice of motion and motion to quash or modify deposition subpoena;

☐ Supporting declaration; and

☐ Supporting memorandum.

Content Note:

Motion can include request for protective orders and request for award of fees and expenses [*see CCP § 1987.1*].

☐ Serve and file motion.

☐ If oral deposition of the nonparty has been noticed, move to stay deposition and quash deposition notice, in addition to quashing deposition subpoena.

Authority:

CCP § 1987.1

Discussion:

See 6.27

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.71

☐ If objecting to substance of discovery sought or manner in which deposition will be conducted:

- ☐ Make reasonable, good-faith attempt to resolve issue.
- ☐ If unable to resolve issue, prepare motion for protective order.
 - ☐ Draft:
 - ☐ Notice of motion and motion for protective order, specifying relief sought;
 - ☐ Supporting declaration; and
 - ☐ Supporting memorandum.

Grounds:

- Unwarranted annoyance;
- Embarrassment;
- Oppression; or
- Undue burden or expense.

Relief Available:

See 6.28[3]

Prerequisite:

A reasonable, good-faith attempt at informal resolution of the issue is required before filing the motion.

- ☐ Serve and file motion, with motion or ex parte application to stay deposition, if needed.

Authority:

CCP §§ 2025.270, 2025.420

Discussion:

See 6.28

Forms:

See 6.72 (notice of motion and motion for protective order), 6.73 (order on motion for protective order)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.23 Options and Strategy.

A party served with a notice of deposition or a copy of a deposition subpoena can oppose the discovery sought because of either:

- The noticing party's failure to comply with the requirements for noticing a deposition or issuing a deposition subpoena, or
- Objections to the substance of the discovery sought or the manner in which the deposition will be conducted.

The options for the party opposing discovery are:

- To prevent the taking of a deposition because of errors or irregularities in the notice:
 - ☐ Service of a written objection and a motion to stay the deposition and quash the deposition notice [*CCP* § 2025.410].



Cross Reference:

Discussion, see 6.24 -6.26.

- To prevent discovery sought from a nonparty:
 - ☐ A motion to quash or modify the deposition subpoena [*CCP* § 1987.1].



Cross Reference:

Discussion, see 6.27.

- To prevent the taking of a deposition because of the substance of the discovery sought or the manner in which the deposition will be conducted:

 A motion for a protective order [*CCP* § 2025.420], with a motion or ex parte application to stay the deposition, if necessary [*CCP* § 2025.270].



Cross Reference:

Discussion, see 6.28.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.24 Objection to Errors or Irregularities in Notice of Deposition.

6.24[1] Must Be Made in Writing. A party served with a deposition notice that does not comply with the requirements for such notice may object to any errors or irregularities in the notice [CCP § 2025.410(a)]. The objection must be made in writing and must specify the errors or irregularities [CCP § 2025.410(a)].



Cross Reference:

Form, see 6.69.

6.24[2] Waived Unless Made at Least Three Days Prior to Deposition. An objection to any error or irregularity in the notice of deposition is waived, unless the objecting party promptly serves the written objection at least three calendar days prior to the date for which the deposition is scheduled [CCP § 2025.410(a); see *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 CA4th 285, 295, 57 CR3d 18] .

6.24[3] Must Be Served on Party Noticing Deposition and All Parties Served With Notice. A written objection to any error or irregularity in the notice of deposition must be served on [CCP § 2025.410(a)]:

- The party seeking to take the deposition; and
- Any other attorney or party on whom the deposition notice was served.

6.24[4] Must Be Personally Served on Party Noticing Deposition If Made Three Days Before. If an objection is made three calendar days before the deposition date, the objecting party must make personal service of the objection on the party who gave notice of the deposition [CCP § 2025.410(b); see CCP § 1011 (method for personal service)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.25 Effect of Objecting to Errors or Irregularities in Notice of Deposition.

A deposition taken after the service of a written objection cannot be used against the objecting party, at trial or at any other hearing in the action, if [CCP § 2025.410(b)]:

- The objecting party did not attend the deposition; and
- The court determines that the objection was valid.

Distinguish--Motion to Quash:

The service of an objection to the notice of deposition does not prevent the deposition from going forward as scheduled. To prevent the deposition from going forward, the objecting party must also file a motion to quash the notice of deposition [CCP § 2025.410(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.26 Motion to Stay Deposition and Quash Deposition Notice.

6.26[1] Grounds. If there are errors or irregularities in a notice of deposition, a party may move for an order [*CCP* § 2025.410(c)]:

- Staying the taking of the deposition; and
- Quashing the deposition notice.



Strategic Points--Party Opposing Discovery:

A written objection should also be served when filing a motion to stay the deposition and quash the deposition, because [*see CCP* § 2025.410]:

- Failure to timely object results in waiver of the error or irregularity; and
- The written objection shows part of the required attempt to resolve the issue prior to filing the motion.

Distinguish--Motion for Protective Order:

A motion to stay a deposition and quash the deposition notice does not prevent the party seeking discovery from later taking the deposition of the deponent on proper notice. If the party opposing discovery seeks to prevent or limit the deposition of the deponent, that party should move for a protective order instead of, or in addition to, the motion to quash.



Cross Reference:

Discussion of protective orders, see 6.28.

6.26[2] Declaration Showing Attempt at Informal Resolution Is Required. A motion to stay a deposition and

quash the deposition notice must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of any issue presented by the motion [CCP § 2025.410(c)].

6.26[3] Motion Papers. The moving papers for a motion to stay a deposition and quash the deposition notice must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [CCP §§ 2002, 2003, 2015.5, 2025.410]; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].



Cross References:

Form, see 6.70. Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 83, Discovery: Depositions*, § 83.60 (*Matthew Bender*).

6.26[4] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under CCP § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice unless the court finds that [CCP § 2025.410(d)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.27 Motion to Quash or Modify Deposition Subpoena.

6.27[1] Grounds. When a deposition subpoena requires the attendance of a witness or the production of documents or things, the court, on motion "reasonably" made, may make an order [CCP § 1987.1(a)]:

- Quashing the deposition subpoena entirely;
- Modifying the deposition subpoena; or
- Directing compliance with the deposition subpoena on those terms and conditions as the court may declare, including protective orders.

The motion may be made by [CCP § 1987.1(b)]:

- A party.
- The witness.
- Any consumer or employee whose records are being subpoenaed.
- A person whose personally identifying information, as defined in CC § 1798.79.8(b), is sought in connection with an underlying action involving that person's exercise of free speech rights.

The court also may make any other order appropriate to protect the parties, the witness, or the consumer or employee from unreasonable or oppressive demands including unreasonable violations of a right of privacy [CCP § 1987.1(a)].



Timing:

CCP § 1987.1 provides only that a motion to quash must be "reasonably made." One court has held that a motion to quash a subpoena duces tecum made seven days before a scheduled judgment debtor's examination was reasonably made [*Lee v. Swansboro Country Property Owners Assn.* (2007) 151

CA4th 575, 583, 59 CR3d 924 .



Strategic Points--Party Opposing Discovery:

If the deposition subpoena has been served with an accompanying notice of deposition, the motion may be combined with a motion to stay the deposition and quash the deposition notice. Similarly, if a protective order is desired, the motion to quash may be combined with a motion for a protective order.

Although a nonparty witness to whom a deposition subpoena is directed may file a motion to quash, the nonparty is not required to file a motion to quash to preserve and raise objections [*see Monarch Healthcare v. Superior Court (2000) 78 CA4th 1282, 1287-1290, 93 CR2d 619*].

Example:

A nonparty served with a deposition subpoena for production of business records produced some, but not all of the documents, and raised trade secret and privacy objections at the time of the production. The nonparty did not waive the objections by failing to file a motion to quash. The nonparty could raise the objections at the time of production and put the burden on the party seeking discovery to file a motion to compel [*Monarch Healthcare v. Superior Court (2000) 78 CA4th 1282, 1287-1290, 93 CR2d 619*].



Cross References:

Form, see 6.71.

Discussion of motion to stay deposition and quash deposition notice, see 6.26.

Discussion of motion for protective orders, see 6.28.

6.27[2] Motion Papers. The moving papers for a motion to quash a deposition subpoena must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*],
- A supporting declaration establishing facts outside the record in the case [*CCP §§ 2002, 2003, 2015.5*], and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].



Cross References:

Form, see 6.71. Discussion of papers generally, see *Ch. 4, Law and Motion Procedure, 4.10 et seq.*

Form for memorandum supporting motion, see *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.60 (Matthew Bender)*.

6.27[3] Award of Fees and Expenses. In making an order on a motion to quash or modify a deposition subpoena, the court has discretion to award the amount of reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds that [*CCP § 1987.2(a)*]:

- The motion was made or opposed in bad faith or without substantial justification; or
- One or more of the requirements of the subpoena was oppressive.

In an action arising from the moving party's exercise of free speech rights on the internet, when a subpoena has been served on any internet service provider, or on the provider of any other interactive computer service, if the moving party prevails, the court is required to award reasonable expenses, including reasonable attorney's fees, incurred in making the motion for an order to quash or modify a subpoena for personally identifying information from a California court for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, unless the respondent makes a prima facie showing of a cause of action [CCP § 1987.2(b)].

6.27[4] Deposition Subpoena for Consumer or Employee Records.

6.27[4][a] Consumer or Employee Who Is Party May Move to Quash. Any consumer or employee who is a party to the action and whose personal records are sought by deposition subpoena may, prior to the date of production, bring a motion to quash or modify the deposition subpoena [CCP §§ 1985.3(g), 1985.6(f)(1)].

Notice of the bringing of the motion to quash or modify must be given to the witness and deposition officer at least five days prior to production [CCP §§ 1985.3(g), 1985.6(f)(1)].

6.27[4][b] Consumer or Employee Who Is Not Party May Serve Written Objection; Motion to Quash Not Required. A nonparty consumer or employee whose personal records are sought by deposition subpoena may, prior to the date of production, serve a written objection on [CCP §§ 1985.3(g), 1985.6(f)(2)]:

- The subpoenaing party;
- The witness; and
- The deposition officer.

The written objection must cite the specific grounds on which production of the records should be prohibited [CCP §§ 1985.3(g), 1985.6(f)(2)].

Distinguish--Party/Nonparty Consumer or Employee:

When the consumer or employee is a party to the action, the consumer or employee must file a motion to quash to oppose the deposition subpoena [CCP §§ 1985.3(g), 1985.6(f)(1)]. When the consumer or employee is not a party, only a written objection is required [CCP §§ 1985.3(g), 1985.6(f)(2)]. After the service of a written objection from a nonparty consumer or employee, the party seeking discovery must file a motion to enforce the subpoena within 20 days of service of the written objection [CCP §§ 1985.3(g), 1985.6(f)(4)].



Cross References:

Form of objection, see 6.67.

Discussion of enforcement of subpoenas, see California Forms of Pleading and Practice, Ch. 535, Subpoena (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.28 Motion for Protective Order.

6.28[1] Persons Entitled to Move for Protective Order. A motion for a protective order may be made by [CCP § 2025.420(a)]:

- Any party;
- Any deponent; and
- Any other affected natural person or organization.

6.28[2] Objective and Grounds. A protective order protects a party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, or undue burden or expense [CCP § 2025.420(b)].

The moving party must demonstrate good cause for the order [CCP § 2025.420(b)].

Exception:

When the party seeking discovery seeks to depose a president or other official at the highest level of management within an organization, and the official moves for a protective order, the party seeking discovery must show good cause that the official has personal knowledge of discoverable information which the party seeking discovery cannot obtain by less intrusive discovery methods [*Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 CA4th 1282, 1289, 13 CR2d 363].

6.28[3] Relief Available. A protective order may encompass any order justice requires to protect a party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, or undue burden or expense [CCP § 2025.420(b)]. A protective order may include, but is not limited to, one or more of the following directions:

- That the deposition not be taken at all [CCP § 2025.420(b)(1)];

- That the deposition be taken at a different time [CCP § 2025.420(b)(2)];
- That a video recording of the deposition testimony of a treating or consulting physician or of any expert witness and intended for possible use at trial be postponed until the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross-examination [CCP § 2025.420(b)(3)];
- That the deposition be taken at a place other than that specified in the deposition notice, if it is within a distance allowed by CCP §§ 2025.250 and 2025.260 [CCP § 2025.420(b)(4)];
- That the deposition be taken only on certain specified terms and conditions [CCP § 2025.420(b)(5)];
- That the deponent's testimony be taken by written questions, instead of oral examination [CCP § 2025.420(b)(6)];
- That the method of discovery be interrogatories to a party instead of an oral deposition [CCP § 2025.420(b)(7)];
- That the testimony be recorded in a manner different from that specified in the deposition notice [CCP § 2025.420(b)(8)];
- That certain matters not be inquired into [CCP § 2025.420(b)(9)];
- That the scope of the examination be limited to certain matters [CCP § 2025.420(b)(10)];
- That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, or copied [CCP § 2025.420(b)(11)];
- That designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition [CCP § 2025.420(b)(12)];
- That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specified persons or only in a specified way [CCP § 2025.420(b)(13)];
- That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court [CCP § 2025.420(b)(14)]; and
- That the deposition be sealed and thereafter opened only on order of the court [CCP § 2025.420(b)(15)].



Cross Reference:

Nature of protective orders, see *DeMeo, California Deposition and Discovery Practice*, § 51.33 (*Matthew Bender*).

Examples:

- Protective order could limit the scope of information medical expert had to provide concerning his practice, by requiring summary of litigation-related work instead of precise accounting of practice that

excessively intruded on legitimate privacy interests [*Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 CA4th 691, 700, 101 CR2d 67].

- Protective order could prevent deponent from being compelled to disclose identity of whistleblower whose safety would be jeopardized by disclosure [*John Z. v. Superior Court* (1991) 1 CA4th 789, 791-792, 2 CR2d 556].

- Protective order could be used to limit the number of corporate officers party was entitled to have present at depositions [*Lowy Dev. Corp. v. Superior Court* (1987) 190 CA3d 317, 321-322, 235 CR 401].

- Protective order could preclude production of medical expert's records regarding former patients, although expert could be asked questions about his practice for purpose of showing bias [*Allen v. Superior Court* (1984) 151 CA3d 447, 453-454, 198 CR 737].

6.28[4] Procedure.

6.28[4][a] When Motion May Be Made. A motion for a protective order may be made before, during, or after a deposition [CCP § 2025.420(a)]. The motion must be made "promptly" [CCP § 2025.420(a)].



Strategic Point--Party Opposing Discovery:

If the time until the scheduled deposition is short, the party or deponent moving for a protective order should also file a motion or ex parte application to stay the taking of the deposition until the motion for protective order is determined [see CCP § 2025.270].



Cross References:

Forms, see 6.72 (motion for protective order), 6.75 (motion for protective order for deposition in progress), 6.81 (motion for protective order after deposition).

6.28[4][b] Declaration Showing Attempt at Informal Resolution Is Required. A motion for a protective order must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [CCP § 2025.420(a)].

6.28[4][c] Motion Papers. The moving papers for a motion for a protective order must include:

- A motion and notice of motion [Cal Rules Ct, Rule 3.1112(a)],
- A supporting declaration establishing facts outside the record in the case, including good cause for the order and the attempt at informal resolution [CCP §§ 2002, 2003, 2015.5, 2025.420], and
- A memorandum in support of the motion [Cal Rules Ct, Rule 3.1112(a)].



Cross References:

Forms, see 6.72, 6.73.

Discussion of papers generally, see Ch. 4, *Law and Motion Procedure*, 4.10 et seq.

Form of memorandum supporting motion, see *California Points and Authorities*, Ch. 83, *Discovery*:

Depositions, § 83.80 (Matthew Bender).

6.28[5] Court May Qualify Denial of Motion. If the motion for a protective order is denied in whole or in part, the court may order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just [*CCP* § 2025.420(c)].

6.28[6] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that [*CCP* § 2025.420(d)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of the sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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6.29 CHECKLIST: Conducting an Oral Deposition.

☐ Determine that appropriate arrangements have been made for taking deposition.

☐ Arrangements made for participation by telephone, video conference, or other remote electronic means, if any.

Prerequisites:

☐ Notice of taking deposition by telephone or other electronic means must be served with notice of deposition or deposition subpoena.

☐ Any person, other than deponent, must give notice of appearance by telephone or other electronic means at least three days before deposition.

☐ Party deponent must appear in person.

☐ Nonparty deponent may appear by telephone or other electronic means per court order.

Authority:

CCP § 2025.310; Cal Rules Ct, Rule 3.1010

Discussion:

See 6.30

☐ Qualified deposition officer engaged.

Authority:*CCP § 2025.320***Discussion:**

See 6.31

- ☐ Arrangements made if using audio or video recording.

Prerequisites:

☐ Notice of deposition must state intention to make audio or video recording, or all parties must stipulate.

☐ Other parties must serve notice of intent to make simultaneous audio or video record at least three days before deposition.

Authority:*CCP § 2025.330***Discussion:**

See 6.32[5]

☐ Surroundings suitable for recording.

☐ Qualified operator.

☐ Competent to operate equipment

☐ If video recording of testimony of consulting or treating physician or expert witness may be used at trial:

☐ Operator must be authorized to administer oath.

☐ Operator cannot be relative or employee of any attorney, unless parties stipulate.

Authority:*CCP § 2025.340***Discussion:**

See 6.32[6][a], [b]

☐ Conduct deposition in accordance with statutory requirements.

☐ Deposition officer puts deponent under oath.

- ☐ Testimony and stated objections are taken stenographically.

Authority:

CCP § 2025.330

Discussion:

See 6.32[1], [2]

- ☐ If using audio or video recording:

☐ Begin with oral or written statement on camera or audio recording stating:

☐ Operator's name and business address;

☐ Name and business address of operator's employer;

☐ Date, time and place of the deposition;

☐ Caption of the case;

☐ Name of the deponent;

☐ Name of party on whose behalf deposition is being taken; and

☐ Any stipulations by parties.

Authority:

CCP § 2025.340(h)

Discussion:

See 6.32[6][d]

- ☐ Have counsel identify themselves on camera or on audio recording.

Authority:

CCP § 2025.340(i)

Discussion:

See 6.32[6][e]

- ☐ Administration of oath must be recorded.

Authority:

CCP § 2025.340(j)

Discussion:

See 6.32[6][f]

- ☐ Proceed with examination and cross-examination of the deponent.

Authority:

CCP § 2025.330

Discussion:

See 6.32[3]

- ☐ If using audio or video recording and more than one unit of tape or electronic storage is required, announce end of each unit and beginning of each succeeding unit on camera or on audio recording.

Authority:

CCP § 2025.340(k)

Discussion:

See 6.32[6][g]

- ☐ Continue with examination to conclusion, unless one of the following occurs:

- ☐ If deponent fails to answer any question or to produce materials, determine whether to adjourn to file motion to compel or to continue examination on other matters.

Authority:

CCP § 2025.460(d)

Discussion:

See 6.34, 6.46 (motion to compel)

- ☐ Deposition officer suspends the taking of testimony because:

- ☐ All parties stipulate to suspension, or

- ☐ A party or deponent demands that the taking of testimony be suspended to enable that party to move for a protective order.

Authority:

CCP § 2025.470

Discussion:

See 6.35, 643 (motion for protective order)

- ☐ Conclude deposition.

☐ If using audio or video recording:

☐ Announce conclusion on camera or on audio recording.

☐ On camera or on audio recording, set forth any stipulations concerning custody of the audio or video recording and exhibits, or other pertinent matters.

Authority:

CCP § 2025.340(l)

Discussion:

See 6.32[6][h]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral Depositions



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6.30 Oral Deposition by Telephone, Video Conference, or Other Remote Electronic Means.

6.30[1] Requirements for Party Taking Deposition. Any party may take an oral deposition by telephone, video conference, or other remote electronic means if the following requirements are met [CCP § 2025.310]:

- Notice of taking the deposition by telephone, video conference, or other remote electronic means is served with the notice of deposition or deposition subpoena [Cal Rules Ct, Rule 3.1010(a)(1)].
- The party taking the deposition makes all arrangements for any other party to participate in the deposition in an equivalent manner. However, each party so appearing must pay all expenses incurred by it or properly allocated to it [Cal Rules Ct, Rule 3.1010(a)(2)].
- Any party may be personally present at the deposition without giving prior notice [Cal Rules Ct, Rule 3.1010(a)(3)].

6.30[2] Requirements for Other Parties to Attend by Telephone or Other Electronic Means. Any person, other than the deponent, may attend a deposition by telephone, video conference, or other remote electronic means, if the following requirements are met [CCP § 2025.310]:

- Written notice of the attendance is served by personal delivery or fax at least three court days before the deposition [Cal Rules Ct, Rule 3.1010(b)(1)].
- The party so attending makes all arrangements and pays all expenses incurred for the attendance [Cal Rules Ct, Rule 3.1010(b)(2)].

6.30[3] Party Deponent Must Appear in Person. A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer [CCP § 2025.310; Cal Rules Ct, Rule 3.1010(c)].

6.30[4] Court May Allow Nonparty Deponent to Appear by Telephone or Other Electronic Means. The court may expressly provide that a nonparty deponent may appear at his or her deposition by telephone, video conference or other electronic means, if it finds [CCP § 2025.310; Cal Rules Ct, Rule 3.1010(d)]:

- There is good cause; and
- There is no prejudice to any party.

The deponent must be sworn in the presence of the deposition officer, or by any other means stipulated to by the parties or ordered by the court [*Cal Rules Ct, Rule 3.1010(d)*].

Any party may be personally present at the deposition [*Cal Rules Ct, Rule 3.1010(d)*].

6.30[5] Court May Make Other Appropriate Orders. On motion by any person, the court in a specific action may make such other orders for a deposition by telephone, video conference, or other remote electronic means as it deems appropriate [*Cal Rules Ct, Rule 3.1010(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.31 Qualifications and Services of Deposition Officer.

6.31[1] Must Be Authorized to Administer Oath. An oral deposition must be conducted under the supervision of an officer who is authorized to administer an oath [CCP § 2025.320].

6.31[2] Can Have No Financial Interest or Personal Relationship. The deposition officer cannot be [CCP § 2025.320(a)]:

- Financially interested in the action;
- A relative or employee of any attorney of the parties; or
- A relative or employee of any of the parties.

6.31[3] Must Offer Services and Products to All Parties.

6.31[3][a] General Requirements. Services and products offered or provided by the deposition officer, or the entity providing the services of the deposition officer, to any party or to any party's attorney or third party who is financing all or part of the action must meet the following requirements [CCP § 2025.320(b)]:

- Services and products offered or provided must be offered to all parties or their attorneys attending the deposition.
- No service or product may be offered or provided unless the service or product is offered or provided to all parties or their attorneys attending the deposition.
- All services or products offered or provided must be made available at the same time to all parties or their attorneys.

6.31[3][b] Offers of Instant Visual Display or Rough Draft Transcripts. Any offer to provide the instant visual display of the testimony or to provide rough draft transcripts to any party that is accepted prior to, or offered at, the

deposition must also be made by the deposition officer at the deposition to all parties in attendance [CCP § 2025.220(a)(5)].

Any party or attorney requesting instant visual display of the testimony, or rough draft transcripts, must pay the reasonable cost of those services [CCP § 2025.220(a)(5)]. The cost may be no greater than the costs charged to any other party or attorney [CCP § 2025.220(a)(5)].



Warning:

If you are requesting instant visual display, inform the provider how many participants are expected at the deposition so that the provider can make available adequate equipment for all to connect.



Strategic Point:

If the provider does not have adequate equipment for all to connect, insist that the other parties not be allowed to connect.

6.31[4] Cannot Provide Information About Participants. The deposition officer, or the entity providing the services of the deposition officer, cannot [CCP § 2025.320(c)]:

- Provide to any party or any party's attorney or third party who is financing all or part of the action any service or product consisting of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition; or
- Collect any personal identifying information about the witness as a service to be provided to any party or third party who is financing all or part of the action.

6.31[5] Party May Request Statement on Record Concerning Services and Products. On the request of any party or any party's attorney attending a deposition, any party or any party's attorney attending the deposition must enter in the record all services and products made available to that party, or to that party's attorney or third party who is financing all or part of the action by the deposition officer or by the entity providing the services of the deposition officer [CCP § 2025.320(d)].

A party in the action who is not represented by an attorney must be informed by the noticing party or the party's attorney that the unrepresented party may request this statement [CCP § 2025.320(d)].

6.31[6] Objections to Qualifications Are Waived Unless Timely Made. Any objection to the qualifications of the deposition officer are waived unless made before the deposition begins or as soon thereafter as [CCP § 2025.320(e)]:

- The ground for that objection becomes known; or
- The ground for that objection could be discovered by reasonable diligence.

6.31[7] Civil Penalty for Violation of Requirements. Any person violating the requirements for deposition officers and their services is subject to a civil penalty of up to \$5,000 [CCP § 2025.320(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.32 Procedure for Deposition.

6.32[1] Oath Is Administered to Deponent. The deposition officer must put the deponent under oath [CCP § 2025.330].

6.32[2] Testimony Is Taken Stenographically. Unless the parties agree or the court orders otherwise, the testimony and any stated objections must be taken stenographically [CCP § 2025.330].

6.32[3] Examination and Cross-Examination Proceed As at Trial. Examination and cross-examination of the deponent must proceed as permitted at trial under the provisions of the Evidence Code [CCP § 2025.330].

Absent abuse of the witness, multiple attorneys may question a deponent on behalf of one party. The California statutes governing depositions do not prohibit questioning by multiple attorneys [see *Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc.* (9th Cir 1983) 712 F2d 1324, 1325].



Finding and Investigating a Witness's Litigation History Using Online Resources:

Many resources are available online for finding and investigating a witness's litigation history. These resources can help you obtain information about the witness's past or present involvement in civil, criminal, or bankruptcy cases. For example, helpful resources at *lexis.com* include:

- For California federal civil lawsuits in which a witness was named as a party, search in Legal tab > Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Civil Court Filings.
- For California state civil lawsuits in which a witness was named as a party, search in Legal tab > Area of Law--States Legal--U.S. > California > Filings > Docket Materials > CA Combined Civil Court Filings From Superior and Municipal Courts.
- For California federal criminal actions in which a witness was named as a party, search in Legal tab

> Area of Law--By Topic > Litigation > Filings > Court Filings > Federal > California U.S. District Criminal Court Filings.

- For California state criminal actions in which a witness was named as a party, search in Legal tab > Area of Law--States Legal--U.S. > California > Filings > Docket Materials > CA Criminal Case Filings.

- For federal and state court opinions from California that mention a witness, search in Legal tab > States Legal--U.S. > California > CA Federal & State Cases, Combined.

- For California judgments against a witness and liens against his or her property, search in Legal tab > States Legal--U.S. > California > Filings > CA Judgment and Lien Filings.

- For uncovering a bankruptcy filed in California by or against a witness, search in Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings.

In all these files, you may begin with a simple search of the witness's name, modified as needed with an address or middle name or other extra identification, such as:

☐ Sample Search: To find information regarding litigation history using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.

☐ Sample Search: To find information regarding litigation history for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.



Strategic Point:

Invariably, it is best to establish a witness's background and experience and cover less controversial subjects early in the deposition. That helps the questioning lawyer establish rapport with the witness and develop information that can later be used to press the deponent when the questioning proceeds to more controversial subjects.



Finding and Investigating a Witness's Personal Property Holdings Using Online Resources:

Many resources are available online for finding and investigating a witness's personal property holdings, such as licenses. These resources can help you find information about the present or past personal property of a witness or a witness's present or former spouse. For example, helpful resources at *lexis.com* include:

- For aircraft, search in Public Records tab > Public Records > Personal Property Locator > Federal Aviation Administration Aircraft Registrations.

- For significant stock holdings, search in Public Records tab > Public Records > Personal Property Locator > Stock Information > Stock Ownership.

- For a contractor's license, search in Public Records tab > Public Records > Licenses > Professional Licenses > CA Contractors State License Board Information.

- For a professional license, search in Public Records tab > Public Records > Licenses > Professional Licenses > CA Professional License.

- For a liquor license, search in Public Records tab > Public Records > Licenses > Liquor Licenses > CA Liquor Licenses.

- For a real estate license, search in Public Records tab > Public Records > Licenses > Professional Licenses > California Real Estate Licenses.

In all these files, you may begin with a simple search of the witness's name, modified as needed with an address or middle name or other extra identification, such as:

☐ Sample Search: To find basic property-holdings information using a witness's name in a format allowing for unknown middle names or initials, try: *first name /3 last name*.

☐ Sample Search: To find basic property-holdings information for a witness with a common name, use a search that specifies a middle initial or includes other known facts, like a past address: *first name /3 x! /3 last name and riverside*.

6.32[4] Other Parties May Transmit Written Questions. In lieu of participating in the oral examination, parties may transmit written questions in a sealed envelope to the party taking the deposition for delivery to the deposition officer [CCP § 2025.330(e)].

The deposition officer must unseal the envelope and propound the questions to the deponent after the oral examination has been completed [CCP § 2025.330(e)].



Warning:

The court reporter may not be familiar with this unusual procedure, so if you plan to do this, alert the reporter in advance to avoid confusion and possible influence by counsel who are present as to how this should be done.

6.32[5] When Audio or Video Technology May Be Used.

6.32[5][a] Stated in Deposition Notice or Agreed to by All Parties. The party noticing the deposition may also record the testimony by audio or video technology if [CCP § 2025.330]:

- The notice of deposition stated an intention also to record by audio or video technology; or
- All the parties agree that the testimony may also be recorded by either of those methods.

6.32[5][b] On Notice by Any Other Party. Any other party, at that party's expense, may make a simultaneous audio or video record of the deposition [CCP § 2025.330].

Prerequisites:

- The party must promptly serve a written notice of his or her intention to make an audio or video

record of the deposition testimony.

- The written notice must be served no less than three calendar days before the date for which the deposition is scheduled.

- The notice must be served on:

- ☐ The party or attorney who noticed the deposition;
- ☐ All other parties or attorneys on whom the deposition notice was served; and
- ☐ Any deponent whose attendance is being compelled by a deposition subpoena.

- If the notice is given three calendar days before the deposition date, it must be made by personal service.

6.32[6] Requirements for Use of Audio or Video Technology.

6.32[6][a] Surroundings Must Be Suitable for Recording. The area used for recording the deponent's oral testimony must be [CCP § 2025.340(a)]:

- Suitably large;
- Adequately lighted; and
- Reasonably quiet.



Strategic Point:

Coordinate with the reporter and the videographer so they can work together to synchronize the transcript and the video. This can be a time-saver when you are reviewing the record and picking out pieces to which you need to refer. If you will be using trial presentation software, let them know in advances so that they can provide compatible material.

6.32[6][b] Qualifications of Operator. The operator of the recording equipment [CCP § 2025.340(b)]:

- Must be competent to set up, operate, and monitor the equipment.
- May be an employee of the attorney taking the deposition unless the operator is also the deposition officer.

Exception:

If a video recording of deposition testimony of a consulting or treating physician or expert witness is to be used at trial, the operator of the recording equipment [CCP § 2025.220(a)(6), 2025.340(c)]:

- Must be a person who is authorized to administer an oath; and
- Cannot be financially interested in the action or be a relative or employee of any attorney of any

party, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions.

The deposition officer or operator must comply with the requirements concerning offering or providing products and services to all parties or their attorneys [CCP § 2025.340(d)-(f)].



Strategic Point:

Using your own employee for a non-expert deposition can save significant expense. While a professional videographer is preferable for a critical deposition or when the size of the case merits use of a professional, the cost of making a video with your own personnel and equipment is minimal, and the videotape can have a critical impact, even in a smaller case.



Cross Reference:

Discussion of requirements concerning products and services, see 6.31[3] -[5].

6.32[6][c] No Distortion of Demeanor or Appearance. The operator may not distort the appearance or the demeanor of participants in the deposition by the use of camera or sound recording techniques [CCP § 2025.340(g)].

6.32[6][d] Beginning of Recording Must Identify Participants. The deposition must begin with an oral or written statement on camera or on the audio recording that includes [CCP § 2025.340(h)]:

- The operator's name and business address;
- The name and business address of the operator's employer;
- The date, time, and place of the deposition;
- The caption of the case;
- The name of the deponent;
- A specification of the party on whose behalf the deposition is being taken; and
- Any stipulations by the parties.

6.32[6][e] Counsel Must Identify Themselves. Counsel for the parties must identify themselves on camera or on the audio recording [CCP § 2025.340(i)].

6.32[6][f] Administration of Oath Must Be Recorded. The oath must be administered to the deponent on camera or on the audio recording [CCP § 2025.340(j)].

6.32[6][g] Beginning and Ending of Each Recording Unit Must Be Announced. If the length of a deposition requires the use of more than one unit of tape or electronic storage, the end of each unit and the beginning of each succeeding unit must be announced on camera or on the audio recording [CCP § 2025.340(k)].

6.32[6][h] Conclusion of Deposition Must Be Announced. At the conclusion of a deposition, a statement must be made on camera or on the audio recording that the deposition is ended [CCP § 2025.340(l)].

The statement must set forth any stipulations made by counsel concerning the custody of the audiotape or videotape

recording and the exhibits, or concerning other pertinent matters [*CCP* § 2025.340(l)].

6.32[7] Notice of Intention to Offer Audio or Video Recording of Deposition in Evidence. A party intending to offer in evidence an audio or video recording of a deposition of a treating or consulting physician or an expert witness must notify the court and all parties in writing [*CCP* § 2025.340(m)].



Cross Reference:

Discussion, see 6.57.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.33 Effect of Objections During Deposition.

6.33[1] Objections Based on Privilege or Work Product Waived If Not Timely Made. The protection of information from discovery on the ground that it is privileged or that it is attorney work product is waived unless a specific objection to its disclosure is timely made during the deposition [*CCP* § 2025.460(a)].

6.33[2] Objections Based on Errors or Irregularities Waived If Not Timely Made. Errors or irregularities of any kind occurring at an oral deposition that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition [*CCP* § 2025.460(b)].

These errors and irregularities include, but are not limited to, those relating to [*CCP* § 2025.460(b)]:

- The manner of taking the deposition;
- The oath or affirmation administered;
- The conduct of a party, attorney, deponent, or deposition officer; and
- The form of any question or answer.

Unless the objecting party demands that the taking of the deposition be suspended to permit a motion for a protective order, the deposition must proceed subject to the objection [*CCP* § 2025.460(b)].



Cross Reference:

Discussion of suspending the taking of testimony, see 6.35.

6.33[3] Objections As to Competency, Relevancy, Materiality, or Admissibility Are Not Waived. The following objections are unnecessary and are not waived by failure to make them before or during the deposition [*CCP* § 2025.460(c)]:

- Objections to the competency of the deponent.
- Objections to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced.

**Strategic Point--Party Conducting Examination:**

Unless a party or deponent demands suspension of the taking of testimony to move for a protective order, counsel cannot instruct the deponent not to answer a question on the ground that it will elicit irrelevant testimony. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial [*Stewart v. Colonial W. Agency, Inc. (2001) 87 CA4th 1006, 1014, 105 CR2d 115* (upholding sanctions imposed on counsel)].

Legal Topics:

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6.34 Effect of Failure of Deponent to Answer or Produce Materials.

If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking that answer or production may [CCP § 2025.460(d)]:

- Adjourn the deposition; or
- Complete the examination on other matters.

In deciding to adjourn or continue, the party seeking discovery does not waive the right to move for an order compelling the answer or production at a later time [CCP § 2025.460(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.35 Suspension of Taking of Testimony.

General practice in California is that a deposition continues from day to day until completed [*Sprague v. Equifax, Inc.* (1985) 166 CA3d 1012, 1041, 213 CR 69 (excluding deposition from evidence at trial because deposition terminated before completion, was not resumed the next day, and no date certain for continuance was set)].

The deposition officer may not suspend the taking of testimony unless [CCP § 2025.470]:

- All parties present at the deposition stipulate to the suspension; or
- Any party attending the deposition, including the deponent, demands that the deposition officer suspend the taking of testimony to enable that party or deponent to move for a protective order.



Strategic Point:

Often depositions are continued to a later date because questioning discloses that requested documents were not produced. In complex cases, there are advantages to being able to use multiple forms of discovery to understand the facts and positions before being required to conclude a particular deposition.



Cross Reference:

Discussion of protective order, see 6.43.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.36 CHECKLIST: Objecting to the Conduct of an Oral Deposition.

☐ Attend deposition as noticed.

☐ If party giving notice fails to attend or proceed with deposition, prepare motion for monetary sanction.

☐ Draft:

☐ Notice of motion and motion for monetary sanction;

☐ Supporting declaration stating facts showing expenses incurred; and

☐ Supporting memorandum.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

Authority:

CCP § 2025.430

Discussion:

See 6.37

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

☐ If deponent does not appear because of noticing party's failure to serve deposition subpoena, file and serve motion for monetary sanction.

☐ Draft:

☐ Notice of motion and motion for monetary sanction;

☐ Supporting declaration stating facts showing expenses incurred; and

☐ Supporting memorandum.

☐ Serve and file motion.

☐ Follow standard noticed motion procedure.

Authority:

CCP § 2025.440

Discussion:

See 6.38

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.74 (notice of motion and motion for monetary sanction for noticing party's failure to serve required deposition subpoena)

☐ Raise objections during deposition, as appropriate, as to:

☐ Qualifications of deposition officer.



Timing:

Objection is waived unless made before deposition begins or as soon as:

- Ground for objection becomes known, or
- Ground for objection could be discovered by reasonable diligence.

Authority:

CCP § 2025.320(e)

Discussion:

See 6.39

- ☐ Information protected as privileged or work product.



Timing:

Objection is waived unless specific objection to disclosure is timely made during deposition.

Authority:

CCP § 2025.460(a)

Discussion:

See 6.40

- ☐ Errors or irregularities in the conduct of the deposition such as those relating to:

- ☐ Manner of taking the deposition;
- ☐ Oath or affirmation administered;
- ☐ Conduct of party, attorney, deponent, or deposition officer; and
- ☐ Form of any question or answer.



Timing:

Objection is waived unless specific objection to error or irregularity is timely made during deposition.

Authority:

CCP § 2025.460(b)

Discussion:

See 6.41

- ☐ Refrain from unnecessary objections, which are not waived by failure to make them before or during deposition, as to:

- ☐ Competency of the deponent; or
- ☐ Relevancy, materiality, or admissibility at trial of testimony or materials produced.

Exception:

If questioning could arguably justify protective order, consider demanding suspension of deposition and motion for protective order.

Authority:*CCP § 2025.460(c)***Discussion:**

See 6.42

- ☐ Determine if deposition is being conducted in manner that would justify protective order.

Grounds:

- Unwarranted annoyance;
- Embarrassment;
- Oppression; or
- Undue burden or expense

- ☐ If protective order is warranted:

- ☐ Demand that deposition officer suspend the taking of testimony.

- ☐ Prepare motion for protective order.

- ☐ Draft:

- ☐ Notice of motion and motion for protective order, specifying relief sought;

- ☐ Supporting declaration, showing attempt at informal resolution; and

- ☐ Supporting memorandum and proposed order.

- ☐ Serve and file motion:

- ☐ Follow standard noticed motion procedure.

Relief Available:

See 6.28[3]

Prerequisite:

A reasonable, good-faith attempt at informal resolution of the issue is required before filing the motion.

Authority:*CCP §§ 2025.420, 2025.470*

Discussion:

See 6.43

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.75 (notice of motion and motion for protective order for deposition in progress)

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.37 Motion for Monetary Sanction for Noticing Party's Failure to Attend or Proceed With Deposition.

6.37[1] Grounds. If the party giving notice of a deposition fails to attend or to proceed without giving timely notice that the deposition will not be taken as scheduled, any party who attends the deposition in person or by attorney may request a monetary sanction against [CCP § 2025.430; see *Rosen v. Superior Court of Los Angeles County* (1966) 244 CA2d 586, 595, 53 CR 347 (sanctions were proper when notice of cancellation was not given)]:

- The party who gave notice of the deposition;
- The attorney for the party who gave notice of the deposition; or
- Both the party and his or her attorney.

6.37[2] Motion Papers. The moving papers for a motion for a monetary sanction for the failure by a party giving notice of a deposition to attend or proceed must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case [CCP §§ 2002, 2003, 2015.5], including a statement of the expenses incurred; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].

➡ **Cross Reference:**

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

6.37[3] Sanction Is Generally Mandatory. If the party giving notice of a deposition fails to attend or proceed with it, the court must impose a monetary sanction unless it finds that [CCP § 2025.430]:

- The one subject to the sanction acted with substantial justification; or

- Other circumstances make the imposition of the sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.38 Motion for Monetary Sanction for Noticing Party's Failure to Serve Required Deposition Subpoena on Nonappearing Deponent.

6.38[1] Grounds. If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken may request a monetary sanction against [CCP § 2025.440]:

- The party who gave notice of the deposition;
- The attorney for the party who gave notice of the deposition; or
- Both the party and his or her attorney.

Distinguish--Failure to Appear by Properly Served Nonparty Deponent:

If the deposition subpoena was properly served, the nonparty deponent is subject to sanction for failing to appear or refusing to be sworn [CCP § 2025.440].

► **Cross Reference:**

Discussion of punishment for disobeying deposition subpoena, see 6.21.

6.38[2] Motion Papers. The moving papers for a motion for a monetary sanction for the failure to serve a deposition subpoena on the deponent must include:

- A motion and notice of motion [Cal Rules Ct, Rule 3.1112(a)];
- A supporting declaration establishing facts outside the record in the case [CCP §§ 2002, 2003, 2015.5], including a statement of the expenses incurred; and
- A memorandum in support of the motion [Cal Rules Ct, Rule 3.1112(a)].

 Cross References:

Forms, see 6.74.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form of memorandum supporting motion, see *California Points and Authorities*, Ch. 83, *Discovery: Depositions*, § 83.11 (*Matthew Bender*).

6.38[3] Sanction Is Generally Mandatory. If the deponent does not appear because of the noticing party's failure to serve a deposition subpoena, the court must impose a monetary sanction unless it finds that [CCP § 2025.440(a)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of the sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.39 Objections to Qualifications of Deposition Officer.

Any objection to the qualifications of the deposition officer are waived unless made before the deposition begins or as soon thereafter as [CCP § 2025.320(e)]:

- The ground for that objection becomes known; or
- The ground for that objection could be discovered by reasonable diligence.



Cross Reference:

Discussion of qualifications of deposition officer, see 6.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.40 Objections to Examination Based on Privilege or Work Product.

The protection of information from discovery on the ground that it is privileged or that it is attorney work product is waived unless a specific objection to its disclosure is timely made during the deposition [CCP § 2025.460(a)].



Warning:

Assertion of privilege in a deposition may preclude that party from later attempting to waive the privilege to introduce evidence at trial [*A & M Records, Inc. v. Heilman* (1977) 75 CA3d 554, 566, 142 CR 390 (trial court properly precluded testimony respecting any matters which the defendant refused to testify about at his deposition based on privilege against self-incrimination); *see also* *Dwyer v. Crocker Nat'l Bank* (1987) 194 CA3d 1418, 1431-1433, 240 CR 297 (trial court did not abuse discretion in imposing evidence sanction against plaintiff who asserted privilege against self-incrimination at deposition)].

Legal Topics:

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6.41 Objections Based on Errors or Irregularities.

6.41[1] Waived If Not Timely Made. Errors or irregularities of any kind occurring at an oral deposition that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition [CCP § 2025.460(b)].

These errors and irregularities include, but are not limited to, those relating to [CCP § 2025.460(b)]:

- The manner of taking the deposition;
- The oath or affirmation administered;
- The conduct of a party, attorney, deponent, or deposition officer; and
- The form of any question or answer.



Strategic Point--Objecting Party:

Unless the objecting party demands that the taking of the deposition be suspended to permit a motion for a protective order, the deposition must proceed, subject to the objection [CCP § 2025.460(b)].



Cross Reference:

Discussion of suspending the taking of testimony, see 6.35.

6.41[2] Specific Forms of Question.

6.41[2][a] Legal Contention Questions Improper. "Legal contention" questions, which ask a party deponent to state all facts, list all witnesses, and identify all documents that support or pertain to a particular contention in that party's pleadings, are improper in the deposition of a party who is represented by counsel. Such questions are properly posed through interrogatories [*Rifkind v. Superior Court* (1994) 22 CA4th 1255, 1259-1263, 27 CR2d 822].

6.41[2][b] Requests for Reenactment and Other Nonverbal Responses During Video Recorded Deposition

Allowed. *CCP § 2025.480(a)*, which allows a party to move to compel if a deponent fails to "answer any question," contemplates nonverbal as well as verbal responses at a video recorded deposition [*Emerson Elec. Co. v. Superior Court* (1997) 16 C4th 1101, 1111-1112, 68 CR2d 883, 946 P2d 841]. Therefore, requests for nonverbal demonstrations, diagrams, or reenactments by the deponent during a video recorded deposition are allowed [*Emerson Elec. Co. v. Superior Court* (1997) 16 C4th 1101, 1111-1112, 68 CR2d 883, 946 P2d 841 (overturning denial of motion to compel plaintiff to diagram position in relation to radial arm saw allegedly involved in accident and to reenact accident)].

**Strategic Point:**

If the deposition is not being video recorded, counsel may be able to refuse reenactment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.42 Objections As to Competency, Relevancy, Materiality, or Admissibility.

The following objections are unnecessary and are not waived by failure to make them before or during the deposition [CCP § 2025.460(c)]:

- Objections to the competency of the deponent; and
- Objections to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced.



Warning:

Unless the questioning is such that the party or deponent demands suspension of the taking of testimony to move for a protective order, counsel cannot instruct the deponent not to answer a question on the ground that it will elicit irrelevant testimony. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial [*Stewart v. Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1014, 105 CR2d 115].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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6.43 Motion for Protective Order.

6.43[1] Party or Deponent May Demand Deposition Officer Suspend Taking Testimony. Any party attending a deposition, including the deponent, may demand that the deposition officer suspend taking the testimony to enable that party or deponent to move for a protective order [CCP § 2025.470].



Strategic Point:

The reporter may list unanswered questions as a matter of course and will do so on request. Confirm that the reporter will do so.

6.43[2] Grounds. The motion for a protective order may be made on the ground that the examination is being conducted [CCP § 2025.470]:

- In bad faith; or
- In a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party.



Strategic Points--Moving Party:

- The relief available under CCP § 2025.420 is also available in a protective order for a deposition in progress.

- Terminating a deposition and moving for a protective order should be done only as a last resort. Counsel should attempt to resolve the disagreement before resorting to such action. For example, if counsel representing the deponent objects that a particular line of questioning is unreasonably annoying, embarrassing or oppressive, counsel should permit other lines of questioning to proceed before

terminating the deposition and seeking a protective order.

Cross Reference:

Discussion of relief generally available through protective orders, see 6.28[3].

6.43[3] Declaration Showing Attempt at Informal Resolution Is Required. The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*CCP* § 2025.420(a)].

6.43[4] Motion Papers. The moving papers for a motion for a protective order must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [*CCP* §§ 2002, 2003, 2015.5, 2025.420(a)]; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].



Strategic Points--Moving Party:

When the manner in which the examination is being conducted is at issue, particularly if the motion for a protective order seeks to terminate the examination, the moving party should attach illustrative pages from the deposition transcript as an exhibit to the motion [*see Cal Rules Ct, Rule 3.1116* (preparation of deposition pages as exhibit to motion)]. Although not specifically required for a motion for a protective order, the moving party may also want to lodge the deposition transcript with the court five days before the hearing, as would be done for a motion to compel, to provide the showing of good cause for the relief sought.

Judge's Perspective:

Counsel should bear in mind that unless the deposition is being videotaped or tape recorded in conjunction with stenographic reporting the court will not be able to discern demeanor or tone from the transcript alone. This is important if the basis for a protective order is something that cannot be gleaned from a bare transcript. In other words, if the manner in which the deposition is being conducted is the basis for the protective order then counsel are left to the tedious task of trying to portray this picture through the vehicle of counsel's declaration, which historically has proven to be a difficult task. If the manner of the deposition is the basis for the protective order, counsel should try to describe the conduct on the record without engaging in vituperative exchanges. Even if the request for the deposition to be halted is unsuccessful, counsel can always ask the trial court for permission to resume the deposition in the court's jury room.

Cross References:

Forms, see 6.72, 6.75.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 83, Discovery: Depositions*, § 83.80 (*Matthew Bender*).

6.43[5] Court May Terminate or Limit Examination. For good cause shown, the court may terminate the

examination or may limit the scope and manner of taking the deposition [*CCP* § 2025.470; *see CCP* § 2025.420(b) (types of limitations that may be imposed)].

If the court terminates the examination, the deposition cannot thereafter be resumed, except on order of the court [*CCP* § 2025.420(b)(16)].

 Cross Reference:

Discussion of types of limitations available in protective orders, *see* 6.28[3].

6.43[6] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes the motion for a protective order, unless it finds that [*CCP* § 2025.420(d)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of the sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryMethodsOral Depositions



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6.44 CHECKLIST: Compelling Attendance, Testimony, or Production.

☐ If party or party-affiliated deponent fails to appear, to proceed with examination, or to produce materials:

- ☐ Inquire as to reason for nonappearance, if deponent failed to appear.
- ☐ Make reasonable, good-faith attempt at informal resolution of issues, including issue of nonappearance.
- ☐ If unable to resolve issue, prepare motion to compel and impose monetary sanction.
 - ☐ Draft:
 - ☐ Notice of motion and motion;
 - ☐ Supporting declaration;
 - ☐ Separate statement, if necessary; and
 - ☐ Memorandum.

Content Notes:

- Motion must show good cause justifying production of any document or thing described in the notice of deposition.

- Declaration must show inquiry as to nonappearance and reasonable, good-faith attempt at informal resolution of issues.

- Include a *Cal Rules Ct, Rule 3.1345* separate statement if moving to compel production.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

☐ If motion granted and deponent fails to comply with order, file motion for sanctions.

Authority:

CCP § 2025.450

Discussion:

See 6.45

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Form:

See 6.76 (notice of motion and motion to compel)

☐ If nonparty deponent fails to appear and testify or produce materials as commanded in the deposition subpoena, seek to impose a contempt sanction and/or seek monetary sanctions from deponent for failure to obey the deposition subpoena.

Authority:

CCP § 2020.240

Discussion:

See 6.21.

☐ If party or nonparty deponent fails to answer question or produce materials specified in deposition notice or deposition subpoena:

☐ Make reasonable, good-faith attempt at informal resolution of issues.

☐ If unable to resolve issues, prepare motion to compel and impose monetary sanction.

☐ Draft:

☐ Notice of motion and motion;

- ☐ Supporting declaration;
- ☐ Separate statement; and
- ☐ Supporting memorandum.

**Timing:**

- Notice of the motion to compel may be given orally at the examination, or by subsequent service in writing [*CCP* § 2025.480(c)].
- Motion must be made no later than 60 days after completion of the record of the deposition [*CCP* § 2025.480(b)].

Content Notes:

- Motion should show good cause justifying production of any document or thing sought to be compelled.
- Declaration must show reasonable, good-faith attempt at informal resolution of issues.

- ☐ Serve and file motion.
- ☐ If nonparty deponent, have written notice and all moving papers personally served on deponent.

Exception:

Personal service is not required if nonparty deponent agrees to accept service by mail at an address specified on the deposition record [*Cal Rules Ct, Rule 3.1346*].

- ☐ Lodge certified copy of transcript with court.

**Timing:**

Transcript must be lodged with court at least five days before the hearing on the motion to compel.

- ☐ If motion granted and deponent fails to comply with order:
 - ☐ Have deponent punished for contempt of court.
 - ☐ File motion for additional sanctions against party or party-affiliated deponent.

Authority:

CCP § 2025.480

Discussion:

See 6.46

Forms:

See 6.77 (notice of motion and motion to compel answer or production), 6.78 (separate statement)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to Compel



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6.45 Motion to Compel Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Materials.

6.45[1] Grounds. If, after service of a deposition notice, a party or party-affiliated deponent fails to appear, to proceed with the examination, or to produce documents or things without having served a valid objection, the party noticing the deposition may move for an order compelling the deponent's attendance and testimony and the production of any document or thing described in the notice [*CCP* § 2025.450(a)].

A party or party-affiliated deponent is one who is [*CCP* § 2025.280(a)]:

- A party to the action;
- An officer, director, or managing agent of a party; or
- An employee of a party.



Warning:

A notice of deposition is sufficient to require attendance, testimony, and/or production only by parties and persons currently affiliated with parties. Former officers, directors, managing agents, or employees of a party must have been served with a deposition subpoena, as well as with a notice of deposition, before their appearance can be compelled [*see Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1398, 115 CR2d 137].

Distinguish--Nonappearance by Nonparty Deponent:

If a nonparty deponent fails to appear or proceed, the nonparty deponent may be punished with a contempt sanction for disobeying the deposition subpoena [*CCP* § 2020.240].

Distinguish--Motion to Compel Further Responses From Any Deponent:

If the deponent appears and proceeds with the deposition but fails to answer particular questions or to produce particular items during the deposition, the party seeking discovery may file a motion to compel the deponent to answer the question or produce the materials [*see CCP* § 2025.480].

Judge's Perspective:

These types of motions are time-consuming, costly, and tedious to put together. If there has been a history of discovery impasses, specifically with the taking of depositions then counsel should consider moving the court for assistance in the form of permitting the depositions to proceed in the court's jury room for easy access to the court or alternatively asking the court to rule on deposition objections or impasses telephonically. Counsel should be aware, however, that there is little likelihood of this procedure being followed outside complex litigation, and that even in complex cases, not all judges would be receptive to it.

**Cross References:**

Discussion of motion to compel any deponent to answer question or produce materials, see 6.46.

Discussion of punishment for disobeying deposition subpoena, see 6.21.

Motions to compel, see *DeMeo, California Deposition and Discovery Practice*, § 51.42 (Matthew Bender).

6.45[2] Motion Must Show Good Cause Justifying Production. The motion to compel must set forth specific facts showing good cause justifying the production of any document or tangible thing described in the deposition notice [CCP § 2025.450(b)(1)].

6.45[3] Declaration Showing Attempt at Informal Resolution or Inquiry About Nonappearance Is Required. The motion to compel must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [CCP § 2025.450(b)(2)].

If the deponent failed to attend the deposition, the motion must be accompanied by a declaration stating that the moving party has contacted the deponent to inquire about the nonappearance [CCP § 2025.450(b)(2)].

**Warning:**

If the deponent fails to attend, the moving party may be subject to sanctions if, after contacting the deponent and listening to the reasons for the nonappearance, the moving party fails to make a good-faith attempt to resolve the issue [see *Leko v. Cornerstone Bldg. Inspection Serv. (2001) 86 CA4th 1109, 1124, 103 CR2d 858*].

Example:

When failure to appear was due to oversight, and deponents' counsel expressed a willingness to reschedule the depositions at a mutually convenient date, moving party was subject to sanctions for proceeding with the motion to compel having made the inquiry about the nonappearance without attempting to resolve the issue [*Leko v. Cornerstone Bldg. Inspection Serv. (2001) 86 CA4th 1109, 1124, 103 CR2d 858*].

6.45[4] Motion Papers. A motion to compel attendance, testimony, or production by a party or party-affiliated deponent must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution, good cause justifying the production demanded, and an inquiry into the nonappearance of the deponent, if the deponent failed to appear [CCP §§ 2002, 2003, 2015.5, 2025.450(b)];

- A separate statement specifying the production demanded [*Cal Rules Ct, Rule 3.1345(a)*]; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].

Cross References:

Form, see 6.76.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Forms of memoranda supporting motion, see *California Points and Authorities, Ch. 83, Discovery: Depositions*, §§ 83.30, 83.32 (Matthew Bender).

6.45[5] Sanctions Against Deponent Are Generally Mandatory If Motion Granted. If the motion is granted, the court must also impose a monetary sanction against the deponent or the party with whom the deponent is affiliated, unless it finds that [*CCP § 2025.450(c)*]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

6.45[6] Sanctions Against Deponent Are Available On Motion of Any Other Attending Party. Any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, may also move for the imposition of a sanction [*CCP § 2025.450(c)(2)*].

The court must impose a monetary sanction against the deponent in favor of the moving party, unless it finds that [*CCP § 2025.450(c)*]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

6.45[7] Sanctions Are Available for Failure to Comply With Order. If a party or party-affiliated deponent fails to obey an order compelling attendance, testimony, and production, the court may make those orders that are just, including [*CCP § 2025.450(d)*]:

- An issue sanction [*CCP § 2023.030(b)*];
- An evidence sanction [*CCP § 2023.030(c)*]; or
- A terminating sanction [*CCP § 2023.030(d)*].

In lieu of or in addition to any other sanction, the court may impose a monetary sanction [*CCP § 2023.030(a)*] in favor or any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to the order to compel [*CCP § 2025.450(d)*]. This sanction may be imposed against the deponent or against the party with whom the deponent is affiliated [*CCP § 2025.450(d)*].

6.45[8] Sanctions Are Available Even If No Opposition to Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the

motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

However, the failure to file a written opposition or to appear at a hearing or the voluntary provision of discovery cannot be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to Compel



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6.46 Motion to Compel Party or Nonparty Deponent to Answer Question or Produce Materials.

6.46[1] Grounds. If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production [CCP § 2025.480(a)].

Distinguish--Compelling Compliance When Deponent Fails to Appear or Proceed:

If a party or party-affiliated deponent fails to appear or appears but refuses to proceed with the deposition, the party seeking discovery may move to compel the deponent to appear, proceed, and produce materials [see CCP § 2025.450]. If a nonparty deponent fails to appear or proceed, the party seeking discovery may move to have the nonparty deponent punished for disobeying the deposition subpoena [see CCP § 2020.240].

➡ Cross References:

Discussion of motion to compel when party deponent fails to appear, see 6.45.

Discussion of punishment of nonparty deponent for disobeying deposition subpoena, see 6.21.

6.46[2] Must Be Made No Later Than 60 Days After Completion of the Deposition Record. If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or deposition subpoena, the party seeking that answer or production may [CCP § 2025.460(d)]:

- Adjourn the deposition; or
- Complete the examination on other matters without waiving the right at a later time to move to compel.

A motion to compel an answer or production must be made no later than 60 days after completion of the record of the deposition [CCP § 2025.480(b)]. The 60-day limit applies to a subpoena for business records as well as a subpoena for an oral deposition, and the 60-day period runs from the date of the response to the subpoena [*Unzipped Apparel, LLC*

v. Bader (2007) 156 CA4th 123, 127, 67 CR3d 111] .

6.46[3] Declaration Showing Attempt at Informal Resolution Is Required. A motion to compel an answer or production must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [CCP § 2025.480(b)].

Reasonable Attempt:

A reasonable and good-faith attempt at informal resolution entails more than an argument at a deposition. Counsel must attempt to talk the matter over, compare their views, consult, and deliberate [*Townsend v. Superior Court (1998) 61 CA4th 1431, 1439, 72 CR2d 333*].



Strategic Point--Moving Party:

The declaration also should set forth specific facts, or refer to facts set forth in the *Cal Rules Ct, Rule 3.1345(a)* separate statement, which show good cause justifying the discovery sought by the motion to compel production [see *Calcor Space Facility, Inc. v. Superior Court (1997) 53 CA4th 216, 224, 61 CR2d 567* (requirement of showing good cause, necessary to compel party to comply with inspection demand, should also be required when compelling nonparty compliance with deposition subpoena)].

6.46[4] Notice of Motion May Be Given Orally at Deposition or Subsequently in Writing. Notice of the motion to compel an answer or production must be given to all parties and to the deponent either [CCP § 2025.480(c)]:

- Orally at the examination; or
- By subsequent service in writing.

If the notice of the motion is given orally, the deposition officer must direct the deponent to attend a session of the court at the time specified in the notice [CCP § 2025.480(c); see *Parker v. Wolters Kluwer United States, Inc. (2007) 149 CA4th 285, 296, 57 CR3d 18* (giving of notice orally by opposing counsel rather than by deposition officer was harmless error because deponent heard the notice and responded that he would not attend)].

6.46[5] Notice and Motion Must Be Personally Served on Nonparty Deponent. A written notice and all moving papers supporting a motion to compel an answer to a deposition question or to compel production of a document or tangible thing from a nonparty deponent must be personally served on the nonparty deponent [Cal Rules Ct, Rule 3.1346].

Exception:

Personal service is not required if the nonparty deponent agrees on the deposition record to accept service by mail at an address specified [Cal Rules Ct, Rule 3.1346].

6.46[6] Moving Party Must Lodge Certified Copy of Relevant Parts of Transcript. At least five days before the hearing on the motion to compel, the moving party must lodge with the court a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the motion [CCP § 2025.480(d)].

If a deposition is recorded by audio or video technology, the moving party must lodge a certified copy of a transcript of any parts of the deposition that are relevant to the motion [CCP § 2025.480(d)].

6.46[7] Motion Papers. The moving papers for a motion to compel an answer or production must include:

- A motion and notice of motion [Cal Rules Ct, Rule 3.1112(a)];

- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution, and good cause justifying any production sought [*CCP* §§ 2002, 2003, 2015.5, 2025.480];

- A separate statement [*Cal Rules Ct, Rule 3.1345(a)*]; and

- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].



Cross References:

Forms, see 6.77, 6.78.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Forms for memoranda supporting motion, see *California Points and Authorities, Ch. 83, Discovery: Depositions*, §§ 83.31, 83.32 (Matthew Bender).

6.46[8] Order. If the court determines that the answer or production sought is subject to discovery, the court must order that the answer be given or the production be made on the resumption of the deposition [*CCP* § 2025.480(e)].

6.46[9] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that [*CCP* § 2025.480(f)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of the sanction unjust.

Distinguish--Sanctions Available If Deponent Fails to Appear:

If a party deponent fails to appear for deposition, parties other than the party noticing the deposition who attended in the expectation that the deponent would testify may request a monetary sanction against the party deponent [*CCP* § 2025.450(c)(2)]. When a deponent fails to answer a question or produce things during a deposition, only the party seeking discovery and moving to compel is entitled to sanctions if the motion is granted [*Townsend v. Superior Court* (1998) 61 CA4th 1431, 1438, 72 CR2d 333].

6.46[10] Failure of Deponent to Comply Is Considered Contempt of Court. If a deponent fails to obey an order compelling an answer or production, the failure may be considered a contempt of court [*CCP* § 2025.480(g)].

6.46[11] Further Sanctions Available Against Party or Party-Affiliated Deponent. If the disobedient deponent is a party or affiliated with a party to the action, the court also may make those orders against the party that are just, including [*CCP* § 2025.480(g)]:

- An issue sanction [*CCP* § 2023.030(b)];
- An evidence sanction [*CCP* § 2023.030(c)]; or
- A terminating sanction [*CCP* § 2023.030(d)].

In lieu of, or in addition to, an issue, evidence, or terminating sanction, the court may impose a monetary sanction [*CCP* § 2023.030(a)] against that party deponent or against any party with whom the deponent is affiliated [*CCP* § 2025.480(g)].

6.46[12] Sanctions Are Available Even If No Opposition to Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

However, the failure to file a written opposition or to appear at a hearing or the voluntary provision of discovery cannot be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to Compel



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VIII. OBTAINING COPIES OF AND REVIEWING THE TRANSCRIPT

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6.47 CHECKLIST: Obtaining Copies of and Reviewing the Transcript.

6.47[1] Deponent's Checklist.

☐ When deposition officer notifies deponent and all parties that transcript is ready for review:

☐ Read stenographic transcript, changing the form or substance of the answer to any question, if necessary; or

☐ If no stenographic transcript is made, review audio or video recording.

Exception:

Notice from the deposition officer is not required if the deponent and all the parties attending the deposition agree to waive the review.

Authority:

CCP §§ 2025.520, 2025.530

Discussion:

See 6.49[1], 6.50[1]

☐ Change form or substance of the answer to any question:

☐ In person, or

☐ By signed letter to the deposition officer.

☐ Indicate approval:

- ☐ If stenographic transcript, sign transcript.
- ☐ If audio or video recording, sign statement identifying deposition as your own.

Exception:

If the deponent's counsel intends to file a motion to suppress the deposition, the transcript or statement identifying the recording should not be signed.

**Timing:**

The deponent must review the transcript or recording and indicate, or refuse to indicate, approval within 30 days following the notice from the deposition officer that the transcript or recording is available for review.

Exception:

Parties may stipulate to a longer or shorter time for review and approval, or, for good cause shown, court may shorten time.

Authority:

CCP §§ 2025.520, 2025.530

Discussion:

See 6.49, 6.50.

Discussion of motion to suppress, see 6.55

6.47[2] Noticing Party's Checklist.

- ☐ Obtain official transcript from deposition officer.

Exception:

If all parties agree not to have the stenographic transcript be the official record, the testimony is not transcribed.

Authority:

CCP § 2025.510(a)

Discussion:

See 6.48

- ☐ Store transcript, under conditions that will preserve it until six months after final disposition of the action.

Authority:

CCP § 2025.550

Discussion:

See 6.51[4]

☐ If you made an audio or video recording of the deposition:

☐ Make recording available for viewing or provide copy to any other party requesting it, on payment of the reasonable cost of copying.

☐ Store recording, under conditions that will preserve it, until six months after final disposition of the action.

Authority:

CCP §§ 2025.510, 2025.560

Discussion:

See 6.48[6], 6.51[5]

☐ If another party made an audio or video recording of the deposition, request copy from that party and pay reasonable cost of copying.

Authority:

CCP § 2025.510(f)

Discussion:

See 6.48[6]

6.47[3] Checklist for Other Parties to Action.

☐ Obtain copy of deposition transcript, if desired, on payment of copying fee to deposition officer.

Authority:

CCP § 2025.510

Discussion:

See 6.48[3]

☐ If noticing party or other party made audio or video recording of deposition, request copy and pay reasonable cost of copying.

Authority:

CCP §§ 2025.510(f), 2025.560(b)

Discussion:

See 6.48[6], 6.51[5]

☐ If you made audio or video recording of deposition, make recording available for viewing or provide copy to any other party requesting it, on payment of the reasonable cost of copying.

Authority:

CCP § 2025.510(f)

Discussion:

See 6.48[6]

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.48 Obtaining Copies of Transcript.

6.48[1] Deposition Recorded Stenographically Must Be Transcribed. Unless the parties agree otherwise, the testimony at any deposition recorded stenographically must be transcribed [*CCP § 2025.510(a)*].

6.48[2] Party Noticing Deposition Bears Cost of Transcription. The party noticing the deposition must bear the cost of the transcription, unless the court, on motion, orders that the cost be borne or shared by another party [*CCP § 2025.510(b)*]. Good cause must be shown for the order [*CCP § 2025.510(b)*]. The attorney or party appearing in pro per requesting the transcription is responsible for timely paying the deposition officer for the services and products requested, unless responsibility for the payment is otherwise provided by law, or the deposition officer is notified in writing, at the time the services and products are requested, that the party or another identified person will be responsible for payment [*CCP § 2025.510(h)(1), (2)*]. This rule does not prevent an attorney and party from allocating responsibility for repayment of the cost by the party to the attorney [*see CCP § 2025.510(h)(3)*].

Consider:

The purpose of the 2007 legislation enacting *CCP § 2025.510(h)* [Stats. 2007 ch. 115, § 1] was to make clear that the court reporter has the right to recover from the attorney regardless of any agreement that exists between the attorney and the client.

6.48[3] Any Other Party or Deponent May Obtain Copy at Own Expense. Any other party or the deponent may obtain a copy of the transcript at his or her own expense [*CCP § 2025.510(c)*].



Warning:

The cost of obtaining a copy may be considerable, because deposition reporters are privately hired, and are not subject to the fee limits applicable to court-retained reporters [*see Gov Code §§ 69950, 69951*].

Example:

A party deponent could not avoid paying the clearly excessive copying fees charged by a reporter service for a copy of his own deposition transcript because deposition reporters are free to charge all the market will bear [*Urban Pac. Equities Corp. v. Superior Court* (1997) 59 CA4th 688, 692-693, 69 CR2d 635].

6.48[4] Deposition Officer Must Make Copies Available to All Parties at Same Time. If the deposition officer receives a request from a party for an original or a copy of the deposition transcript, or any portion of the transcript, and the full or partial transcript will be available to that party prior to the time the original or copy would be available to any other party, the deposition officer must [CCP § 2025.510(d)]:

- Immediately notify all other parties who attended the deposition of the request, and
- On request by any of the other parties, simultaneously make the same copy of the full or partial deposition transcript available to all parties.

6.48[5] Deposition Officer Must Retain Stenographic Notes. Stenographic notes of depositions must be retained by the reporter for the following periods [CCP § 2025.510(e)]:

- Not less than eight years from the date of the deposition, if no transcript is produced; or
- Not less than one year from the date on which the transcript is produced.

Stenographic notes may be either on paper or electronic media, as long as the method allows for satisfactory production of a transcript at any time during the required periods of retention [CCP § 2025.510(e)].

6.48[6] Copies of Any Audio or Video Recordings Made by Any Party Must Be Made Available to All Parties. At the request of any other party to the action, including a party who did not attend the taking of the deposition testimony, any party who records or causes the recording of that testimony by means of audio or video technology must promptly [CCP § 2025.510(f)]:

- Permit that other party to hear the audio recording or to view the video recording; and
- Furnish a copy of the audio or video recording to that party on receipt of payment of the reasonable cost of making a copy of the recording.

6.48[7] Stenographic Transcript Is Official Record. If the testimony at the deposition is recorded both stenographically, and by audio or video technology, the stenographic transcript is the official record of that testimony for the purpose of the trial and any subsequent hearing or appeal [CCP § 2025.510(g)].

6.48[8] Availability of Transcript or Recording to Other Persons.

6.48[8][a] Any Person May Request Copy. Any person may request from the deposition officer [CCP § 2025.570(a)]:

- A copy of the transcript of the deposition testimony made by, or at the direction of, any party; or
- An audio or video recording of the deposition testimony.

If the transcript or recording is still in the possession of the deposition officer, the copy must be made available to the person requesting it, on payment of a reasonable charge set by the deposition officer, unless the court issues an order to the contrary [CCP § 2025.570(a)].

6.48[8][b] Deposition Officer Must Notify Participants of Request. If a copy of the transcript or a recording is requested from the deposition officer, the deposition officer must mail a notice to all parties attending the deposition and to the deponent at his or her last known address [CCP § 2025.570(b)]. The notice must [CCP § 2025.570(b)]:

- Inform the parties and the deponent that the copy is being sought;
- Disclose the name of the person requesting the copy; and
- Advise them of the right to seek a protective order.

➡ **Cross References:**

Discussion of protective orders, see 6.28. Form of motion for protective order after deposition, see 6.81.

6.48[8][c] Copy to Be Provided Unless Subject to Protective Order Within 30 Days. If a protective order is not served on the deposition officer within 30 days of the mailing of the notice, the deposition officer must make the copy available to the person requesting the copy [*CCP* § 2025.570(c)].

➡ **Cross Reference:**

Form of motion for protective order after deposition, see 6.81.

6.48[8][d] Applicable Only As to Depositions On or After January 1, 1998. The availability of copies for other persons applies only to recorded testimony taken at depositions occurring on or after January 1, 1998 [*CCP* § 2025.570(d)].

Legal Topics:

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6.49 Procedure for Review of Transcript by Deponent.

6.49[1] Deposition Officer Must Give Notice When Transcript Is Available. If the deposition testimony is stenographically recorded, the deposition officer must send written notice to the deponent and to all parties attending the deposition when the original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing [CCP § 2025.520(a)].

Exception:

The notice does not need to be given if the deponent and the attending parties agree on the record [CCP § 2025.520(a)]:

- That the reading, correcting, and signing of the transcript of the testimony will be waived; or
- That the reading, correcting, and signing of a transcript of the testimony will take place after the entire deposition has been concluded or at some other specific time.

6.49[2] Deponent Has 30 Days to Review and Make Changes to Transcript. For 30 days following each notice, the deponent may change the form or the substance of the answer to a question, and may either approve the transcript by signing it, or refuse to approve the transcript by not signing it [CCP § 2025.520(b)].

Exception:

The attending parties and the deponent may agree on the record, or otherwise in writing, to a longer or shorter time period for the deponent to change answers and to approve, or refuse to approve, the transcript [CCP § 2025.520(b)].

6.49[3] Deponent May Indicate Changes, Approval, or Disapproval in Letter. Within the 30 days following notice from the deposition officer, the deponent may change the form or the substance of the answer to any question and may approve, or refuse to approve, the transcript by means of a letter to the deposition officer [CCP § 2025.520(c)].

The letter must be signed by the deponent and mailed to the deposition officer by certified or registered mail with return

receipt requested [CCP § 2025.520(c)]. A copy of the letter must be sent by first-class mail to all parties attending the deposition [CCP § 2025.520(c)].

6.49[4] Court May Shorten 30-Day Period for Review. For good cause shown, the court may shorten the 30-day period for making changes, approving, or refusing to approve the transcript [CCP § 2025.520(d)].

6.49[5] Deposition Officer Must Indicate Deponent's Actions on Transcript. The deposition officer must indicate on the original of the transcript, if the deponent has not already done so at the office of the deposition officer [CCP § 2025.520(e)]:

- Any action taken by the deponent; and
- The deponent's approval of, or failure or refusal to approve, the transcript.

6.49[6] Deposition Officer Must Notify Parties of Changes Made in Person. The deposition officer must notify in writing the parties attending the deposition of any changes that the deponent timely made in person [CCP § 2025.520(e)].

6.49[7] Effect of Deponent's Failure or Refusal to Approve Transcript. If the deponent fails or refuses to approve the transcript within the allotted period, the deposition is given the same effect as though it had been approved, subject to any changes timely made by the deponent [CCP § 2025.520(f)].

Exception:

On a seasonable motion to suppress, the court may determine that the reasons given for the failure or refusal to approve the transcript require rejection of the deposition in whole or in part [CCP § 2025.520(g)].

Judge's Perspective:

If the deponent fails to read, correct, and sign the deposition transcript within the time frame permitted, and there has been no stipulation to extend the time frame, then the original will be deemed to have been read, corrected and signed. This is quite significant if the deponent's testimony is later used to support a motion for summary adjudication/judgment. The deponent will be unable to make changes to the transcript, and the court will ignore a declaration submitted by the deponent attempting to do the same thing. Specifically, a triable issue of fact cannot be created by way of a declaration (which is at odds with deposition testimony) in order to defeat the summary adjudication/judgment request [*see Visueta v. General Motors Corp.* (1991) 234 CA3d 1609, 1613, 286 CR 402 ; *see also D'Amico v. Board of Med. Exam'rs* (1974) 11 C3d 1, 20-22, 112 CR 786, 520 P2d 10 (discussing general principle)].

Although an unexecuted deposition transcript can be used in the civil action as though it had been approved, the deponent cannot be charged with the crime of perjury, based on false testimony during the deposition, unless the transcript is signed [*People v. Post* (2001) 94 CA4th 467, 480-484, 114 CR2d 356 ; *Collins v. Superior Court* (2001) 89 CA4th 1244, 1248-1249, 108 CR2d 123].



Cross Reference:

Discussion of motions to suppress, see 6.55.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.50 Procedure for Review of Audio or Video Recording by Deponent.

6.50[1] Deposition Officer Must Give Notice of Availability of Audio or Video Recording When No Stenographic Transcription. If there is no stenographic transcription of the deposition, the deposition officer must send written notice to the deponent and to all parties attending the deposition that the audio or video recording made by, or at the direction of, any party, is available for review [CCP § 2025.530(a)].

Exception:

This notice is not required if the deponent and all the parties attending the deposition agree on the record to waive the hearing or viewing of the audio or video recording of the testimony [CCP § 2025.530(a)].

6.50[2] Deponent Has 30 Days to Change Answer to Any Question. For 30 days after the deposition officer gives notice that the recording is available for review, the deponent may change the substance of the answer to any question either [CCP § 2025.530(b)]:

- In person; or
- By signed letter to the deposition officer.

6.50[3] Deposition Officer Must Put Deponent's Actions in Writing. The deposition officer must set forth in a writing to accompany the recording any changes made by the deponent, and either [CCP § 2025.530(c)]:

- The deponent's signature identifying the deposition as his or her own;
- A statement of the deponent's failure to supply the signature; or
- A statement of the deponent's failure to contact the officer within the allotted time period.

6.50[4] Effect of Deponent's Failure or Refusal to Identify Deposition As His/Her Own. When a deponent fails to contact the officer within the allotted period, or expressly refuses by a signature to identify the deposition as his or her own, the deposition is given the same effect as though signed [CCP § 2025.530(d)].

Exception:

On a reasonable motion to suppress the deposition, the court may determine that the reasons given for the refusal to sign require rejection of the deposition in whole or in part [*CCP* § 2025.530(e)].

**Cross Reference:**

Discussion of motions to suppress, see 6.55.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.51 Certification and Storage of Deposition.

6.51[1] Deposition Officer Must Certify Official Record of Deposition. The deposition officer must certify that the deponent was duly sworn and that the transcript or recording is a true record of the testimony given [CCP § 2025.540(a)]. The certification must appear on the transcript or in the writing accompanying the audio or video record of deposition testimony, when there is no stenographic transcription [CCP § 2025.540(a)].

6.51[2] Rough-Draft Transcript May Not Be Certified, Cited, or Used. When prepared as a rough-draft transcript, the transcript of the deposition may not be certified and may not be used, cited, or transcribed as the certified transcript of the deposition proceedings [CCP § 2025.540(b)].

The rough-draft transcript may not be cited or used in any way or at any time to rebut or contradict the certified transcript of deposition proceedings provided by the deposition officer [CCP § 2025.540(b)].

6.51[3] Certified Record of Deposition Is Not Filed With Court. The certified transcript of a deposition is not filed with the court [CCP § 2025.550(a)].

6.51[4] Requirements for Retention of Certified Transcript.

6.51[4][a] Deposition Officer Must Transmit Transcript to Noticing Party's Attorney. The deposition officer must [CCP § 2025.550(a)]:

- Securely seal the transcript in an envelope or package endorsed with the title of the action and marked: "Deposition of _____ [name of deponent]", and
- Promptly transmit the envelope or package to the attorney for the party who noticed the deposition.

6.51[4][b] Attorney Must Retain Until Six Months After Action. The attorney to whom the transcript is sent must store it under conditions that will protect it against loss, destruction, or tampering [CCP § 2025.550(a)]. The attorney must retain custody of the transcript until six months after final disposition of the action [CCP § 2025.550(b)].

Exception:

The court, on motion of any party and for good cause shown, may order that the transcript be preserved for a longer period [CCP § 2025.550(b)].

6.51[5] Requirements for Retention of Audio or Video Record.

6.51[5][a] Operator Must Retain and Store Recording. An audio or video recording of deposition testimony made by, or at the direction of any party, including a certified tape made by an operator authorized to administer an oath, is not filed with the court [CCP § 2025.560(a)].

The operator must retain custody of the recording and must store it under conditions that will [CCP § 2025.560(a)]:

- Protect it against loss, destruction, or tampering; and
- Preserve as far as practicable, the quality of the recording and the integrity of the testimony and images it contains.

6.51[5][b] Operator Must Make Recording Available to Parties. At the request of any party to the action, including a party who did not attend the taking of the deposition testimony, or at the request of the deponent, the operator must promptly [CCP § 2025.560(b)]:

- Permit the one making the request to hear or to view the recording on receipt of payment of a reasonable charge for providing the facilities for hearing or viewing the recording; and
- Furnish a copy of the audio or video recording to the one making the request on receipt of payment of the reasonable cost of making that copy of the recording.

6.51[5][c] Operator Must Retain Until Six Months After Action. The attorney or operator who has custody of an audio or video recording of deposition testimony made by, or at the direction of, any party, shall retain custody of it until six months after final disposition of the action [CCP § 2025.560(c)].

Exception:

The court, on motion of any party and for good cause shown, may order that the recording be preserved for a longer period [CCP § 2025.560(c)].

Legal Topics:

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Chapter 6 Oral Depositions in California
IX. USING OR PREVENTING THE USE OF A DEPOSITION

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6.52 CHECKLIST: Using Depositions.

6.52[1] Checklist for Party Intending to Use Deposition.

- ☐ Determine parts of deposition transcript to be used at trial, as appropriate, in accordance with the rules of evidence.

Authority:

CCP § 2025.620

Discussion:

See 6.53

- ☐ If intending to offer an audio or video recording in evidence:

- ☐ Notify court and all parties of intent.
- ☐ Specify parts of deposition to be offered.

Prerequisite:

If intending to offer a video recording of the deposition testimony of a treating or consulting physician or of any expert witness, even though the deponent is available to testify, the deposition notice must have reserved the right to use the deposition at trial.

The notice of intent must be made within sufficient time to allow:

- ☐ Objections;

☐ Rulings by the judge; and

☐ Any editing of recording.

Authority:

CCP §§ 2025.340(m), 2025.620(d)

Discussion:

See 6.56, 6.57[1], [2]

Form:

See 6.79 (notice of intent to offer audio or video recording in evidence)

☐ Prepare recording to be offered at trial:

☐ Have recording edited, if ordered by court.

☐ Have stenographic transcript made, if not previously done, to accompany recording.

Authority:

CCP § 2025.340(m)

Discussion:

See 6.57[4], [6]

6.52[2] Checklist for Party Seeking to Prevent Use of Deposition.

☐ If representing deponent, and seeking to prevent use of deposition:

☐ Make reasonable, good-faith attempt to resolve issue.

☐ If unable to resolve, file motion to suppress:

☐ Draft:

☐ Notice of motion and motion;

☐ Supporting declaration; and

☐ Supporting memorandum.

Prerequisite:

The deponent must have refused to sign the deposition transcript or statement identifying an audio or video deposition as his or her own.

Content Notes:

- The motion must be "reasonably" made, stating reasons requiring rejection of the deposition in whole or in part.

- The declaration must state facts showing the informal attempt at resolution.

☐ Serve and file motion.

☐ Follow standard noticed motion procedure.

Authority:

CCP §§ 2025.520, 2025.530

Discussion:

See 6.55

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.80 (notice of motion and motion to suppress deposition)

☐ If another party has given notice of an intent to offer an audio or video recording in evidence:

☐ Review parts sought to be offered.

☐ Make written objections, if any.

Authority:

CCP § 2025.340(m)

Discussion:

See 6.57[3], [4]

☐ Determine whether protective order should be sought after deposition has been taken.

☐ Make reasonable, good-faith attempt to resolve issue.

☐ If unable to resolve issue, prepare motion for protective order.

☐ Draft:

☐ Notice of motion and motion for protective order;

☐ Supporting declaration; and

- ☐ Supporting memorandum.

Prerequisite:

A reasonable, good-faith attempt at informal resolution is required before filing the motion.

- ☐ Serve and file motion:

- ☐ Follow standard noticed motion procedure.

If protective orders are sought because the parties have received a notice from the deposition officer that a person has requested a copy of the transcript or recording of the deposition, the protective order must be obtained and served on the deposition officer within 30 days of the mailing of the notice.

Authority:

CCP §§ 2025.420, 2025.570(c)

Discussion:

See 6.48

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 6.81 (notice of motion and motion for protective order after deposition)

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.53 Admissibility of Deposition.

6.53[1] May Be Used Against Any Party. At the trial or any other hearing in the action, any part or all of a deposition may be used against any party [*CCP* § 2025.620]:

- Who was present or represented at the taking of the deposition; or
- Who had due notice of the deposition and did not serve a valid objection.

6.53[2] May Be Used to the Extent Admissible. A deposition may be used to the extent that it is admissible under the rules of evidence, applied as though the deponent were then present and testifying as a witness, in accordance with the provisions of *CCP* § 2025.620 [*CCP* § 2025.620].

Cross Reference:

Detailed discussion of the use of deposition testimony during trial, see California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, §§ 20.30-20.38; or

DeMeo, *California Deposition and Discovery Practice*, §§ 50.20 -50.31 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.54 Purposes for Which a Deposition May Be Used.

6.54[1] Any Party May Use for Impeachment of Deponent As a Witness. Any party may use a deposition for the purpose of contradicting or impeaching the trial testimony of the deponent, or for any other purpose permitted by the Evidence Code [*CCP § 2025.620(a)*].

6.54[2] Adverse Party May Use Deposition of Party for Any Purpose. An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was related to a party as [*CCP § 2025.620(b)*]:

- An officer;
- A director;
- A managing agent;
- An employee;
- An agent; or
- A designee [*see CCP § 2025.230*].

It is not a ground for objection to the use of a deposition of a party by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing [*CCP § 2025.620(b)*].

6.54[3] Any Party May Use for Any Purpose When Court Has Made Certain Findings.

6.54[3][a] Deponent Resides More Than 150 Miles From Trial. Any party may use the deposition of any person or organization, including that of any party to the action, for any purpose if the court finds that the deponent resides more than 150 miles from the place of the trial or other hearing [*CCP § 2025.620(c)(1)*].

6.54[3][b] Deponent Cannot Testify for Specific Reasons. Any party may use the deposition of any person or organization, including that of any party to the action, for any purpose if the court finds that the deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is [CCP § 2025.620(c)(2)]:

- Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant;
- Disqualified from testifying;
- Dead or unable to attend or testify because of existing physical or mental illness or infirmity;
- Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process; or
- Absent from the trial or other hearing and the proponent has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

6.54[3][c] Exceptional Circumstances Exist. Any party may use the deposition of any person or organization, including that of any party to the action, for any purpose if the court finds that exceptional circumstances make it desirable to allow the use of the deposition in the interests of justice. When considering the use of a deposition based on exceptional circumstances, the court will provide due regard to the importance of presenting the testimony of witnesses orally in open court [CCP § 2025.620(c)(3)].

Legal Topics:

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6.55 Motion to Suppress Deposition.

6.55[1] Grounds. If a deponent fails or refuses to approve a deposition transcript or to identify an audio or video deposition as his or her own, the deposition is given the same effect as though approved [CCP §§ 2025.520, 2025.530].

However, if a "reasonable" motion to suppress is filed, the court may determine that the reasons given in the motion for the refusal to sign require rejection of the deposition in whole or in part [CCP §§ 2025.520, 2025.530].

6.55[2] Declaration Showing Attempt at Informal Resolution Is Required. A motion to suppress a deposition must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [CCP §§ 2025.520, 2025.530].

6.55[3] Motion Papers. The moving papers for a motion to suppress a deposition must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [CCP §§ 2002, 2003, 2015.5, 2025.520, 2025.530]; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].



Cross References:

Form, see 6.80.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

6.55[4] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under CCP § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition, unless it finds that [CCP §§ 2025.520(h), 2025.530(f)]:

- The one subject to the sanction acted with substantial justification; or

- Other circumstances make the imposition of the sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.56 Use of Video Recording of Physician or Expert Witness.

Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness, even though the deponent is available to testify, if [CCP § 2025.620(d)]:

- The deposition notice reserved the right to use the deposition at trial [see CCP § 2025.220(a)(6)];
and
- That party has given notice in writing of his or her intent to use the video recording [see CCP § 2025.340(m)].

➡ **Cross References:**

Discussion of reservation of right to use deposition at trial, see 6.10[6].

Discussion of written notice of intent to use video recording, see 6.57.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsDepositionsCivil ProcedureDiscoveryMethodsOral Depositions



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6.57 Notice of Intent to Offer an Audio or Video Recording in Evidence.

6.57[1] Party Intending to Offer Must Give Notice to Court and All Parties in Writing. A party intending to offer an audio or video recording of a deposition in evidence must notify the court and all parties in writing of that intent and of the parts of the deposition to be offered [*CCP § 2025.340(m)*].



Cross Reference:

Form of notice of intent, see 6.79.

6.57[2] Notice Must Be Made Within Sufficient Time for Objections and Editing. A notice of intent to offer an audio or video recording of a deposition in evidence must be made within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing [*CCP § 2025.340(m)*].

The notice must also be made within sufficient time for any editing of the recording [*CCP § 2025.340(m)*].

6.57[3] Objections Must Be Made in Writing. Objections to all or part of the deposition must be made in writing [*CCP § 2025.340(m)*]. The court may permit further designations of testimony and objections as justice may require [*CCP § 2025.340(m)*].

6.57[4] Court May Order Suppression of Portions or Editing of Recording. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that [*CCP § 2025.340(m)*]:

- The party offering the recording of the deposition at the trial or hearing suppress those portions; or
- An edited version of the deposition recording be prepared for use at the trial or hearing.

6.57[5] Original Recording Must Be Preserved. The original audio or video record of the deposition must be preserved unaltered [*CCP § 2025.340(m)*].

6.57[6] Recording Must Be Accompanied by Stenographic Transcript. If no stenographic record of the

deposition testimony has previously been made, the party offering a videotape or an audiotape recording of that testimony under *CCP* § 2025.620 must accompany that offer with a stenographic transcript prepared from that recording [*CCP* § 2025.340(m)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.58 Offering Parts of a Deposition Relevant to Parts Previously Introduced.

Subject to the requirements regarding the use of depositions in *CCP* § 2025.620, a party may offer in evidence all or any part of a deposition [*CCP* § 2025.620(e)].

If a party introduces only part of a deposition, any other party may introduce any other parts that are relevant to the parts introduced [*CCP* § 2025.620(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.59 Effect of Substitution of Parties.

Substitution of parties does not affect the right to use depositions previously taken [CCP § 2025.620(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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6.60 Use of Depositions in Subsequent Action.

When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action [CCP § 2025.620(g)].

A deposition previously taken may also be used as permitted by the Evidence Code [CCP § 2025.620(g)]. The Evidence Code allows use of former testimony when the declarant is unavailable as a witness and the party against whom the former testimony is offered was [Evid Code § 1291(a)(2)]:

- A party to the action or proceeding in which the testimony was given;
- Had the right and opportunity to cross examine the declarant; and
- Has an interest and motive similar to that which the party has at the present hearing.

If the party against who the former testimony is offered was not a party to the prior action or proceeding, the former testimony may be introduced in evidence in a civil action if the declarant is unavailable as a witness and the party to the prior action or proceeding had the right and opportunity to cross examine the declarant with an interest and motive similar to that which the party has at the present hearing [Evid Code § 1292(a)].



Warning:

A discovery deposition from prior litigation may well be inadmissible because the interest and motive requirements are not met. In many instances a party will not cross examine a witness or examine one's own witness in a discovery deposition. To do so would have only limited benefit in clarifying an issue that could be clarified later without prejudice and could run the risk of premature disclosure of a defense. The interest in cross examining at trial is much stronger. Therefore, the party's interest and motive in a discovery deposition may not conform to the interest and motive at trial [*Wahlgren v. Coleco Indus.* (1984) 151 CA3d 543, 546-547, 198 CR 715 (prior deposition inadmissible under both Evid Code §§ 1291 and 1292)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsDepositionsCivil ProcedureDiscoveryMethodsOral Depositions



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6.60A CHECKLIST: Taking Deposition in California in Connection With Out-of-State Action.

- ☐ Have subpoena issued in jurisdiction in which out-of-state action is pending.
- ☐ Have subpoena issued in California either by California court or California attorney.
- ☐ For subpoena issued by California superior court:

Discussion:

See 6.60C[1]

- ☐ Submit original or copy of subpoena issued under authority of a court of another state or foreign nation to clerk of superior court in county in which discovery is sought to be conducted in California

Authority:

CCP § 2029.300(a)

- ☐ Submit application on Judicial Council Form SUBP-030 requesting that superior court issue a subpoena with same terms as foreign subpoena.

Authority:

CCP § 2029.300(b)(1).

Form:

See 6.82

- ☐ Pay fee specified in *Gov Code* § 70626.

Authority:

CCP § 2029.300(b)(2)].

- ☐ For subpoena issued by California attorney:

Discussion:

See 6.60C[2]

- ☐ Verify that attorney is active member of California State Bar.

Authority:

CCP § 2029.350(a).

- ☐ Provide California attorney with original or a true and correct copy of foreign subpoena.

Authority:

CCP § 2029.350(a)].

- ☐ Confirm that subpoena does all of following:

Authority:

CCP § 2029.350(b)

- ☐ Incorporates the terms used in foreign subpoena.
- ☐ Contains or is accompanied by names, addresses, and telephone numbers of all counsel of record in proceeding to which subpoena relates, and of any party not represented by counsel.
- ☐ Bears caption and case number of the out-of-state case to which it relates.
- ☐ States name of superior court of county in which discovery is to be conducted.
- ☐ Is on appropriate California Judicial Council form.

Form:

See 6.83 (subpoena for business records), 6.84 (subpoena for testimony), 6.85 (subpoena for testimony and documents), 6.86 (subpoena for inspection of premises).

- ☐ Serve subpoena personally in compliance with California law.

Authority:

CCP § 2029.400; see also *CCP § 1985*].

Discussion:

See 6.60C[3]

- ☐ Conduct deposition in accordance with general California discovery rules and procedures.

Authority:

CCP § 2029.500; see *CCP §§ 1985-2015.6, 016.010-2036.050*

Discussion:

See 6.60D

- ☐ If discovery-related dispute arises in California with respect to out-of-state action, consider filing petition with superior court to resolve dispute.

Authority:

CCP § 2029.600(a),(b)

Discussion:

6.60E[1]

- ☐ File petition in superior court in county in which discovery is to be conducted.

Authority:

CCP § 2029.600(a)

Discussion:

6.60E[1]

- ☐ Insure that petition conforms to following requirements:

Authority:

CCP § 2029.610(d).

Discussion:

See 6.60E[2]

- ☐ Must bear the caption and case number of out-of-state case to which it relates.

- ☐ First page must state name of court in which document is filed.

- ☐ First page must state the case number assigned by court.

Authority:

See *CCP* § 2029.610(b).

- ☐ Comply with all applicable California rules and statutes applicable to filing, including rules relating to notice and filing and service of papers.

Authority:

CCP § 2029.600, 2029.630; see *CCP* § 1005

Discussion:

See 6.60E[1]

- ☐ Pay applicable filing fee.

Authority:

See *CCP* § 2029.610(a)].

- ☐ Party to out-of-state proceeding may file response to petition.

Authority:

See *CCP* § 2029.610(c) (fees for responding party)

Discussion:

See 6.60E[3]

- ☐ If subsequent disputes arise in connection with out-of-state proceeding, deponent or other disputant may file another petition for appropriate relief in same superior court as previous petition.

Authority:

CCP § 2029.620(a)

Discussion:

See 6.60E[4]

- ☐ Appeal superior court order granting, denying, or otherwise resolving petition by petitioning appropriate court of appeal for an extraordinary writ.

Authority:

CCP § 2029.650

Discussion:

See 6.60E[5]



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6.60B Party to Out-of-State Action May Depose Persons In California.

6.60B[1] Interstate and International Depositions and Discovery Act Governs. The taking of depositions in California in connection with out-of-state proceedings is governed by the Interstate and International Depositions and Discovery Act [CCP §§ 2029.010-2029.390]. The Act applies to depositions for the production of tangible items and inspection of premises, in addition to those requiring testimony [CCP § 2029.200(e)].

6.60B[2] Deponent May Be Organization or Natural Person. Under the Interstate and International Depositions and Discovery Act [CCP §§ 2029.010-2029.390], a party to an action pending outside of California may take the deposition in California of either an organization or a natural person [CCP § 2029.200(c)].



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6.60C Obtaining Subpoena in California.

6.60C[1] Court May Issue Subpoena. A party to an action pending outside of California who wishes to take a deposition in California may obtain a court-issued subpoena by taking the following steps:

- Request issuance of a subpoena by submitting the original or a copy of a subpoena issued under authority of a court of another state or a foreign nation to the clerk of the superior court in the county in which discovery is sought to be conducted in California [*CCP* § 2029.300(a)]. This request does not constitute making an appearance in a California court [*CCP* § 2029.300(a)].
- Submit an application on Judicial Council Form SUBP-030 requesting that the superior court issue a subpoena with the same terms as the foreign subpoena [*CCP* § 2029.300(b)(1)].
- Pay the fee specified in *Gov Code* § 70626 [*CCP* § 2029.300(b)(2)].

When a party satisfies these requirements, the clerk is required to promptly issue a subpoena for service upon the person to which the foreign subpoena is directed [*CCP* § 2029.300(c)].

➡ **Cross Reference:**

Form, see 6.82 (application for subpoena)

6.60C[2] California Attorney May Issue Subpoena. If a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in California, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena [*CCP* § 2029.350(a)].

A subpoena issued by a California attorney must satisfy the following conditions [*CCP* § 2029.350(b)]:

- It must incorporate the terms used in the foreign subpoena.

- It must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
- It must bear the caption and case number of the out-of-state case to which it relates.
- It must state the name of the superior court of the county in which the discovery is to be conducted.
- It must be on a Judicial Council form.

**Cross Reference:**

Forms, see 6.83 (subpoena for business records), 6.84 (subpoena for testimony), 6.85 (subpoena for testimony and documents), 6.86 (subpoena for inspection of premises).

6.60C[3] Personal Service of Subpoena Is Required. The subpoena must be personally served in compliance with California law, including, without limitation, *CCP* § 1985 [*CCP* § 2029.400].



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6.60D General Discovery Rules Apply.

Discovery under the Interstate and International Depositions and Discovery Act [*CCP* §§ 2029.010-2029.390] is subject to the general California discovery rules found in *CCP* §§ 1985-2015.6 and 2016.010-2036.050 [*CCP* § 2029.500].



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6.60E Petition for Relief May Be Filed in California In Event of Dispute.

6.60E[1] Petition Must Comply With Applicable California Rules or Statutes. If a dispute arises relating to discovery under the Interstate and International Depositions and Discovery Act, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted and must comply with the applicable rules or statutes [*CCP* §§ 2029.600(a)]. This request for relief is called a petition [*CCP* § 2029.600(b)].

A petition for relief must be accompanied by a civil case cover sheet [*CCP* § 2029.600(c)] and the appropriate fee [*see CCP* § 2029.610(a)]. The petition is subject to the requirements of *CCP* § 1005 relating to notice and filing and service of papers [*CCP* § 2029.630].

If a party to a proceeding pending in a foreign jurisdiction seeks discovery from a witness in California by properly issued notice or by agreement, the deponent or any other party may seek relief under *CCP* § 2029.600 or *CCP* § 2029.620, regardless of whether the deponent was subpoenaed under the Interstate and International Depositions and Discovery Act [*CCP* § 2029.640].

6.60E[2] Petition and Response Must Contain Specified Information. Any petition, response, or related document must satisfy the following conditions [*CCP* § 2029.610(d)]:

- It must bear the caption and case number of the out-of-state case to which it relates.
- The first page must state the name of the court in which the document is filed.
- The first page must state the case number assigned by the court under *CCP* § 2029.610(b).

6.60E[3] Response to Petition for Relief May Be Filed. When responding to a petition under *CCP* § 2029.600, a party to the out-of-state proceeding must pay a first appearance fee as specified in *Gov Code* § 70612 [*CCP* § 2029.610(a)]. A person who is not a party to the out-of-state proceeding may file a response without paying a fee [*CCP* § 2029.610(c)].

6.60E[4] Subsequent Petition May Be Filed in Same Court if Another Dispute Arises. If a petition has been filed under *CCP* § 2029.600 and another dispute later arises relating to discovery being conducted in the same county for purposes of the same out-of-state proceeding, the deponent or other disputant may file a petition for appropriate relief in the same superior court as the previous petition [*CCP* § 2029.620(a)]. The first page of the petition must clearly indicate that it is not the first petition filed in that court that relates to the out-of-state case [*CCP* § 2029.620(b); see 2029.620(c), (d) (fees)]. The subsequent petition, response, or related document must contain the same information required for an initial petition [see 6.05[8][h]] and must be accompanied by a civil case cover sheet [*CCP* § 2029.620(e), (f)].

6.60E[5] Appellate Review Is Available by Extraordinary Writ. If a superior court issues an order granting, denying, or otherwise resolving a petition under *CCP* § 2029.600 or *CCP* § 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ. No order or other action of a court under the Interstate and International Depositions and Discovery Act is appealable in California [*CCP* § 2029.650(a)]. Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the discovery that is the subject of that order, or both [*CCP* § 2029.650(b)].



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XI. FORMS

A. Giving Notice of Oral Depositions in California

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6.61 Notice of Motion and Motion for Leave to Increase Travel Limits for Deposition of Party or Party-Affiliated Deponent.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff, vs.
_____, [name],
Defendant.

)
)
) No: _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER INCREASING TRAVEL LIMITS FOR DE-
) POSITION AND REQUIRING
) _____ [name] TO BE DEPOSED
) AT _____ [place] AND FOR MON-
) ETARY SANCTION, SUPPORTING DECLARA-
) TION OF _____ [name], AND
) MEMORANDUM IN SUPPORT OF THE MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Plaintiff Smith & Co., Inc.] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order increasing the travel limits for deposition and requiring _____ [prospective deponent and party or party affiliation, e.g., Charles Green, a managing director of Plaintiff Smith & Co.,] to attend and testify at an oral deposition at _____ [place, e.g., the law offices of Tom Doe, Esq.], located at _____ [address], California, a place _____ [describe distance farther than permitted in CCP §§ 2025.250 and 2025.260, e.g., more than 150 miles from his residence]. _____ [Moving party, e.g., Defendant Mary Jones] will, and hereby does, further move for an order imposing a monetary sanction against _____ [prospective deponent or opposing party and/or attorney, e.g., Plaintiff Smith & Co. and its attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground that the interests of justice will be served by requiring this deponent's attendance at this more distant place.

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, e.g., Defendant Mary Jones] is seeking an order of this court increasing the travel limits for deposition and requiring _____ [name of prospective deponent, e.g., Charles Green] to attend and testify at an oral deposition at _____ [place, e.g., the law offices of Tom Doe, Esq.], located at _____ [address], California, a place _____ [describe distance farther than permitted in CCP § 2025.250, e.g., more than 150 miles from his residence].

[EITHER]

3. _____ [Name of prospective deponent] is a/the _____ [plaintiff or defendant] in this action.

[OR]

3. _____ [Name of prospective deponent] is _____ [specify party affiliation, e.g., a managing director of Plaintiff Smith & Co.].

[CONTINUE]

4. The interests of justice will be served by requiring the deponent to attend and testify at the place requested because _____ [specify all factors to be considered, e.g., deponent regularly travels on business to the city where Defendant Mary Jones requests the deposition be held, and Defendant Mary Jones has offered to schedule the deposition to coincide with deponent's travel schedule; deponent's residence is in a remote rural area, and taking the deposition within the usual travel limit would require greater expense for all parties] .

5. On _____ [date], _____ [specify actions taken to confer with responding party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

6. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.260

Prerequisite to Motion:

See 6.10[1][d]

Factors to Be Considered in Granting Motion:

See 6.10[1][e]

Related Form of Memorandum:

See *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.10 (Matthew Bender)*



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6.62 Notice of Taking Oral Deposition.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No: _____
_____ [name],	)	NOTICE OF TAKING DEPOSITION OF
Defendant.	)	_____ [name] ON ORAL EXAM-
	)	INATION [AND FOR PRODUCTION OF DOCU-
	)	MENTS AND/OR THINGS]

To _____ [list all parties or attorneys for parties]:

PLEASE TAKE NOTICE that _____ [party, e.g., Defendant Mary Jones] will take the deposition, on oral examination, of _____ [deponent, e.g., Plaintiff John Smith]. The deposition will be taken on _____ [date], commencing at _____ [time], at _____ [address where deposition will be taken].

[ADD, if deponent is not a natural person]

NOTICE IS FURTHER GIVEN that the matters on which examination is requested are _____ [specify]

matters with reasonable particularity]. _____ [*Name of deponent organization*] must designate and produce at the deposition one or more of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to the above-described matters to the extent of any information known or reasonably available to the deponent. It is hereby requested that _____ [*name of deponent organization*] provide prompt notification in writing to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.

[*ADD, if deponent is to produce documents or other tangible things*]

NOTICE IS FURTHER GIVEN that _____ [*name of deponent*] shall bring and produce at the deposition, at the time and place specified in this notice, _____ [*specify with reasonable particularity any materials or category of materials to be produced*].

[*ADD, if noticing party intends to record deposition by audio or video recording*]

NOTICE IS FURTHER GIVEN that _____ [*noticing party, e.g., Defendant Mary Jones*] _____ [*intends or reserves the right*] to record the testimony at the deposition by _____ [*specify recording method, e.g., videotape*], in addition to recording this testimony by stenographic method.

[*ADD, if noticing party intends to record testimony by stenographic method, through instant visual display of testimony*]

NOTICE IS FURTHER GIVEN that _____ [*noticing party, e.g., Defendant Mary Jones*] intends to record the testimony at the deposition by stenographic method, through instant visual display of testimony.

[*ADD, if deponent is a treating or consulting physician or expert witness, and noticing party intends to reserve the right to use the video recording of deposition at trial*]

NOTICE IS FURTHER GIVEN that _____ [*noticing party, e.g., Defendant Mary Jones*] reserves the right to use the video recording of the deposition at trial under *CCP § 2025.620(d)*.

[*CONTINUE*]

The deposition will be taken before a deposition officer who is authorized to administer an oath. If the deposition is not completed on the date specified in this notice, the taking of the deposition will be continued from day to day thereafter, except for Sundays and holidays, at the same place, until completed.

Date: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

NOTES.

Authority:

CCP §§ 2025.220-2025.270



Timing:

See 6.09

Number of Depositions Allowed:

See 6.07

Drafting Notice of Deposition:

See 6.10

Service of Notice of Deposition:

See 6.11



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6.63 Notice of Motion and Motion for Order Authorizing Deposition of Prisoner.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER AUTHORIZING DEPOSITION OF PRISON-
) ER, SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
thereafter as the matter may be heard, in [_____ (Department or Division) _____]

1-6 MB Practice Guide: CA Civil Discovery 6.63

of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that _____ [name of prisoner], a prisoner in _____ [specify name and location of jail or prison], be produced for the taking of his/her deposition on _____ [oral examination or written questions], to be conducted at this _____ [jail or prison] at _____ [place] on _____ [date], commencing at _____ [time] or at such other time as the court may designate. The motion will be made on the grounds that _____ [name of prisoner] has knowledge of matters relevant and material to this action, and that his/her testimony as to such matters is necessary to _____ [moving party, e.g., Plaintiff John Smith] in preparing for and proceeding to the trial of this action.

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [moving party, e.g., Plaintiff John Smith] is seeking an order of this court that _____ [name of prisoner], a prisoner in _____ [specify name and location of jail or prison], be produced for the taking of his/her deposition on _____ [oral examination or written questions].

3. The nature of this action is _____ [specify, e.g., a personal injury case arising out of an automobile accident in which Plaintiff John Smith was injured].

4. _____ [Name of prisoner] is expected to testify about _____ [specify testimony expected, e.g., the circumstances involved in the accident, to which he was a witness].

5. The testimony of _____ [name of prisoner] is material because _____ [specify, e.g., he was the only witness to the accident, other than the parties, and the issue of liability is in dispute].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP §§ 1995-1997; Pen Code § 2623

Taking Deposition of Prisoner in Civil Action:

See 6.05[7]



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XI. FORMS

B. Using a Deposition Subpoena to Obtain Discovery from a Nonparty

1-6 MB Practice Guide: CA Civil Discovery 6.64

6.64 Judicial Council Form SUBP-015 Deposition Subpoena for Personal Appearance.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 2020.020(a); California Judicial Council Form SUBP-015 has been adopted for mandatory use
[*Cal Rules Ct, Rule 1.31*]

Deposition Subpoena to Command Attendance and Testimony:

See 6.16

➡ Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms



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XI. FORMS

B. Using a Deposition Subpoena to Obtain Discovery from a Nonparty

1-6 MB Practice Guide: CA Civil Discovery 6.65

6.65 Judicial Council Form SUBP-020 Deposition Subpoena for Personal Appearance and Production of Documents and Things.

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 2020.020(c); California Judicial Council Form SUBP-020 has been adopted for mandatory use
[*Cal Rules Ct, Rule 1.31*]

Deposition Subpoena to Command Attendance, Testimony, and Production of Materials:

See 6.18

➡ Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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XI. FORMS

B. Using a Deposition Subpoena to Obtain Discovery from a Nonparty

1-6 MB Practice Guide: CA Civil Discovery 6.66

6.66 Judicial Council Form SUBP-010 Deposition Subpoena for Production of Business Records.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 2020.020(b); California Judicial Council Form SUBP-010 has been adopted for mandatory use
[*Cal Rules Ct, Rule 1.31*]

Deposition Subpoena Commanding Production of Business Records for Copying:

See 6.17

► Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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XI. FORMS

B. Using a Deposition Subpoena to Obtain Discovery from a Nonparty

1-6 MB Practice Guide: CA Civil Discovery 6.67

6.67 Judicial Council Form SUBP-025 Notice to Consumer or Employee and Objection.

[Click here to view image.](#)

NOTES.

Authority:

CCP §§ 1985.3, 1985.6, 2020.410(d), 2020.510, 2025.220, 2025.240; California Judicial Council Form SUBP-025 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Giving Notice to Consumer or Employee When Subpoenaing Records:

See 6.11[3], 6.17[8], 6.18[9]

 Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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XI. FORMS

B. Using a Deposition Subpoena to Obtain Discovery from a Nonparty

1-6 MB Practice Guide: CA Civil Discovery 6.68

6.68 Written Authorization of Consumer or Employee for Release of Records.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No: _____
_____ [name],	)	AUTHORIZATION FOR RELEASE OF
Defendant.	)	_____ [specify records requested,
	)	e.g., EMPLOYMENT RECORDS]
	)	

To _____ [Custodian of Records or name of deponent]:

The original or any copy of _____ [specify records requested, e.g., employment records pertaining to
_____ [name of consumer or employee], which you possess and maintain, may be released to
_____ [subpoenaing party, e.g., Defendant Jones & Co.] in the above-entitled action.

_____ [signature]

[ADD, if attorney signing on behalf of client]

Attorney for _____

[name of consumer or employee]

NOTES.

Authority:

CCP §§ 1985.3(c), 1985.6(c), 2020.410(d), 2020.510

Serving Written Authorization for Release of Records With Deposition Subpoena:

See 6.17[8], 6.18[9]



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XI. FORMS

C. Responding to a Notice of Deposition and/or Deposition Subpoena

1-6 MB Practice Guide: CA Civil Discovery 6.69

6.69 Objections to Errors or Irregularities in Notice of Deposition.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No: _____
_____ [name],	)	OBJECTION TO NOTICE OF TAKING DEPOS-
Defendant.	)	ITION OF _____ [name]
	)	
	)	

To _____ [party who served notice of deposition and list any other party/attorney on whom deposition notice was served]:

NOTICE IS HEREBY GIVEN that _____ [objecting party, e.g., Plaintiff John Smith] objects to the notice of the taking of the deposition of _____ [name], which was served on _____ [date] by _____ [party noticing deposition], on the following grounds:

_____ [State error or irregularity of deposition notice not complying with requirements of CCP §§ 2025.210-2025.270 , e.g., The notice specifies a place for taking the deposition that is not within 75 miles of the deponent's residence or within the county where the action is pending and within 150 miles of the deponent's residence].

[Set forth further errors or irregularities, e.g., The notice was not served sufficiently in advance of the date noticed for the taking of the deposition, as required by *CCP* § 2025.270 or The deponent is not a party to the action or an officer, director, managing agent, or employee of a party who can be required by *CCP* § 2025.280 to attend and to testify by service of a deposition notice on a party].

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [objecting party]

NOTES.

Authority:

CCP § 2025.410



Timing:

See 6.24[2]

Objecting to Errors or Irregularities in Notice of Deposition:

See 6.24

Effect of Objections to Errors or Irregularities in Notice of Deposition:

See 6.25



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XI. FORMS

C. Responding to a Notice of Deposition and/or Deposition Subpoena

1-6 MB Practice Guide: CA Civil Discovery 6.70

6.70 Notice of Motion and Motion to Stay Deposition and Quash Deposition Notice.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION TO STAY
) DEPOSITION OF _____ [name]
) AND QUASH NOTICE OF DEPOSITION AND
) FOR MONETARY SANCTION, SUPPORTING DE-
) CLARATION OF _____ [name],
) AND MEMORANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that the deposition of _____ [name] be stayed and that the notice of the taking of that deposition be quashed, and will further move for an order imposing a monetary sanction against _____ [opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$ _____. The motion for stay and to quash will be made on the ground that _____ [specify, e.g., the deposition notice, attached hereto as Exhibit A, specifies a place for taking the deposition that is more distant than 150 miles from the deponent's residence, as described in the written objection that was timely served on the parties and is attached hereto as Exhibit B. This error, which Defendant Mary Jones has failed to correct, warrants the quashing of the notice].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order of this court that the taking of the deposition of _____ [name] be stayed and that the notice of the taking of the deposition of _____ [name] be quashed.

3. On _____ [date], _____ [party noticing deposition, e.g., Defendant Mary Jones] served a notice to take the deposition of _____ [name] on _____ [date] at _____ [place]. A true and correct copy of the notice is attached as Exhibit _____ to the motion of _____ [moving party, e.g., Plaintiff John Smith] for an order staying the taking of the deposition and quashing the deposition notice, and made a part hereof.

4. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] timely served a written objection to the deposition notice on _____ [party noticing deposition, e.g., Defendant Mary Jones] [and on all other parties or their attorneys on whom the deposition notice was served]. A true and correct copy of this objection is attached as Exhibit _____ to the motion of _____ [moving party, e.g., Plaintiff John Smith] for an order staying the taking of the deposition and quashing the deposition notice, and made a part hereof.

5. The motion of _____ [moving party, e.g., Plaintiff John Smith] for an order staying the taking of the deposition and quashing the deposition notice should be granted because _____ [specify, e.g., the notice fails to comply with the travel limitation requirements of CCP § 2025.250(a) because the place noticed for the taking of the deposition is more than 150 miles from the deponent's residence].

6. On _____ [date], _____ [specify actions taken to confer with noticing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

7. _____ [Moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the amount of \$_____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.410

Prerequisite to Motion:

See 6.26[2]

Motion to Stay Deposition and Quash Deposition Notice:

See 6.26

Related Form of Memorandum:

See *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.60 (Matthew Bender)*



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XI. FORMS

C. Responding to a Notice of Deposition and/or Deposition Subpoena

1-6 MB Practice Guide: CA Civil Discovery 6.71

6.71 Notice of Motion and Motion to Quash or Modify Deposition Subpoena.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION TO
) _____ [QUASH or MODIFY] DE-
) POSITION SUBPOENA AND FOR AWARD OF
) ATTORNEYS' FEES AND EXPENSES, SUPPORT-
) ING DECLARATION OF _____
) [name], AND MEMORANDUM IN SUPPORT OF
) MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [witness to whom deposition subpoena is directed];

[ADD, if deposition subpoena commands production of business records to be made to deposition officer named in subpoena]

_____ [Deposition officer named in deposition subpoena];

[CONTINUE]

_____ [Party who issued deposition subpoena, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order that the deposition subpoena directed to _____ [witness to whom deposition subpoena is directed], issued by _____ [party who issued deposition subpoena, e.g., Defendant Mary Jones], served on _____ [date], be _____ [quashed or modified], and will further move for an order awarding reasonable expenses, including attorneys' fees, in favor of _____ [moving party, e.g., Plaintiff John Smith] against _____ [opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$ _____. The motion to _____ [quash or modify] will be made on the ground that _____ [specify, e.g., the deposition subpoena, attached hereto as Exhibit A, directs the witness to produce documents at his/her deposition that are privileged, confidential, and unrelated to this action].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order of this court _____ [quashing or modifying] the deposition subpoena directed to _____ [witness to whom deposition subpoena is directed], issued by _____ [party who issued deposition subpoena, e.g.,

Defendant Mary Jones], served on _____[*date*], and awarding reasonable expenses, including attorneys' fees, in favor of _____[*moving party, e.g., Plaintiff John Smith*] against _____[*opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee*].

3. On _____[*date*], _____[*party who issued deposition subpoena, e.g., Defendant Mary Jones*] served a deposition subpoena directed to _____[*witness to whom deposition subpoena is directed*], commanding _____[*specify*]. A true and correct copy of the notice is attached as Exhibit _____ to the motion of _____[*moving party, e.g., Plaintiff John Smith*] for an order _____[*quashing or modifying*] the deposition subpoena.

4. The motion of _____[*moving party, e.g., Plaintiff John Smith*] for an order _____[*quashing or modifying*] the deposition subpoena should be granted because _____[*specify facts*].

5. The request of _____[*moving party, e.g., Plaintiff John Smith*] for an award of reasonable expenses should be granted because _____[*specify facts indicating that the party who issued the subpoena is acting in bad faith or without substantial justification, or that the subpoena is oppressive*].

6. _____[*Moving party, e.g., Plaintiff John Smith*] bases his/her request for an award of reasonable expenses, including attorneys' fees, in the amount of \$_____ on _____[*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount requested*].

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

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP §§ 1987.1, 1987.2

Motion to Quash or Modify Deposition Subpoena:

See 6.27

Award of Fees and Expenses:

See 6.27[3]

Related Form of Memorandum:

See *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.60 (Matthew Bender)*



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XI. FORMS

C. Responding to a Notice of Deposition and/or Deposition Subpoena

1-6 MB Practice Guide: CA Civil Discovery 6.72

6.72 Notice of Motion and Motion for Protective Order.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER RESTRICTING DISCOVERY
) AND IMPOSING MONETARY SANCTION, SUP-
) PORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) (Deposition)
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party noticing deposition, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order that the deposition of _____ [name], which was to be taken on _____ [date] at _____ [time] at _____ [place], _____ [specify order sought, e.g., be limited by prohibiting any information concerning confidential business research being conducted on behalf of Defendant Mary Jones from being disclosed]. _____ [Moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] will also, and hereby does, move for an order imposing a monetary sanction against _____ [opposing party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground that good cause exists for the order _____ [specify grounds, e.g., in that the disclosure of information concerning confidential business research being conducted on behalf of Defendant, which is unrelated to this action, would jeopardize Defendant's business relationship with her clients and subject her to potential liability for breach of confidentiality agreements. Justice requires this order to protect Defendant Mary Jones from unwarranted annoyance, embarrassment, and oppression, and undue burden and expense] .

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] is seeking a protective order from this court concerning the deposition of _____ [name of deponent], notice of which was served on _____ [date]. A true and correct copy of the deposition notice is attached hereto as Exhibit _____ and made a part hereof.

3. Good cause exists for the order sought by _____ [moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] in that _____ [specify facts showing good cause for the particular order sought, e.g., deponent conducts confidential business research on behalf of Defendant Mary Jones, which is unrelated to this action and which is subject to confidentiality agreements entered into between Defendant and her clients].

[Set forth, in consecutively numbered paragraphs, additional facts showing good cause for order(s) sought.]

4. On _____ [date], _____ [specify actions taken to confer with noticing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

5. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.420

Prerequisite to Motion:

See 6.28[4][b]

Relief Available:

See 6.28[3]

Drafting Motion for Protective Order:

See 6.28[4][c]

Related Form of Order:

See 6.73

Related Form of Memorandum:

See *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.80 (Matthew Bender)*



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XI. FORMS

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1-6 MB Practice Guide: CA Civil Discovery 6.73

6.73 Order on Motion for Protective Order.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No: _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] for a protective order, directing that the deposition of _____ [name], which was to be taken on _____ [date] at _____ [time] at _____ [place], _____ [specify order sought, e.g., be limited by prohibiting any information concerning confidential business research being conducted on behalf of Defendant Mary Jones from being disclosed], and for an order imposing a monetary sanction against _____ [opposing party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe], came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]. Defendant appeared by counsel _____ [name]. [Specify other appearances, if any.]

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the deposition of _____[*name*], which was to be taken on _____[*date*] at _____[*time*] at _____[*place*], _____[*specify order, e.g., be limited so that any information concerning confidential business research being conducted on behalf of Defendant Mary Jones shall not be inquired into or disclosed*].

[AND EITHER, if imposing sanctions]

IT IS FURTHER ORDERED that _____[*unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe*] pay forthwith to _____[*successful party, e.g., Defendant Mary Jones*] the sum of \$_____ as reasonable expenses and attorneys' fees.

[OR, if not ordering sanctions]

On further proof made to the satisfaction of the court that _____[*unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe*] _____[*acted with substantial justification or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____[*unsuccessful party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe*].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2025.420

Related Form of Motion:

See 6.72



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Chapter 6 Oral Depositions in California

XI. FORMS

D. Objecting to the Conduct of an Oral Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.74

6.74 Notice of Motion and Motion for Monetary Sanction for Noticing Party's Failure to Serve Required Deposition Subpoena on Nonappearing Deponent.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
)
) No: _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER IMPOSING MONETARY SANCTION FOR
) FAILURE TO SERVE DEPONENT WITH DEPOS-
) ITION SUBPOENA RESULTING IN DEPONENT'S
) FAILURE TO APPEAR FOR SCHEDULED DE-
) POSITION, SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order to impose a monetary sanction against _____ [party who served deposition notice and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in favor of _____ [moving party, e.g., Plaintiff John Smith] in the amount of \$ _____. This motion will be made on the grounds that _____ [moving party and/or attorney attending, e.g., Plaintiff John Smith and his attorney Tom Doe] attended the deposition at the time and place stated in the notice served by _____ [party who served deposition notice, e.g., Defendant Mary Jones] in the expectation that the testimony of the deponent, _____ [name], would be taken, but the deposition was not taken because _____ [party who served deposition notice, e.g., Defendant Mary Jones] failed to serve the required deposition subpoena on the deponent, _____ [name], who therefore failed to attend. As a result, _____ [moving party, e.g., Plaintiff John Smith] incurred reasonable expenses in the amount specified.

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order of this court to impose a monetary sanction against _____ [party who served deposition notice and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in favor of _____ [moving party, e.g., Plaintiff John Smith] in the amount of the reasonable expenses, including reasonable attorneys' fees, incurred by him/her in attending the scheduled deposition of _____ [name] at the time and place stated in the notice of deposition.

3. On _____ [date], _____ [party who served deposition notice, e.g., Defendant Mary Jones] served _____ [moving party, e.g., Plaintiff John Smith] with a notice of the taking of the deposition of _____ [name] on _____ [date], at _____ [time], at _____ [place]. A true copy of this notice is attached hereto as Exhibit A and made a part hereof.

4. On _____ [date], at _____ [time], _____ [moving party and/or attorney attending deposition, e.g., Plaintiff John Smith and I, as attorney for Plaintiff John Smith,] appeared at _____ [place] for the taking of the deposition of _____ [name], as specified in the deposition notice, in the expectation that the testimony of the deponent, _____ [name], would be taken.

5. The deposition did not proceed as specified in the deposition notice, because _____ [name of deponent], who is neither a party to the action nor affiliated with a party to the action, failed to appear at the specified time and place, never having been properly served by _____ [party who served deposition notice, e.g., Defendant Mary Jones] with a deposition subpoena as shown by _____ [state facts showing that deponent was never properly served, e.g., the fact that no copy of the deposition subpoena was served with the deposition notice].

6. As a result of this failure by _____ [party who served deposition notice, e.g., Defendant Mary Jones] to serve _____ [name of deponent] with a deposition subpoena, _____ [moving party, e.g., Plaintiff John Smith] has incurred the following expenses: _____ [itemize reasonable expenses incurred, including attorneys' fees, and explain basis of computing each], for a total of \$_____.

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.440

Motion for Monetary Sanction--Failure to Serve Deposition Subpoena:

See 6.38

Related Form of Memorandum:

See *California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.11 (Matthew Bender)*



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Chapter 6 Oral Depositions in California

XI. FORMS

D. Objecting to the Conduct of an Oral Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.75

6.75 Notice of Motion and Motion for Protective Order for Deposition in Progress.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER _____
) [TERMINATING or LIMITING SCOPE AND
) MANNER OF] DEPOSITION OF
) _____ [name] AND IMPOSING
) MONETARY SANCTION, SUPPORTING DE-
) CLARATION OF _____ [name],
) AND MEMORANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party noticing deposition, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, deponent, or affected natural person or organization, e.g., Plaintiff Smith & Co.] will, and hereby does, move for a protective order that the deposition of _____ [name], which commenced on _____ [date] at _____ [time] at _____ [place], pursuant to a notice served on _____ [date], be _____ [specify order sought, e.g., terminated]. _____ [Moving party or deponent, e.g., Plaintiff Smith & Co.] will also, and hereby does, move for an order imposing a monetary sanction against _____ [opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$ _____. The motion will be made on the ground that the deposition is being conducted _____ [specify grounds, e.g., in bad faith and in a manner that is unreasonably annoying and oppressive to the deponent and Plaintiff Smith & Co]. Good cause exists for _____ [specify relief sought, e.g., terminating the deposition] in that _____ [specify facts].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff Smith & Co. in the action described above].

2. _____ [Moving party or deponent, e.g., Plaintiff Smith & Co.] is seeking a protective order from this court concerning the deposition of _____ [name of deponent], which commenced on _____ [date] at _____ [place].

3. The deposition of _____ [name] is being conducted _____ [specify grounds, e.g., in bad faith and in a manner that is unreasonably annoying and oppressive to the deponent and Plaintiff Smith & Co] in that _____ [specify facts]. This questioning appears on the following pages and lines of the transcript of deponent's testimony: _____ [specify]. Copies of the applicable pages are attached to this declaration as Exhibit A and made a part hereof.

4. Good cause exists for the order sought by _____ [moving party or deponent, e.g., Plaintiff Smith & Co.] in that _____ [specify facts showing good cause for the particular order sought, e.g., the

deponent, an employee of Plaintiff, has repeatedly testified that he has no personal knowledge of the matters being inquired into. Discovery has already been provided on these matters through other depositions, interrogatories, and the production of documents. Opposing counsel persists in arguing with and badgering the deponent to testify about these matters of which he has repeatedly said he has no knowledge].

[Set forth, in consecutively numbered paragraphs, additional facts showing good cause for order(s) sought.]

5. On _____ [date], _____ [specify actions taken to confer with opposing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

6. _____ [Moving party, e.g., Plaintiff Smith & Co.] bases the request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP §§ 2025.420, 2025.470

Motion for Protective Order for Deposition in Progress:

See 6.43

Relief Available in Protective Orders:

See 6.28[3]

Related Form of Memorandum:

See California Points and Authorities, Ch. 83, Discovery: Depositions, § 83.80 (Matthew Bender)



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Chapter 6 Oral Depositions in California

XI. FORMS

E. Compelling Attendance, Testimony, or Production at a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.76

6.76 Notice of Motion and Motion to Compel Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Materials.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
)
) No: _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER TO COMPEL _____ [party or
) party-affiliated deponent, e.g., DEFENDANT MARY
) JONES] TO ATTEND AND TESTIFY AT DEPOS-
) ITION [AND PRODUCE DOCUMENTS AND/OR
) TANGIBLE THINGS DESCRIBED IN DEPOS-
) ITION NOTICE] AND TO IMPOSE MONETARY
) SANCTION, SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
[Telephone Appearance]
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order to compel _____ [party or party-affiliated deponent] to attend and testify at a deposition [and to produce those documents and/or tangible things described in the deposition notice attached hereto as Exhibit A]. _____ [Moving party, e.g., Plaintiff John Smith] will further move for an order imposing a monetary sanction against _____ [party deponent or party with whom deponent is affiliated and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in favor of _____ [moving party, e.g., Plaintiff John Smith] in the amount of \$ _____. The motion to compel will be made on the ground that _____ [party or party-affiliated deponent] failed to [attend and] testify at the deposition as scheduled [and to produce for inspection those documents and/or tangible things described] in the deposition notice, which was served on _____ [party or party-affiliated deponent] on _____ [date], a copy of which is attached hereto as Exhibit A. [The motion will be made on the further ground that good cause exists for compelling those documents and/or tangible things described in the deposition notice.]

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order of this court to compel _____ [party or party-affiliated deponent] to attend and testify at a deposition [and to produce those documents and/or tangible things described in the deposition notice attached to this motion as Exhibit A] and to impose a monetary sanction against _____ [party deponent or party with whom deponent is affiliated and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Jane Lee].

3. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] served the deponent, _____ [name], with a notice to take his/her deposition on _____ [date]. A true and correct copy of this notice is attached to this motion as Exhibit A.

[EITHER]

4. _____ [Name of deponent] is a/the _____ [plaintiff or defendant] in this action.

[OR]

4. _____ [Name of deponent] is _____ [specify party affiliation, e.g., an employee of Defendant Mary Jones] .

[CONTINUE]

5. _____ [Party deponent or party with whom deponent is affiliated, e.g., Defendant Mary Jones] did not timely serve a valid objection to the deposition notice pursuant to CCP § 2025.410.

6. _____ [Party or party-affiliated deponent] failed to [attend and] testify at the deposition as scheduled [or to produce the documents described in the deposition notice].

[Set forth, in consecutively numbered paragraphs, additional facts concerning the deponent's failure to proceed, if deponent appeared but did not testify.]

[ADD, if moving party seeks to compel production of documents]

7. Good cause exists for the production of documents and/or tangible things specified in the deposition notice as follows:

a. _____ [Specify, in successively lettered subparagraphs the items described in the deposition notice and state facts showing good cause justifying production of each item].

[CONTINUE]

8. On _____ [date], _____ [specify actions taken to inquire into deponent's failure to appear, if applicable, and to confer with opposing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

9. _____ [Moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.450

Prerequisite to Motion:

See 6.45[3]

Drafting Motion to Compel:

See 6.45[4]

Sanctions Available on Motion of Other Attending Parties:

See 6.45[6]

Related Forms of Memoranda:

See California Points and Authorities, Ch. 83, Discovery: Depositions, §§ 83.30, 83.32 (Matthew Bender)



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Chapter 6 Oral Depositions in California

XI. FORMS

E. Compelling Attendance, Testimony, or Production at a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.77

6.77 Notice of Motion and Motion to Compel Further Response from Party or Nonparty Deponent.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION TO COM-
) PEL DEPONENT TO _____
) [ANSWER QUESTIONS *and/or* PRODUCE DOCU-
) MENTS *and/or* TANGIBLE THINGS] AND TO IM-
) POSE MONETARY SANCTION, SUPPORTING
) DECLARATION OF _____ [name],
) AND MEMORANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [identify deponent] and his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order to compel _____ [identify deponent] to _____ [answer those questions, listed in the accompanying separate statement, which he/she failed to answer *and/or* produce those documents and/or things, listed in the accompanying separate statement, which he/she failed to produce] at his/her deposition. _____ [Moving party, e.g., Defendant Mary Jones] will also, and hereby does move for an order imposing a monetary sanction against _____ [identify deponent or opposing party and/or his/her attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] in favor of _____ [moving party, e.g., Defendant Mary Jones] in the amount of \$ _____. The motion to compel will be made on the ground that the information sought by the _____ [questions and/or production of documents and/or things] is properly subject to discovery.

The motion will be based on this notice of motion, [on the oral notice given to the deponent at the deposition,] on the declaration of _____ [name], on the separate statement filed herewith pursuant to *Cal Rules Ct, Rule 3.1345*, on the memorandum set forth below, on the records and file herein, on the certified copy of the relevant parts of the deposition transcript [to be] lodged with the court, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, e.g., Defendant Mary Jones] is seeking an order of this court to compel _____ [identify deponent] to _____ [answer those questions, listed in the accompanying separate statement, which he/she failed to answer *and/or* produce those documents and/or things, listed in the accompanying separate statement, which he/she failed to produce] at his/her deposition and to impose a monetary sanction against _____ [identify deponent or opposing party and/or his/her attorney, e.g., Plaintiff John Smith and his attorney Tom Doe].

3. The above action is one for _____ [specify nature of the action].

4. On _____ [date], _____ [moving party, e.g., Defendant Mary Jones] served a notice of the deposition of _____ [identify deponent] on all parties appearing in the action. A true and correct copy of the notice is attached to this motion as Exhibit A.

[ADD, if deponent is not a party or affiliated with a party]

5. On _____ [date], _____ [moving party, e.g., Defendant Mary Jones] served the deponent with a deposition subpoena, directing him/her to attend and testify at a deposition [and produce the documents and/or tangible things under his/her control specified in the deposition subpoena]. A true and correct copy of the deposition subpoena is attached to this motion as Exhibit B.

[CONTINUE]

6. The deposition of _____ [identify deponent] was commenced in this action on _____ [date], at _____ [time], at _____ [place], pursuant to the deposition notice.

7. During the taking of the testimony at the deposition, _____ [identify deponent] failed to _____ [answer questions as detailed in the separate statement accompanying this motion, and/or produce those documents and/or things under his/her control as detailed in the separate statement accompanying this motion], and as appears in the transcript of the deposition [to be] lodged with this court.

8. The information sought that the deponent has failed to provide is relevant to the subject matter involved in this action and is not privileged, as set forth in the separate statement accompanying this motion.

[ADD, if moving to compel production]

9. Good cause justifying the production exists, as detailed in the separate statement filed herewith.

[ADD, if deponent was given oral notice of the motion to compel]

10. When _____ [identify deponent] failed to _____ [answer the questions and/or produce the documents and/or tangible things], declarant orally notified the deponent that he/she would apply to this court for an order compelling him/her to _____ [answer the questions and/or produce the documents and/or tangible things]. The deposition officer then directed the deponent to appear and attend a session of this court at _____ [date and time specified in the notice]. The oral notice of motion and the deposition officer's direction to deponent appear in the transcript of the deposition [to be] lodged with this court, at page(s) _____, line(s) _____, and page(s) _____, line(s) _____, respectively. [True copies of these transcript pages are attached hereto as Exhibit _____ for the court's convenience and made a part hereof.]

[CONTINUE]

11. On _____ [date], _____ [specify actions taken to confer with deponent and/or opposing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

12. _____ [moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.480



Timing:

See 6.46[2]

Prerequisite to Motion:

See 6.46[3]

Drafting Motion to Compel:

See 6.46[7]

Lodging Transcript:

See 6.46[6]

Related Form of Separate Statement:

See 6.78

Related Forms of Memoranda:

See *California Points and Authorities*, Ch. 83, *Discovery: Depositions*, §§ 83.31, 83.32 (Matthew Bender)



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Chapter 6 Oral Depositions in California

XI. FORMS

E. Compelling Attendance, Testimony, or Production at a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.78

6.78 Separate Statement of Questions and Answers in Dispute.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) SEPARATE STATEMENT IN SUPPORT OF MO-
) TION TO COMPEL DEPONENT TO
) _____ [ANSWER QUESTIONS
) and/or PRODUCE DOCUMENTS and/or TAN-
) GIBLE THINGS]
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

This separate statement is submitted, pursuant to *Cal Rules Ct, Rule 3.1345*, in support of the motion of _____ [moving party, e.g., Defendant Mary Jones] for an order to compel _____ [identify deponent] to _____ [answer those questions, which he/she failed to answer, and/or produce those documents and/or things, which he/she failed to produce,] at his/her deposition.

1. DEPOSITION QUESTION _____[*identify specific question by transcript page and line*]

Text of Question: _____[*specify text of question*].

Text of Response: _____[*specify text of response*].

Statement of Reasons for Compelling Further Response: _____[*set forth factual and legal reasons for compelling further response, answer, or production*].

[*ADD, if necessary to understand the discovery request and responses to it*]

Related Definitions and Instructions: _____[*specify the text of all definitions, instructions, and other matters required to understand the specific question and the response to it*].

[*ADD, if the response to the specific discovery request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request*]

Related Requests and Responses: _____[*specify text of related requests and responses*].

[*ADD, if pleadings, other documents in file, or other items of discovery are relevant to motion and relied on by moving party*]

Related Pleadings and Other Documents: _____[*summarize each document*].

[*CONTINUE*]

[*Set forth additional deposition questions at issue, identified by transcript page and line, with text of question and response, reasons for compelling, and related information*]

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

Cal Rules Ct, Rule 3.1345

Papers Filed With Motion to Compel:

See 6.46[7]

Related Form for Notice of Motion:

See 6.77



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Chapter 6 Oral Depositions in California

XI. FORMS

F. Using or Preventing the Use of a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.79

6.79 Notice of Intent to Offer Audio or Video Recording in Evidence.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No: _____
_____ [name],	)	NOTICE OF INTENT TO OFFER
Defendant.	)	_____ [AUDIO or VIDEO] RE-
	)	CORDING OF DEPOSITION OF
	)	_____ [name] IN EVIDENCE

To the Court and all parties to the action:

NOTICE IS HEREBY GIVEN that _____ [party giving notice of intent, e.g., Plaintiff John Smith]
intends to offer the following _____ [audio or video] recording in evidence at trial:

Deposition of _____ [name of deponent], taken on _____ [date],
_____ [in its entirety or specify parts of the deposition to be offered].

[ADD, if intending to use a video recording of the deposition testimony of a treating or consulting physician or expert witness, even though the deponent is available to testify].

The notice of deposition of _____ [name of deponent], served on _____ [date], reserved the right to use the video recording of the deposition at trial.

[CONTINUE]

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2025.340(m)



Timing:

See 6.57[2]

Prerequisites for Using Video Recording of Physician/Expert Witness:

See 6.56

Notice of Intent to Offer Audio or Video Recording:

See 6.57



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Chapter 6 Oral Depositions in California

XI. FORMS

F. Using or Preventing the Use of a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.80

6.80 Notice of Motion and Motion to Suppress Deposition.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION TO SUP-
) PRESS DEPOSITION OF _____
) [name] AND TO IMPOSE MONETARY SANC-
) TION, SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [opposing party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order suppressing the deposition of _____ [name], taken by _____ [party noticing deposition, e.g., Defendant Mary Jones] in this action on _____ [date], and will further move for the imposition of a monetary sanction against _____ [identify opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$ _____. The motion to suppress the deposition will be made on the grounds that _____ [specify reasons deponent failed or refused to approve transcript or sign statement identifying deposition as his/her own].

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order of this court suppressing the deposition of _____ [name], taken by _____ [identify party noticing deposition, e.g., Defendant Mary Jones] in this action on _____ [date], and imposing a monetary sanction against _____ [identify opposing party and/or attorney, e.g., Defendant Mary Jones and her attorney Jane Lee].

3. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] received written notice that the _____ [transcript or recording] of the above-described deposition was available for _____ [reading, correcting, and signing or review].

[EITHER, if moving party is deponent]

4. Thereafter, _____ [moving party, e.g., Plaintiff John Smith], the deponent, _____ [failed or refused to approve the transcript or refused to sign a statement identifying the deposition as his/her own] for the following reasons: _____ [specify].

[OR, if person other than moving party is deponent]

4. Thereafter, _____ [name of deponent] _____ [failed or refused to approve the transcript or refused to sign a statement identifying the deposition as his/her own] for the reasons described in his/her declaration, attached to the foregoing motion as Exhibit A.

[CONTINUE]

5. On _____ [date], _____ [specify actions taken to confer with opposing party in a reasonable and good-faith attempt to resolve informally the issues covered by the motion].

6. _____ [Moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP §§ 2025.520, 2025.530

Prerequisite to Motion:

See 6.55[2]

Motion to Suppress:

See 6.55



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Chapter 6 Oral Depositions in California

XI. FORMS

F. Using or Preventing the Use of a Deposition

1-6 MB Practice Guide: CA Civil Discovery 6.81

6.81 Notice of Motion and Motion for Protective Order After Deposition.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No: _____
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER _____ [specify
) order sought, e.g., SEALING] DEPOSITION OF
) _____ [name] AND FOR MONET-
) ARY SANCTION, SUPPORTING DECLARATION
) OF _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) [Telephone Appearance]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [identify opposing party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order that the deposition of _____ [name], which was taken on _____ [date] at _____ [time] at _____ [place], _____ [specify order sought, e.g., be sealed]. _____ [Moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] will also, and hereby does, move for an order imposing a monetary sanction against _____ [identify opposing party and/or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground that good cause exists for the order _____ [specify grounds, e.g., because the deponent testified concerning confidential commercial information that is unrelated to this action, the disclosure of which would jeopardize Defendant's business. Justice requires this order to protect Defendant Mary Jones from unwarranted annoyance, embarrassment, and oppression, and undue burden and expense].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] is seeking a protective order from this court concerning the deposition of _____ [name of deponent], which was taken on _____ [date].

3. Good cause exists for the order sought by _____ [moving party, deponent, or affected natural person or organization, e.g., Defendant Mary Jones] in that _____ [specify facts showing good cause for the particular order sought, e.g., the deponent testified concerning confidential commercial information that is unrelated to this action, the disclosure of which would jeopardize Defendant's business].

[Set forth, in consecutively numbered paragraphs, additional facts showing good cause for order(s) sought.]

4. On _____ [date], _____ [specify actions taken to confer with noticing party in a

reasonable and good-faith attempt to resolve informally the issues covered by the motion].

5. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2025.420

Prerequisite to Motion:

See 6.28[4][b]

Relief Available in Protective Order:

See 6.28[3]



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G. Taking Deposition in California in Connection with Out-of-State Action

1-6 MB Practice Guide: CA Civil Discovery 6.82

6.82 Judicial Council Form SUBP-030, Application for Discovery Subpoena in Action Pending Outside California.

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 2029.300; California Judicial Council Form SUBP-030 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Applying for Subpoena for Discovery in Action Pending Outside California:

See 6.60C[1]



Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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G. Taking Deposition in California in Connection with Out-of-State Action

1-6 MB Practice Guide: CA Civil Discovery 6.83

6.83 Judicial Council Form SUBP-035, Subpoena for Production of Business Records in Action Pending Outside California.

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Go to Interactive Fillable Form.

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NOTES.

Authority:

CCP § 2029.350; California Judicial Council Form SUBP-035 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Subpoena for Production of Business Records in Action Pending Outside California:

See 6.60C[2]

► Cross Reference:

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G. Taking Deposition in California in Connection with Out-of-State Action

1-6 MB Practice Guide: CA Civil Discovery 6.84

6.84 Judicial Council Form SUBP-040, Deposition Subpoena for Personal Appearance in Action Pending Outside California.

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NOTES.

Authority:

CCP § 2029.350; California Judicial Council Form SUBP-040 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Subpoena for Personal Appearance in Action Pending Outside California:

See 6.60C[2]

➡ Cross Reference:

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Chapter 6 Oral Depositions in California
XI. FORMS

G. Taking Deposition in California in Connection with Out-of-State Action

1-6 MB Practice Guide: CA Civil Discovery 6.85

6.85 Judicial Council Form SUBP-045, Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 2029.350; California Judicial Council Form SUBP-045 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California:

See 6.60C[2]

➡ Cross Reference:

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G. Taking Deposition in California in Connection with Out-of-State Action

1-6 MB Practice Guide: CA Civil Discovery 6.86

6.86 Judicial Council Form SUBP-050, Subpoena for Inspection of Premises in Action Pending Outside California.

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NOTES.

Authority:

CCP § 2029.350; California Judicial Council Form SUBP-050 has been adopted for mandatory use [*Cal Rules Ct, Rule 1.31*]

Subpoena for Inspection of Premises in Action Pending Outside California:

See 6.60C[2]

► Cross Reference:

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Chapter 7 Oral Depositions Outside of California

1-7 MB Practice Guide: CA Civil Discovery 7.syn

§ 7.syn Synopsis to Chapter 7: Oral Depositions Outside of California

7.01 Scope.

7.02 Objective and Strategy.

7.03 CHECKLIST: Taking an Oral Deposition in Another State, U.S. Territory, or Possession.

7.03[1] Checklist for Party Noticing Deposition in Another State, U.S. Territory, or Possession.

7.03[2] Checklist for Party Opposing Taking of Deposition in Another State, U.S. Territory, or Insular Possession.

7.04 Scope of Deposition.

7.04[1] May Be Taken in Another State, or in a Territory or Insular Possession.

7.04[2] May Be Taken of Any Person, Including Any Party.

7.04[3] Subject to Same Scope and Limitations As Deposition Taken in California.

7.05 Procedures for Depositions in California Generally Apply.

7.06 Deposition of Party or Party-Affiliated Deponent.

7.06[1] Service of Notice Is Effective to Compel Attendance, Testimony, and Production of Materials.

7.06[2] Notice Must Specify Place of Deposition Within 75 Miles of Residence or Business.

7.07 Process of Jurisdiction Where Deposition Will Be Taken Must Be Used to Compel Attendance, Testimony, and Production by Nonparty Deponent.

7.08 Qualifications of Person Supervising Deposition in Another State, U.S. Territory, or Insular Possession.

7.09 Procedure to Initiate Process in Another State, U.S. Territory, or Insular Possession.

7.09[1] Commission Issued by Clerk of Court.

7.09[1][a] Issued on Request.

7.09[1][b] Requests Process in Place of Examination.

7.09[2] Court Order.

7.10 CHECKLIST: Taking an Oral Deposition in a Foreign Nation.

7.10[1] Checklist for Party Noticing Deposition in a Foreign Nation.

7.10[2] Checklist for Party Opposing Taking of Deposition in a Foreign Nation.

7.11 Scope of Deposition.

7.11[1] May Be Taken in a Foreign Nation.

7.11[2] May Be Taken of Any Person, Including Any Party.

7.11[3] Subject to Same Scope and Limitations As Deposition Taken in California.

7.12 Procedures for Depositions in California Generally Apply.

7.13 Service of Notice Is Effective to Compel Attendance, Testimony, and Production by Party or Party-Affiliated Deponent.

7.14 Process of Foreign Nation Where Deposition Will Be Taken Must Be Used to Compel Attendance, Testimony, and Production by Nonparty Deponent.

7.15 Qualifications of Person Supervising Deposition in a Foreign Nation.

7.16 Motion to Initiate Process in a Foreign Nation.

7.16[1] Court Issues Commission, Letters Rogatory, or Letter of Request on Motion.

7.16[2] Contents of Commission, Letters Rogatory, or Letter of Request.

7.17 Commission to Take Deposition Outside California (Cal. Judicial Council Form DISC-030)

7.18 Ex Parte Application for Order for Commission for Deposition in Another State or U.S. Territory or Possession.

7.19 [Proposed] Order for Commission for Deposition in Another State or U.S. Territory or Possession.

7.20 Notice of Motion and Motion for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation.

7.21 [Proposed] Order for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation.

7.22 Letters Rogatory for Deposition in a Foreign Nation.

7.23 Letter of Request for Deposition in a Foreign Nation.



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Chapter 7 Oral Depositions Outside of California
I. STRATEGY

1-7 MB Practice Guide: CA Civil Discovery 7.01

7.01 Scope.

This chapter covers:

- Objectives and strategy for taking depositions outside of California for actions pending in California [see 7.02].
- Scope of depositions [see 7.04] and procedures for taking depositions in other states or U.S. territories or insular possessions [see 7.03 -7.09; Forms: see 7.17 -7.19].
- Scope of depositions [see 7.11] and procedures for taking depositions in foreign nations [see 7.10, 7.12 -7.16; Forms: see 7.20 -7.23].

Core Statutes:

CCP §§ 2026.010, 2027.010

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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Chapter 7 Oral Depositions Outside of California
I. STRATEGY

1-7 MB Practice Guide: CA Civil Discovery 7.02

7.02 Objective and Strategy.

For actions pending in California, depositions of witnesses outside the state must be taken where the witness is located. However, if the nonresident deponent is a party, or an officer, director, managing agent, or employee of a party, the court can order that the deposition be conducted in California under *CCP* §§ 2025.260 [*Glass v. Superior Court* (1988) 204 CA3d 1048, 1052-1053, 251 CR 690 ; see Ch. 6, *Oral Depositions in California* 6.10[1][d], [e]].

Although California law generally requires the same scope and procedures apply to depositions taken outside and inside the state, the law of the witness's foreign-jurisdiction location governs the procedure for compelling a nonparty deponent's attendance, testimony, and production of documents [see *CCP* §§ 2026.010(a), 2027.010(a)]. If the prospective deponent is outside of the United States, the laws of the foreign nation in which the deponent is located may generally control the scope of pretrial discovery and, in particular, the manner in which a deposition may be conducted.

Taking a deposition in another state or in a U.S. territory or insular possession requires the issuance of a commission by the clerk of court in California, or if the other jurisdiction requires it, a court order for the commission, which may be obtained by ex parte application [*CCP* § 2026.010(f)].

Taking a deposition in a foreign nation can be a far more time-consuming and cumbersome process, depending on the requirements of the foreign jurisdiction. Whether the country involved is a signatory of the Hague Convention [23 UST 2555, TIAS 7444] is an important factor. If so, service on the deponent will be much easier than it would be in a nonsignatory country. The procedure for taking a deposition in a foreign nation is initiated by noticed motion to the California court for issuance of a commission, letters rogatory, or a letter of request, whichever is required by the foreign nation [*CCP* § 2027.010(e)].

Consult the website of the U.S. State Department for the requirements of the particular foreign nation where the prospective deponent is located [see U.S. State Dept. Circular, Obtaining Evidence Abroad, http://travel.state.gov/obtaining_evidence.html].

Judge's Perspective:

If an out-of-state deposition is requested by one party and the deposition is to take place within the jurisdiction of the United States, out-of-state commissions are routinely issued by the clerk of the trial department to which the case is assigned [see *CCP* § 2026.010(f)]. More often than not commissions are

requested pursuant to stipulation. It is rare for a court to hear a formal motion on the issuance of an out-of-state commission.

However, for letters rogatory the opposite is true--they are almost always done pursuant to a formal motion. With respect to letters rogatory, the court is very much dependent on the requesting party's research as to what the order should contain to satisfy the requirements of the foreign nation.

Strategic Point:



If at all possible, a stipulation should be sought to avoid the necessity for a formal motion.



Warning--Privilege Issues:

If an issue is likely to arise with respect to privilege, research the choice-of-law rules of the forum in which the deposition is to be taken to determine what law is likely to apply should the issue be contested. In a federal court action, the conflicts rules of the forum in which the deposition is being taken has been applied in an action based on state law. Thus, for example, a Massachusetts federal court applied California law on attorney-client privilege to a deposition being taken in California. The court applied California choice-of-law rules to determine that California law should apply to the privilege issue [see *Connolly Data Sys., Inc. v. Victor Techs., Inc.* (SD Cal 1987) 114 FRD 89, 91-93 (defendant asserting privilege was California corporation, allegedly privileged communications were in California between corporation's attorney and former employee of corporation); but see *International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1370-1371, 282 CR 783 (party to California action required to produce documents belonging to party and used to refresh memory of nonparty deponent in Connecticut)].



Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 193, Discovery: Depositions (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 6, Discovery Outside California; Ch. 51, Oral Depositions (Matthew Bender).

Hogan & Weber's California Civil Discovery, Ch. 4, Out-of-State Discovery (Matthew Bender 6th ed.).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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Chapter 7 Oral Depositions Outside of California
II. TAKING AN ORAL DEPOSITION IN ANOTHER STATE, IN A U.S. TERRITORY, OR INSULAR
POSSESSION

1-7 MB Practice Guide: CA Civil Discovery 7.03

7.03 CHECKLIST: Taking an Oral Deposition in Another State, U.S. Territory, or Possession.

7.03[1] Checklist for Party Noticing Deposition in Another State, U.S. Territory, or Possession.

☐ Determine whether commission issued by court clerk or court order for commission is required:

☐ Notice of deposition is sufficient to compel attendance, testimony, and production by party or party-affiliated deponent in another state, or U.S. territory or possession.

☐ Process and procedures of other jurisdiction are required to compel attendance, testimony, and production by nonparty deponent.

Authority:

CCP § 2026.010(b)

Discussion:

See 7.06, 7.07

☐ If deponent is party or party-affiliated, notice deposition to be taken:

☐ Before qualified person,

☐ At place within 75 miles of deponent's residence or business.

Authority:

CCP § 2026.010(b), (d), (e)

Discussion:

See 7.06[2]

☐ If deponent is nonparty, determine whether court order for commission is required by other jurisdiction to initiate process.

☐ If court order is not required, obtain form of commission from clerk of court, or prepare form of commission to be issued by clerk.

Authority:*CCP § 2026.010(c)-(f)***Discussion:**

See 7.09[1][a]

Form:

See 7.17

☐ If court order is required, prepare ex parte application and proposed order for issuance of commission.

Authority:*CCP § 2026.010(f)***Discussion:**

See 7.09[2]

Forms:

See 7.17 (Judicial council form for commission to be issued by clerk), 7.18 (ex parte application for order for commission), 7.19 (order for commission)

☐ Have process issue in other jurisdiction to compel deponent's attendance, testimony, and production.

☐ Notice deposition, to be taken as specified in commission.

☐ Always consider video recording out-of-state deposition for potential use at trial.

Authority:*CCP § 2026.010(a); see CCP §§ 2025.340, 2026.010(d)-(f)***Discussion:**

See 7.05

7.03[2] Checklist for Party Opposing Taking of Deposition in Another State, U.S. Territory, or Insular Possession.

☐ Review deposition notice to determine basis for opposing discovery, if any, in accordance with general procedures for depositions in California:

☐ Object to errors or irregularities in notice.

☐ For party and party-affiliated deponent, object to place outside California for deposition if not within 75 miles of deponent's business or residence.

Authority:

CCP § 2026.010

Discussion:

See 7.05, 7.06

☐ Serve written objection to errors or irregularities in notice.

At least 3 calendar days before deposition is scheduled.

☐ Make attempt to resolve issues.

☐ Move to stay deposition and quash notice, if unable to resolve issues.

Authority:

CCP §§ 2025.410, 2026.010(a)

Checklist for Responding to Notice of Deposition:

See *Ch. 6, Oral Depositions in California*, 6.22

☐ Object to substance of discovery sought or manner in which deposition will be conducted.

☐ Make attempt to resolve issues.

☐ Move for protective order if unable to resolve issues.

Authority:

CCP §§ 2025.420, 2026.010(a)

Discussion:

See 7.04, 7.05

Relief Available in Protective Order:

See *Ch. 6, Oral Depositions in California*, 6.28[3]

Checklist for Responding to Notice of Deposition:

See *Ch. 6, Oral Depositions in California*, 6.22

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsForeign DiscoveryCivil
ProcedureDiscoveryMethodsOral Depositions



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POSSESSION

1-7 MB Practice Guide: CA Civil Discovery 7.04

7.04 Scope of Deposition.

7.04[1] May Be Taken in Another State, or in a Territory or Insular Possession. Any party to an action in California may obtain discovery by taking an oral deposition in another state of the United States, or in a territory, or in an insular possession subject to its jurisdiction [*CCP* § 2026.010(a)].

7.04[2] May Be Taken of Any Person, Including Any Party. A party may take the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency [*CCP* § 2026.010(a); *see CCP* § 2025.010].

7.04[3] Subject to Same Scope and Limitations As Deposition Taken in California. An oral deposition taken in another state, U.S. territory, or insular possession may be used to obtain discovery [*CCP* § 2026.010(a); *see CCP* § 2025.010]:

- Within the same scope, delimited by *CCP* §§ 2017.010-2017.320, as an oral deposition taken in California; and

- Subject to the same restrictions, set forth in *CCP* §§ 2019.010-2019.210, as an oral deposition taken in California.

➡ Cross References:

Discussion of scope of discovery in general, *see Ch. 2, Scope of Discovery.*

Discussion of scope and limitations of depositions taken in California, *see Ch. 6, Oral Depositions in California, 6.05.*

Legal Topics:

For related research and practice materials, *see the following legal topics:*
Civil ProcedureDiscoveryMethodsOral Depositions



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POSSESSION

1-7 MB Practice Guide: CA Civil Discovery 7.05

7.05 Procedures for Depositions in California Generally Apply.

Except as modified by *CCP* § 2026.010, the procedures for taking oral depositions in California apply to a deposition taken in another state of the United States, or in a territory or an insular possession subject to its jurisdiction [*CCP* § 2026.010(a)].



Cross Reference:

Discussion, see Ch. 6, Oral Depositions in California.



Strategic Point:

When taking a deposition of a witness outside California, you should almost always consider video recording the deposition. The video will prevent the need to rely on only a written transcript at trial, should it become necessary to present the testimony of an unavailable deponent. With proper notice, a party can use the recording of the deposition at trial in lieu of live testimony [see *CCP* §§ 2025.220-2025.240, 2025.340(m), 2025.620]. The procedure for having a deposition video recorded in an out-of-state deposition is similar to that for a deposition taken in California [see *CCP* §§ 2025.330, 2025.340, 2026.010(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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POSSESSION

1-7 MB Practice Guide: CA Civil Discovery 7.06

7.06 Deposition of Party or Party-Affiliated Deponent.

7.06[1] Service of Notice Is Effective to Compel Attendance, Testimony, and Production of Materials. If the deponent is a party or affiliated with a party, the service of the deposition notice is effective to require that deponent to [CCP § 2026.010(b)]:

- Attend and testify; and
- Produce any documents or tangible things for inspection and copying.

A party or party-affiliated deponent is one who is [CCP § 2026.010(b)]:

- A party to the action;
- An officer, director, or managing agent of a party; or
- An employee of a party.

7.06[2] Notice Must Specify Place of Deposition Within 75 Miles of Residence or Business. The deposition notice must specify a place in the state, territory or insular possession of the United States that is within 75 miles of the deponent's residence or business office [CCP § 2026.010(b)].



Strategic Point--Party Seeking Discovery:

If a party or party-affiliated deponent is located outside of California, the party seeking discovery is not required to take the deposition outside of California. If circumstances warrant, the party seeking discovery should consider a motion to increase travel limits for the deponent to require him or her to travel to California for the deposition [see *Glass v. Superior Court* (1988) 204 CA3d 1048, 1052-1053, 251 CR 690 (CCP § 2025.260 allows court to order deposition of nonresident in California as exception

to *CCP* § 1989)].

Example:

An Indiana corporation sued petitioners, California residents, in California. The trial court denied defendants' motion to compel the attendance of three senior members of the corporation's management team, residents of Indiana, at depositions in California. The court of appeal vacated the order and held that the trial court would not have discretion to deny defendants' motion on remand in light of the factors in *CCP* § 2025.260 for allowing depositions at locations more distant from a party-affiliated deponent's residence than those authorized in *CCP* § 2025.250(a) [*Glass v. Superior Court* (1988) 204 CA3d 1048, 1052-1053, 251 CR 690].

**Cross Reference:**

Discussion of motion to increase travel limits for party or party-affiliated deponent, see *Ch. 6, Oral Depositions in California*, 6.10[1][d].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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POSSESSION

1-7 MB Practice Guide: CA Civil Discovery 7.07

7.07 Process of Jurisdiction Where Deposition Will Be Taken Must Be Used to Compel Attendance, Testimony, and Production by Nonparty Deponent.

If the deponent is not a party to the action or affiliated with a party, a party serving a deposition notice must use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to [CCP § 2026.010(c)]:

- Attend and testify; and
- Produce any document or tangible thing for inspection, copying, and any related activity.



Warning:

Familiarity with local procedures and rules is crucial; for example, Illinois requires the party seeking the deposition to petition for a court order, which, if issued is final and appealable [see Ill S Ct. R 204; *Eskandani v. Phillips* (1975) 61 Ill2d 183, 194-195, 334 NE2d 146].

Distinguish--Extent to Which Law of Another State Applies:

Although the laws of the place where the deposition of a nonparty deponent will be held govern the process for compelling the deponent to attend, testify, and produce documents, California law otherwise applies in the conduct of the deposition [see *International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1370-1371, 282 CR 783].

Example:

A plaintiff sought documents from a defendant that the defendant had used to refresh the memory of a nonparty deponent who had been deposed in Connecticut. The plaintiff was entitled to the documents under California law. The plaintiff was not required to seek a court order in Connecticut to obtain the documents from the defendant, as would be required in a Connecticut action. Connecticut law applied only to the procedure for compelling the nonparty deponent to attend, testify, and produce documents; California law governed the plaintiff's request for the documents from the defendant [*International Ins. Co. v. Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1370-1371, 282 CR 783].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral Depositions



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1-7 MB Practice Guide: CA Civil Discovery 7.08

7.08 Qualifications of Person Supervising Deposition in Another State, U.S. Territory, or Insular Possession.

A deposition taken in another state, or territory or insular possession must be conducted [*CCP* § 2026.010(d)]:

- Under the supervision of a person who is:
 - ☐ Authorized to administer oaths by the laws of the United States or those of the place where the examination is to be held; and
 - ☐ Not otherwise disqualified under the requirements for deposition officers in California [*see CCP* §§ 2025.320, 2025.340]; or
- Before a person appointed by the court and thus authorized to administer oaths and take testimony.



Cross Reference:

Discussion of qualifications of deposition officers in California, see *Ch. 6, Oral Depositions in California*, 6.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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1-7 MB Practice Guide: CA Civil Discovery 7.09

7.09 Procedure to Initiate Process in Another State, U.S. Territory, or Insular Possession.

7.09[1] Commission Issued by Clerk of Court.

7.09[1][a] Issued on Request. On request, the clerk of the court must issue a commission authorizing the deposition in another state, U.S. territory, or possession [*CCP § 2026.010(f)*].

The clerk must issue the commission to any party in any action pending in its venue without a noticed motion or court order [*CCP § 2026.010(f)*].

Judge's Perspective:

If an out-of-state deposition is requested by one party and the deposition is to take place within the jurisdiction of the United States, out-of-state commissions are routinely issued by the clerk of the trial department to which the case is assigned [*see CCP § 2026.010(f)*]. More often than not, commissions are requested pursuant to stipulation. It is the rare instance that the court hears a formal motion on the issuance of an out-of-state commission.

➡ Cross Reference:

See Martindale-Hubbell Law Digest, Civil Actions and Procedure for a summary of specific deposition requirements of the jurisdiction.



Trap:

Do not leave home without a commission. If the deponent is a nonparty, is not under subpoena and does not show up, you may have to pay for the other party's trip.

7.09[1][b] Requests Process in Place of Examination. The commission must request that process issue in the place where the examination is to be held [*CCP § 2026.010(f)*]:

- Requiring attendance; and

- Enforcing the obligations of the deponent to produce documents and answer questions.

The commission may contain such terms as are required by the foreign jurisdiction to initiate process [*CCP* § 2026.010(f)].

California Judicial Council Form DISC-030 is an official form for this certificate. Use of this form is optional [*see* Cal Rule of Ct, Rule 1.35].

➤ **Cross Reference:**

Form for commission to take Deposition outside California (Cal. Judicial Council Form DISC-030), *see* 7.17.

7.09[2] Court Order. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application [*CCP* § 2026.010(f)].

➤ **Cross References:**

Forms, *see* 7.18 (ex parte application), 7.19 (order for commission).

Discussion of procedure for ex parte applications, *see Ch. 4, Law and Motion Procedure*, 4.33 et seq.

Legal Topics:

For related research and practice materials, *see* the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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7.10 CHECKLIST: Taking an Oral Deposition in a Foreign Nation.

7.10[1] Checklist for Party Noticing Deposition in a Foreign Nation.

☐ Determine, through U.S. State Department, whether taking of deposition and proposed manner of taking deposition are allowed under law of foreign nation.

☐ Determine whether commission, letters rogatory, or letter of request are required:

☐ Notice of deposition may be sufficient to compel attendance, testimony, and production by party or party-affiliated deponent in a foreign nation.

☐ Process and procedures of foreign jurisdiction are required to compel attendance, testimony, and production by nonparty deponent.

☐ Consider availability of alternative procedures (e.g., video-conferencing) that would save travel expenses and time.

Authority:

CCP § 2027.010(b), (c)

Discussion:

See 7.13, 7.14

☐ If deponent is party or party-affiliated:

☐ Notice deposition in accordance with California procedures, after verifying that foreign jurisdiction

allows deposition in the manner contemplated and imposes no further requirements.

Authority:

CCP § 2027.010(b), (d), (e)

Discussion:

See 7.13

- ☐ If deponent is nonparty, determine required procedure to initiate process in foreign nation.
- ☐ Prepare noticed motion and proposed document to be issued by California court, in accordance with requirements of foreign nation:
- ☐ Commission;
 - ☐ Letters rogatory; or
 - ☐ Letter of request.
- ☐ Serve and file motion to obtain required document.
- ☐ Proceed in accordance with requirements of foreign nation.

Authority:

CCP § 2027.010(e)

Discussion:

See 7.14 -7.16

Forms:

See 7.20 (motion for commission, letters rogatory, or letter of request), 7.21 (order for commission, letters rogatory, or letter of request), 7.22 (letters rogatory), 7.23 (letter of request)

7.10[2] Checklist for Party Opposing Taking of Deposition in a Foreign Nation.

- ☐ Review notice of deposition and/or motion for commission, letters rogatory, or letter of request to determine basis for opposing discovery, if any, in accordance with general procedures for depositions in California:
- ☐ Objection to errors or irregularities in notice.
 - ☐ Objection to discovery sought or manner in which deposition will be conducted.

Authority:

*CCP § 2027.010***Discussion:***See 7.11, 7.12*☐ If objecting to errors or irregularities in notice of deposition:☐ Serve written objection.

At least 3 calendar days before deposition is scheduled.

☐ Make attempt to resolve issues.☐ Move to stay deposition and quash notice, if unable to resolve issues.**Authority:***CCP §§ 2025.410, 2027.010(a)***Checklist for Responding to Notice of Deposition:***See Ch. 6, Oral Depositions in California, 6.22*☐ If objecting to substance of discovery sought or manner in which deposition will be conducted:☐ File opposition to noticed motion for commission, letters rogatory, or letter of request.☐ Move for protective order.**Authority:***CCP §§ 2025.420, 2027.010(a)***Discussion:***See Ch. 6, Oral Depositions in California, 6.28[3] (relief available in protective order)***Checklist for Responding to Notice of Deposition:***See Ch. 6, Oral Depositions in California, 6.22***Legal Topics:**

For related research and practice materials, see the following legal topics:

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7.11 Scope of Deposition.

7.11[1] May Be Taken in a Foreign Nation. Any party to an action in California may obtain discovery by taking an oral deposition in a foreign nation [CCP § 2027.010(a)].



Trap:

The extent to which pretrial discovery is allowed in a foreign nation and the manner in which a deposition may be conducted, even when the parties stipulate to the discovery, are governed by the law of the foreign nation. Before noticing the deposition, verify with the U.S. State Department the requirements of the particular foreign nation in which discovery is sought.

The U.S. State Department offers detailed information online for persons seeking to obtain evidence abroad. See U.S. State Dept. Circular, Obtaining Evidence Abroad, http://travel.state.gov/obtaining_evidence.html.



Strategic Point:

Parties should consider using a video-conferencing center to avoid the cost and time of traveling to a foreign country for depositions.

7.11[2] May Be Taken of Any Person, Including Any Party. A party may take the oral deposition of any person, including any party to the action, in a foreign nation [CCP § 2027.010(a); see CCP § 2025.010].

7.11[3] Subject to Same Scope and Limitations As Deposition Taken in California. An oral deposition taken in a foreign nation may be used to obtain discovery [CCP § 2027.010(a); see CCP § 2025.010]:

- Within the same scope, delimited by CCP § 2017.010 *et seq.*, as an oral deposition taken in California; and
- Subject to the same restrictions, set forth in CCP § 2019.010 *et seq.*, as an oral deposition taken in

California.

**Cross References:**

Discussion scope of discovery in general, see Ch. 2, Scope of Discovery.

Discussion of scope and limitations of depositions taken in California, see *Ch. 6, Oral Depositions in California*, 6.05.

Legal Topics:

For related research and practice materials, see the following legal topics:

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7.12 Procedures for Depositions in California Generally Apply.

Except as modified by *CCP § 2027.010*, the procedures for taking oral depositions in California apply to a deposition taken in a foreign nation [*CCP § 2027.010(a)*].



Cross Reference:

Discussion, see Ch. 6, Oral Depositions in California.

Legal Topics:

For related research and practice materials, see the following legal topics:

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7.13 Service of Notice Is Effective to Compel Attendance, Testimony, and Production by Party or Party-Affiliated Deponent.

If the deponent is a party or affiliated with a party, the service of the deposition notice is effective to require that deponent [CCP § 2027.010(b)]:

- Attend and testify; and
- Produce any document or tangible thing for inspection and copying.

A party-affiliated deponent is one who is [CCP § 2027.010(b)]:

- An officer, director, or managing agent of a party; or
- An employee of a party.



Strategic Point--Party Seeking Discovery:

A deposition taken in another state, U.S. territory, or insular possession must be taken within 75 miles of the deponent's residence or business office [CCP § 2026.010(b)]. There is no similar specific distance requirement for depositions taken in foreign nations [see CCP § 2027.010(b)]. However, to avoid having an another party or the deponent move for a protective order to require the deposition to be taken in a place other than the place specified in the notice, the convenience of the deponent and other parties attending should be taken into account [see CCP §§ 2025.010, 2025.420, 2027.010(a)].



Cross References:

Discussion of relief available in protective orders, see *Ch. 6, Oral Depositions in California*, 6.28[3].

See Martindale-Hubbell International Law Digest, Civil Actions and Procedure for a summary of specific deposition requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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7.14 Process of Foreign Nation Where Deposition Will Be Taken Must Be Used to Compel Attendance, Testimony, and Production by Nonparty Deponent.

If the deponent is not a party to the action or affiliated with a party, a party serving a deposition notice must use any process and procedures required and available under the laws of the foreign nation where the deposition is to be taken to compel the deponent to [CCP § 2027.010(c)]:

- Attend and testify; and
- Produce any document or tangible thing for inspection, copying, and any related activity.

A party-affiliated deponent is one who is [CCP § 2027.010(c)]:

- An officer, director, or managing agent of a party; or
- An employee of a party.

Legal Topics:

For related research and practice materials, see the following legal topics:

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7.15 Qualifications of Person Supervising Deposition in a Foreign Nation.

A deposition taken in a foreign nation must be conducted under the supervision of [CCP § 2027.010(d)]:

- A person who is:
 - ☐ Authorized to administer oaths, or their equivalent, by the laws of the United States or of the foreign nation; and
 - ☐ Not otherwise disqualified under the requirements for deposition officers in California [see CCP §§ 2025.320, 2025.340]; or
- A person or officer appointed by commission or under letters rogatory; or
- Any person agreed to by all the parties.

The person before whom a deposition may be taken in a foreign nation depends on the law of that nation. If the witness is willing, the foreign nation may permit a deposition to be taken by U.S. counsel before a U.S. consular officer. If the foreign nation requires testimony to be taken by local judicial authority, U.S. counsel may be unable to participate and may have to provide written interrogatories attached to a letter rogatory to the foreign judicial authority [see U.S. State Dept. Circular, Obtaining Evidence Abroad, http://travel.state.gov/obtaining_evidence.html].



Strategic Point:

When discovery is proceeding cooperatively, parties may wish to stipulate that a deposition in a foreign country be taken by a person agreed to by all the parties [CCP § 2027.010(d)(3)]. Before attempting to take foreign depositions by stipulation, carefully consider the internal requirements of the country where the deposition will be taken.



Cross Reference:

Discussion of qualifications of deposition officers in California, see *Ch. 6, Oral Depositions in California*, 6.31.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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7.16 Motion to Initiate Process in a Foreign Nation.

7.16[1] Court Issues Commission, Letters Rogatory, or Letter of Request on Motion. On motion of the party seeking to take an oral deposition in a foreign nation, the court in which the action is pending will issue a commission, letters rogatory, or a letter of request, if it determines that one is necessary or convenient [*CCP* § 2027.010(e)].

The law of the foreign nation determines whether a party seeking discovery needs to use a commission, letters rogatory, or a letter of request. Generally, the differences are that [*see Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 CA3d 503, 506-507, 109 CR 219]:

- A commission authorizes a designated individual to take the deposition of a named witness.
- A letter rogatory is a judicial request, addressed to a foreign court, that the deponent be examined by written or oral interrogatories within the foreign court's jurisdiction.
- A letter of request is a method of international discovery provided under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [23 UST 2555, TIAS 7444 (reprinted in United States Code Service, International Agreements volume)], which is transmitted to the foreign nation's central authority, requesting an appropriate judicial authority in that country to obtain evidence.

Parties to the Hague Evidence Convention include:

- Argentina, Australia.
- Barbados, Belarus, Bulgaria.
- China (including Hong Kong and Macau), Cyprus, Czech Republic.
- Denmark.

- Estonia.
- Finland, France.
- Germany.
- Israel, Italy.
- Kuwait.
- Latvia, Lithuania, Luxembourg.
- Mexico, Monaco.
- Netherlands, Norway.
- Poland, Portugal.
- Russian Federation.
- Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland.
- Turkey.
- Ukraine, United Kingdom, United States.
- Venezuela.



Strategic Point:

If taking a deposition in a foreign country is necessary, try to do so by stipulation. Consider the use of a video-conferencing center to avoid the cost and time of traveling to a foreign country for depositions.

7.16[2] Contents of Commission, Letters Rogatory, or Letter of Request. The commission, letters rogatory, or letter of request may include any terms and directions that are just and appropriate [CCP § 2027.010(e)].

The deposition officer may be designated by name or by descriptive title in the deposition notice and in the commission [CCP § 2027.010(e)].

Letters rogatory or a letter of request may be addressed: "To the Appropriate Judicial Authority in [*name of foreign nation*]" [CCP § 2027.010(e)].



Warning:

Although California law provides that the letter to a foreign judicial authority may include any terms and directions that are just and appropriate, the extent to which those terms or directions will be allowed depends on the foreign jurisdiction where discovery is sought. Thus, for example, methods of conducting a deposition, such as telephone participation or videotaping, may not be authorized. Similarly, a deposition may have to be taken by written questions, instead of on oral examination, in the foreign nation where discovery is sought. Confirm that the discovery and manner of discovery sought will be

allowed under the laws of the foreign nation and draft the request in accordance with those laws. In addition, you should be aware of any privileges under the foreign nation's law that could possibly prevent the discovery [see Restatement (Third) of Foreign Relations Law of the United States § 473(3) (Tentative Draft No. 7, 1986)].

Judge's Perspective:

The court will depend on the requesting party's research to provide the correct form and contents of the order so as to satisfy the requirements of the foreign nation.

The U.S. State Department offers detailed information online for persons seeking to obtain evidence abroad. Those resources are U.S. State Dept. Circular, Obtaining Evidence Abroad, http://travel.state.gov/obtaining_evidence.html and U.S. State Dept. Circular, Preparation of Letters Rogatory, http://travel.state.gov/letters_rogatory.html.



Cross Reference:

Hague Evidence Convention, see *DeMeo, California Deposition and Discovery Practice, Ch. 6, Discovery Outside California, § 6.14.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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7.17 Commission to Take Deposition Outside California (Cal. Judicial Council Form DISC-030)

Commission to Take Deposition Outside California (Cal. Judicial Council Form DISC-030)

[Click here to view image.](#)

NOTES.

Authority:

California Judicial Council Form DISC-030, pictured above, has been approved for optional use [see CCP § 2026.210; *Cal Rules of Ct, Rules 1.35*]

Commission for Deposition in Another State:

See 7.09

Commission for Deposition in Foreign Nation:

See 7.16

➡ Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis™ Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

Commission to Be Issued by Clerk of Court for Deposition Outside of California

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	COMMISSION TO TAKE DEPOSITION OF
_____ [name],	)	_____

Defendant.) [name]
)
)

THE PEOPLE OF THE STATE OF CALIFORNIA, TO _____ [name or descriptive title of commissioner]:

WHEREAS, it appears to the Superior Court of the State of California, County of _____ [specify] from the application of _____ [name party seeking discovery, e.g., Mary Jones] _____ [plaintiff or defendant] in this matter, that _____ [name of prospective deponent] of _____ [specify city and state or country where prospective deponent is located] is a material witness in the action currently pending in this court between _____ [name], plaintiff, and _____ [name], defendant, and that the testimony of the witness can now be taken by deposition _____ [on oral examination or by written questions] at _____ [specify place outside of California]; this court, in confidence of your prudence and fidelity, appoints you as commissioner to examine the witness.

This court requests that process issue in _____ [specify place where examination is to be held], requiring attendance and enforcing the obligations of the witness to produce documents and answer questions. [Set forth all terms required by foreign jurisdiction to initiate process.]

[EITHER, if deposition on oral examination]

You are authorized and empowered, _____ [at a time and place to be fixed by you or specify date, time, and place] in _____ [specify city and state or country where deposition will be held], to administer an oath to the witness and to cause the testimony of the witness on oral examination to be reduced to writing and subscribed by the witness, and to certify the deposition to the above-entitled court and forward it in a sealed envelope, endorsed with the title of this action and marked "Deposition of _____" [specify name of deponent] to _____ [specify attorney or court clerk where completed deposition should be sent].

[OR, if deposition by written questions]

You are authorized and empowered, _____ [at a time and place to be fixed by you or specify date, time, and place] in _____ [specify city and state or country where deposition will be held], to administer an oath to the witness and to cause the testimony of the witness in answer to the attached questions, cross questions, redirect and recross questions, all of which are to be propounded by you to the witness, to be reduced to writing and subscribed by the witness, and to certify the deposition to the above-entitled court and forward it in a sealed envelope, endorsed with the title of this action and marked "Deposition of _____" [specify name of deponent] to _____ [specify attorney or court clerk where completed deposition should be sent].

[CONTINUE]

Dated: _____

_____ Clerk

By _____ Deputy Clerk

[Seal]

NOTES.

Authority:

CCP §§ 2026.010, 2027.010

Commission for Deposition in Another State:

See 7.09

Commission for Deposition in Foreign Nation:

See 7.16

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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7.18 Ex Parte Application for Order for Commission for Deposition in Another State or U.S. Territory or Possession.

Ex Parte Application for Order for Commission for Deposition in Another State or U.S. Territory or Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	EX PARTE APPLICATION FOR ISSUANCE OF
vs.	)	COMMISSION TO TAKE DEPOSITION OF
_____ [name],	)	_____ [name] IN
Defendant.	)	_____ [identify state or U.S. territory or possession], SUPPORTING DECLARATION
	)	OF _____ [name], AND MEMOR-
	)	ANDUM IN SUPPORT OF MOTION
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

I, _____ [name], hereby apply on behalf of _____ [identify party, e.g., Defendant Mary Jones], for issuance, out of and under the seal of this court, of a commission appointing _____ [name] as the person before whom the deposition of _____ [name] is to be taken _____ [on oral examination or by written questions] _____ [at a date, time, and

place to be determined by that deposition officer or *specify*], in _____ [*specify city and state, territory, or U.S. possession where deposition will be held*]. This application is made pursuant to *Code of Civil Procedure Section 2026.010* on the grounds that _____ [*name of prospective deponent*] is outside California, that _____ [*identify party, e.g., Defendant Mary Jones*] is entitled to take his/her testimony by deposition, and that a court order for the commission is required by _____ [*specify state, territory, or U.S. possession*].

Date: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

SUPPORTING DECLARATION OF _____

I, _____, declare:

1. I am _____ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above*].

2. _____ [*Party, e.g., Defendant Mary Jones*] is seeking an order of this court for issuance of a commission appointing _____ [*name*] as the person before whom the deposition of _____ [*name*] is to be taken.

[*ADD, if moving party is a plaintiff*]

3. Defendant _____ [*name*] _____ [*was served with a summons or appeared*] in this action on _____ [*date*].

[*CONTINUE*]

4. The subject matter of this action is _____ [*specify nature of action, e.g., an action for the alleged breach of a contract for services*].

5. _____ [*Name of prospective deponent*] is outside of California and is _____ [*temporarily*] residing at _____ [*address*].

6. _____ [*Name of prospective deponent*] is expected to testify about _____ [*specify, e.g., the services provided by the defendant in performance of the terms of the contract*].

7. The testimony of _____ [*Name of prospective deponent*] is material because _____ [*specify, e.g., he was the supervisor in the defendant's office in charge of the plaintiff's project and worked closely with the plaintiff to ensure that the project was completed in accordance with the parties'*]

agreement].

8. _____ [Party, e.g., Defendant Mary Jones] served a notice of the deposition of _____ [name] on _____ [identify opposing party, e.g., Plaintiff John Smith] on _____ [date]. A copy of this notice is attached hereto as Exhibit _____ and made a part hereof.

9. A court order for the commission is required by the laws of _____ [specify state, territory, or U.S. possession where deposition will be taken].

10. _____ [Name of person to be appointed], whose address is _____ [specify address], is a person authorized to administer oaths by the laws of _____ [the United States or specify jurisdiction where deposition will be held], and thus is a competent and proper person to be appointed as the person before whom the deposition of _____ [name] is to be taken.

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2026.010(d)-(f)

When Order Is Needed:

See 7.09[2]

Related Form of Order:

See 7.19

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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IV. FORMS

1-7 MB Practice Guide: CA Civil Discovery 7.19

7.19 [Proposed] Order for Commission for Deposition in Another State or U.S. Territory or Possession.

[Proposed] Order for Commission for Deposition in Another State or U.S. Territory or Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	[PROPOSED] ORDER THAT COMMISSION IS-
_____ [name],	)	SUE FOR TAKING DEPOSITION OF
Defendant.	)	_____ [name] OUTSIDE OF CALI-
	)	FORNIA
	)	

Application having been made by _____ [party, e.g., Defendant Mary Jones] for an order that a commission issue for the taking of the deposition of _____ [name] outside of California, proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that a commission issue out of and under the seal of this court directed to _____ [name], whose address is _____ [specify], to administer oaths and to take testimony at the deposition of _____ [name] _____ [on oral examination or by written questions] _____ [at a date, time, and place to be determined by that deposition officer or specify], in _____ [specify city and state, territory, or U.S. possession where deposition will be held].

IT IS FURTHER ORDERED that the commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligation of the deponent to produce documents and answer

questions.

[ADD, if required]

IT IS FURTHER ORDERED that the following be included in the commission: _____[set forth such terms as are required by foreign jurisdiction to initiate process].

Dated: _____

_____ [Typed name of Judge]
Judge of the Superior Court

NOTES.

Authority:

CCP § 2026.010(d)-(f)

When Order Is Needed:

See 7.09[2]

Related Form of Application:

See 7.18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral Depositions



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Chapter 7 Oral Depositions Outside of California
IV. FORMS

1-7 MB Practice Guide: CA Civil Discovery 7.20

7.20 Notice of Motion and Motion for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation.

Notice of Motion and Motion for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ISSU-
vs.	)	ANCE OF _____ [COMMISSION
_____ [name],	)	or LETTERS ROGATORY or LETTER OF RE-
Defendant.	)	QUEST] TO TAKE DEPOSITION OF
	)	_____ [name] OUTSIDE CALI-
	)	FORNIA, SUPPORTING DECLARATION OF
	)	_____ [name], AND MEMOR-
	)	ANDUM IN SUPPORT OF MOTION
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To _____ [identify opposing party, e.g., Defendant Mary Jones] and to his/her attorney of record:

[EITHER, if seeking issuance of commission]

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in _____ [Department or Division] _____ of this court, located at _____ [address], _____ [identify moving party, e.g., Plaintiff John Smith] will, and hereby does, move the court for issuance, out of and under its seal, of a commission appointing _____ [name or descriptive title] as the person before whom the deposition of _____ [name] is to be taken _____ [on oral examination or by written questions] _____ [at a date, time, and place to be determined by that deposition officer or specify], within _____ [specify foreign nation where deposition will be held].

[OR, if seeking letters rogatory or letter of request]

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in _____ [Department or Division] _____ of this court, located at _____ [street address], _____ [city], _____ [identify moving party, e.g., Plaintiff John Smith] will, and hereby does, move the court for issuance, out of and under its seal, of _____ [letters rogatory or a letter of request] requesting the appropriate judicial authority in _____ [name of foreign nation] to appoint some competent person or officer as the person before whom the deposition of _____ [name] is to be taken _____ [on oral examination or by written questions] within _____ [specify foreign nation where deposition will be held].

[CONTINUE in same paragraph]

This motion will be made on the ground the _____ [name of prospective deponent] is outside California, that _____ [identify moving party, e.g., Plaintiff John Smith] is entitled to take his/her testimony by deposition, and that it is _____ [necessary and/or convenient] that the _____ [commission or letters rogatory or letter of request] issue.

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____

I, _____, declare:

1. I am _____ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above*].

[*EITHER, if seeking issuance of a commission*]

2. _____ [*Moving party, e.g., Plaintiff John Smith*] is seeking an order of this court for issuance of a commission appointing _____ [*name or descriptive title*] as the person before whom the deposition of _____ [*name*] is to be taken.

[*OR, if seeking letters rogatory or letter of request*]

2. _____ [*Moving party, e.g., Plaintiff John Smith*] is seeking an order of this court for issuance of _____ [*letters rogatory or a letter of request*] requesting the appropriate judicial authority in _____ [*name of foreign nation*] to appoint some competent person or officer as the person before whom the deposition of _____ [*name*] is to be taken.

[*ADD, if moving party is a plaintiff*]

3. Defendant _____ [*name*] _____ [*was served with a summons or appeared*] in this action on _____ [*date*].

[*CONTINUE*]

4. The subject matter of this action is _____ [*specify nature of action*].

5. _____ [*Name of prospective deponent*] is out of California and is _____ [*temporarily*] residing at _____ [*address*].

6. _____ [*Name of prospective deponent*] is expected to testify about _____ [*specify*].

7. The testimony of _____ [*Name of prospective deponent*] is material because _____ [*specify*].

8. It is _____ [*necessary and/or convenient*] that this court issue _____ [*a commission or letters rogatory or a letter of request*] in that _____ [*specify, in accordance with requirements of foreign jurisdiction*].

[*ADD, if seeking commission and parties have not agreed on deposition officer*]

9. _____ [*Name or descriptive title of person to be appointed*], whose address is _____ [*specify address*], is a person authorized to administer oaths under the laws of _____ [*the United States or specify foreign jurisdiction*], and thus is a competent and proper person to be appointed as the person before whom the deposition of _____ [*name*] is to be taken.

[*OR ADD, if seeking commission and parties have agreed on deposition officer*]

9. _____[*Name or descriptive title of person to be appointed*], whose address is _____[*specify address*], is a person agreed to by all the parties, and thus is a competent and proper person to be appointed as the person before whom the deposition of _____[*name*] is to be taken.

[*CONTINUE*]

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

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2027.010(d), (e)

Motion to Initiate Process in Foreign Nation:

See 7.16

Related Form of Order:

See 7.21

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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7.21 [Proposed] Order for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation.

[Proposed] Order for Commission, Letters Rogatory, or Letter of Request for Deposition in a Foreign Nation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	[PROPOSED] ORDER THAT
_____ [name],	)	_____ [COMMISSION <i>or</i> LET-
Defendant.	)	TERS ROGATORY <i>or</i> LETTER OF REQUEST] IS-
	)	SUE TO TAKE DEPOSITION OF
	)	_____ [name] OUTSIDE CALI-
	)	FORNIA

The motion of _____ [moving party, e.g., Plaintiff John Smith] for issuance of _____
[a commission *or* letters rogatory *or* a letter of request] for the taking of the deposition of
_____ [name] _____ [on oral examination *or* by written questions] came on regularly
for hearing on _____ [date]. Plaintiff appeared by counsel _____ [name]. Defendant
appeared by counsel _____ [name].

On proof made to the satisfaction of the court that the motion ought to be granted,

[EITHER]

IT IS ORDERED that a commission issue out of and under the seal of this court directed to _____ [name or descriptive title] whose address is _____ [specify address] to administer oaths and to take testimony at the deposition of _____ [name] _____ [on oral examination or by written questions] _____ [at a date, time, and place to be determined by that deposition officer or specify], within _____ [specify foreign nation where deposition will be held].

[OR]

IT IS ORDERED that _____ [letters rogatory or a letter of request] issue out of and under the seal of this court addressed "To the Appropriate Judicial Authority in _____ [name of foreign nation]" to take the deposition of _____ [name] _____ [on oral examination or by written questions] _____ [at a date, time, and place to be determined by that authority or specify], within _____ [specify foreign nation where deposition will be held].

[CONTINUE]

IT IS FURTHER ORDERED that _____ [set forth any terms and directions that are just and appropriate] .

Dated: _____

Judge of the Superior Court

NOTES.

Authority:

CCP § 2027.010(d), (e)

Order to Initiate Process in Foreign Nation:

See 7.16

Related Form of Motion:

See 7.20

Form of Letters Rogatory:

See 7.22

Form of Letter of Request:

See 7.23

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions



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Chapter 7 Oral Depositions Outside of California
IV. FORMS

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7.22 Letters Rogatory for Deposition in a Foreign Nation.

Letters Rogatory for Deposition in a Foreign Nation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	LETTERS ROGATORY RE DEPOSITION OF
_____ [name],	)	_____ [name]
Defendant.	)	THE PEOPLE OF THE STATE OF CALIFORNIA
	)	
	)	

To the Appropriate Judicial Authority in _____ [name of foreign nation]:

It has been determined by this court that the testimony of _____ [name of prospective deponent] who now _____ [resides or is temporarily] in your jurisdiction, is _____ [necessary and/or convenient] in the above-described action now pending in this court in which the above-described plaintiff and defendant are parties.

We therefore request that in the interest of justice you cause _____ [name of deponent], by the proper and usual process of your court, to appear before you or some competent person or officer appointed by you and authorized for the purpose, at a time and place to be determined by you, then and there to make answer on his/her _____ [oath or solemn affirmation] to _____ [oral examination by the parties and

their attorneys or the questions, cross questions, redirect, and recross questions attached hereto]. We request that you will cause his/her testimony in answer to this examination to be reduced to writing.

[ADD, if seeking production of documents]

We further request that you cause such books, papers, or other articles that the witness may produce or identify to be marked as _____ [identify as taken on behalf of party seeking discovery, e.g., Plaintiff John Smith's] Exhibits.

[CONTINUE]

We request that you then cause this testimony [with all exhibits so marked and attested] to be returned to us in an envelope endorsed with the title of this action and marked "Deposition of _____ [name]" addressed to the Clerk of this Court at _____ [specify address] and to cause the same to be forwarded to such clerk _____ [by mail or specify manner of transmittal, e.g., through the nearest United States minister or consul].

We are ready and willing to do the same for you in a similar case when required.

Date: _____

Judge of the Superior Court [Typed name of Judge]

By _____ Deputy Clerk
[Seal]

NOTES.

Authority:

CCP § 2027.010(d)(e)

Initiating Process in a Foreign Nation:

See 7.16

Related Forms of Motion and Order for Letters Rogatory:

See 7.20, 7.21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Discovery Methods Foreign Discovery



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Chapter 7 Oral Depositions Outside of California
IV. FORMS

1-7 MB Practice Guide: CA Civil Discovery 7.23

7.23 Letter of Request for Deposition in a Foreign Nation.

Letter of Request for Deposition in a Foreign Nation.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	LETTER OF REQUEST RE DEPOSITION OF
_____ [name],	)	_____ [name]
Defendant.	)	THE PEOPLE OF THE STATE OF CALIFORNIA
	)	
	)	

To _____ [title and address of Central Authority of foreign nation], the Central Authority of
_____ [name of foreign nation]:

It has been determined by this court that testimony of _____ [name of prospective deponent] who now
_____ [resides or is temporarily] in your jurisdiction, is _____ [necessary and/or
convenient] in the above-described action now pending in this court in which the above-described plaintiff and
defendant are parties. We therefore issue this letter of request for international judicial assistance, in accordance with
the Hague Convention of March 18, 1970, on the taking of evidence in civil or commercial matters, as follows:

1. This letter of request, sent by the Superior Court of California for the County of _____ [name of
county] to the Central Authority of _____ [name of foreign nation], is to be transmitted to

1-7 MB Practice Guide: CA Civil Discovery 7.23

_____ [specify authority requested to execute letter], the authority competent to execute it.

2. The names and addresses of the parties to the proceedings, and their representatives, are as follows:

_____ [identify].

3. The nature of the proceedings for which the evidence is required and all necessary information in regard to the proceedings are as follows: _____ [specify].

[EITHER]

4. The following evidence is to be obtained: _____ [specify].

[AND/OR]

4. The following judicial act is to be performed: _____ [specify].

[CONTINUE]

5. The following person is to be examined: _____ [specify name, address, and nationality].

[EITHER]

6. The questions that are to be put to the person to be examined are _____ [attached hereto as Exhibit A or specify].

[OR]

6. The subject matter about which _____ [name] is to be examined is as follows:
_____ [specify].

[ADD, if appropriate]

7. The following _____ [documents and/or real property and/or personal property] is/are to be inspected: _____ [specify].

[ADD, if appropriate]

8. The evidence is required to be given on oath or affirmation, as follows: _____

[specify special form to be used].

[ADD, if appropriate]

9. It is requested that the following special _____ [method or procedure] be followed, pursuant to Article 9 of the Hague Convention. _____ [Identify party to reimburse costs] will reimburse the fees and costs occasioned by the use of this special _____ [method or procedure], pursuant to Article 14 of the Hague Convention.

[ADD, if appropriate]

10. The person to be examined may claim privilege or duty to refuse to give the evidence under the *California Evidence Code, Sections 900-1070*, pursuant to Article 11 of the Hague Convention.

[ADD, if appropriate]

11. A translation into _____ [specify language of foreign nation] of this letter of request is attached hereto as Exhibit _____.

[ADD, if appropriate]

12. It is requested that _____ [specify executing authority] inform the Superior Court of the State of California for the County of _____ [name of county] of the time and place at which the proceedings will take place, so that the parties concerned and their representatives may be present. It is also requested that this information be sent directly to the parties and their representatives at the addresses stated above.

[CONTINUE]

13. _____ [Identify party to reimburse costs] will reimburse the fees and costs incurred in executing this letter of request, in serving process to compel the appearance of the person to be examined and in his/her attendance, and in preparing a transcript of the proceedings, pursuant to Article 26 of the Hague Convention.

We are ready and willing to do the same for you in a similar case when required.

Date: _____

_____ [Typed name of Judge]

Judge of the Superior Court

By _____ Deputy Clerk

[Seal]

NOTES.

Authority:

CCP § 2027.010(d)(e)

Initiating Process in a Foreign Nation:

See 7.16

Related Forms of Motion and Order for Letter of Request:

See 7.20, 7.21

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsForeign Discovery



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Chapter 8 Depositions on Written Questions

1-8 MB Practice Guide: CA Civil Discovery 8.syn

§ 8.syn Synopsis to Chapter 8: Depositions on Written Questions

8.01 Scope.

8.02 Objective and Strategy.

8.03 CHECKLIST: Taking a Deposition by Written Questions.

8.04 Options and Strategy for Party Noticing Deposition.

8.04[1] Consider Alternative Forms of Discovery.

8.04[2] Consider Shortening Time for Cross, Redirect, and Recross Questions.

8.05 Use by Any Party Instead of Oral Deposition.

8.06 Limitations on Number of Depositions Apply.

8.07 Giving Notice of Depositions on Written Questions.

8.07[1] Procedures for Oral Depositions Generally Apply.

8.07[2] Notice Must Identify Deposition Officer but Need Not Specify Date, Time, and Place.

8.07[3] Questions for Direct Examination Must Accompany Notice.

8.07[4] Serve Notice on All Appearing Parties.

8.08 Time for Cross, Redirect, and Recross.

8.08[1] Cross Questions Are Due Within 30 Days of Service of Notice and Questions.

8.08[2] Redirect Questions Are Due Within 15 Days of Cross.

8.08[3] Recross Questions Are Due Within 15 Days of Redirect.

8.09 Advance Review of Written Questions.

8.09[1] Propounding Party May Forward Direct Questions Before Deposition.

8.09[2] Deponent May Not Preview Cross, Redirect, or Recross Questions.

8.10 Noticing Party Delivers All Questions Served to Deposition Officer.

8.11 Deposition Officer Propounds Questions and Records Testimony.

8.12 CHECKLIST: Objecting to Questions in Depositions on Written Questions.

8.13 Options and Strategy.

8.14 Objections As to Form.

8.14[1] Must Be Made Within 15 Days of Service.

8.14[2] Objection Not Timely Served Is Waived.

8.14[3] Motion to Sustain Objection.

8.14[3][a] Must Be Made Promptly by Objecting Party.

8.14[3][b] Declaration Showing Attempt at Informal Resolution Is Required.

8.14[4] Unless Sustained, Deposition Officer Propounds Question.

8.14[5] Sanctions Against Losing Party Are Generally Mandatory.

8.15 Objections Based on Privilege or Work Product.

8.15[1] Must Be Made Within 15 Days of Service.

8.15[2] Objection Not Timely Served Is Waived.

8.15[3] Motion to Overrule Objection.

8.15[3][a] May Be Made by Party Propounding Question.

8.15[3][b] Declaration Showing Attempt at Informal Resolution Is Required.

8.15[4] Unless Overruled, Deposition Officer Cannot Propound Question.

8.15[5] Sanctions Against Losing Party Are Generally Mandatory.

8.16 Motion for Protective Order.

8.16[1] Orders Available in Oral Depositions Apply to Depositions on Written Questions.

8.16[2] Orders Specifically Available for Depositions on Written Questions.

8.17 Notice of Taking Deposition by Written Questions.

8.18 Written Questions to Be Propounded at Deposition by Written Questions.

8.19 Objections to Written Questions.



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Chapter 8 Depositions on Written Questions
I. STRATEGY

1-8 MB Practice Guide: CA Civil Discovery 8.01

8.01 Scope.

This chapter covers:

- Objectives and strategy for obtaining discovery through the use of depositions by written questions [*see* 8.02].
- Options and strategies [*see* 8.03, 8.04] and limitations [*see* 8.05, 8.06] for written questions.
- Noticing depositions by written questions [*see* 8.07; Form: *see* 8.17], and propounding questions for depositions by written questions [*see* 8.07[3], 8.08-8.11; Form: *see* 8.18].
- Objecting to questions propounded for depositions by written questions [*see* 8.13-8.16], including making written objections [*see* 8.14, 8.15; Form: *see* 8.19], moving to sustain objections as to form [*see* 8.14[3]], and moving to overrule objections based on privilege and work product [*see* 8.15[3]].
- Moving for protective orders in response to a notice of deposition by written questions [*see* 8.16].

Core Statutes:

CCP §§ 2028.010-2028.080

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten Depositions



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Chapter 8 Depositions on Written Questions
I. STRATEGY

1-8 MB Practice Guide: CA Civil Discovery 8.02

8.02 Objective and Strategy.

A deposition by written questions is a discovery procedure that offers an alternative to a deposition by oral examination. The procedures for oral deposition, such as compelling the attendance of a nonparty deponent through use of a deposition subpoena, generally apply [see *CCP § 2028.010*].

Once the parties have determined which questions will be propounded, the court reporter must promptly take and record the witness's testimony under oath. This involves the court reporter reading the questions to the witness and making a complete record of the answers [*CCP § 2028.080*]. The court reporter then must adhere to the required follow-up procedures, such as the witness's review correction and signature, certification, and sealing [see *CCP § 2028.010*].

Taking a deposition on written questions is so infrequent that it has become a nearly extinct discovery device.

Distinguish:

The *CCP § 2028.010 et seq.* procedure for depositions on written questions is distinct from the *CCP § 2025.330(e)* procedure by which a party who chooses not to participate in an oral deposition may submit written questions to be posed at the end of the oral examination [see *Ch. 6, Oral Depositions in California*, 6.32[4]].



Strategic Points--Party Seeking Discovery:

Use of a deposition by written questions should be a last resort since it lacks the spontaneity or demeanor useful in assessing the impact of witness's testimony. Taking a deposition by telephone as authorized by *CCP § 2025.310* provide spontaneity and "observation" of the witness's demeanor to a greater degree than impassive responses to written questions. If costs are a significant factor, the option of having answers recorded under oath without preparation of a stenographic transcript may result in substantial savings. Yet, even if significant costs in fees, travel, and time are large and the amount and nature of the information to be obtained is small, depositions on written questions can sometimes be useful. Nevertheless, an inability to ask follow-up questions is an additional drawback to consider. Moreover, because all direct, cross, redirect, and recross questions must be provided in advance, and in compliance with specific time requirements for service on other parties, conducting a deposition on written questions is likely to become a frustrating and attenuated process [see *CCP § 2028.030*].



Strategic Point--Party Opposing Discovery:

If a party has noticed a deposition by written questions, any other adverse party is not necessarily precluded from personally attending.

If there is an interest in assessing a witness's responses and demeanor in person, counsel can move for a protective order specifically requesting [CCP § 2028.070; *see* 8.16]:

- That the testimony be taken by oral, instead of written, examination; or
- That opposing counsel be permitted to attend the deposition by written questions in person and to propound questions by oral examination.



Detailed Discussion/Forms:

Written depositions in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

California Forms of Pleading and Practice, Ch. 193, Discovery: Depositions (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 52, Written Depositions (Matthew Bender).

Hogan & Weber's California Civil Discovery, Ch. 3, Written Depositions (Matthew Bender 6th ed.).

Written questions in federal cases, see Moore's Federal Practice, Ch. 31, Depositions Upon Written Questions (Matthew Bender 3d ed.).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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Chapter 8 Depositions on Written Questions
II. TAKING A DEPOSITION BY WRITTEN QUESTIONS

1-8 MB Practice Guide: CA Civil Discovery 8.03

8.03 CHECKLIST: Taking a Deposition by Written Questions.

☐ Determine whether to move to shorten time for interchange of questions.

Questions must be served:

☐ Direct--With notice of deposition.

☐ Cross--Within 30 days after service of notice.

☐ Redirect--Within 15 days of service of cross questions.

☐ Recross--Within 15 days of service of redirect questions.

☐ Court may, for good cause shown, extend or shorten time periods.

Authority:

CCP § 2028.030

Discussion:

See 8.04[1]

☐ Prepare notice of deposition, checking format to:

☐ Specify name or descriptive title of deposition officer.

☐ Specify address of deposition officer.

1-8 MB Practice Guide: CA Civil Discovery 8.03

- ☐ Specify date, time, and place of deposition, or state that date, time, and location will be determined by deposition officer.
- ☐ Identify deponent.
- ☐ Describe material to be produced, if any.
- ☐ State intention to use audio or video technology.
- ☐ State intention to reserve right to use video of physician or expert at trial.
- ☐ Describe matters to be covered at deposition, if deponent is not a natural person.
- ☐ List all parties, in notice or in accompanying proof of service, on whom notice will be served.
- ☐ Attach questions to be propounded on direct examination.

Authority:

CCP §§ 2025.220-2025.240, 2028.010, 2028.020

Discussion:

See 8.07

Forms:

See 8.17 (notice of taking deposition by written questions), 8.18 (written questions)

- ☐ Serve in accordance with procedures for oral depositions.
- ☐ If nonparty deponent, serve with deposition subpoena.

Authority:

CCP §§ 2025.220-2025.240, 2028.010

Checklist for Giving Notice of Oral Depositions:

See Ch. 6, Oral Depositions in California, 6.03

- ☐ After exchange of direct, cross, redirect, and recross questions, and resolution of any motions, deliver all questions to deposition officer.

Authority:

CCP § 2028.080

Discussion:

See 8.10

Motions to Sustain or Overrule Objections:

See 8.14 -8.15

Motion for Protective Order:

See 8.16

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten Depositions



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8.04 Options and Strategy for Party Noticing Deposition.

8.04[1] Consider Alternative Forms of Discovery. Counsel can use other discovery devices to obtain the information sought in a deposition by written questions. For example:

- An oral deposition by telephone may be preferable in many instances [*see CCP § 2025.310*].
- If there is to be an oral deposition, a party who does not want to participate in person may submit written questions to be posed by the deposition office at the conclusion of the oral examination [*see CCP § 2025.330(e)*].
- If the deponent is a party or affiliated with a party, interrogatories may be a more efficient way to obtain the same information.

A deposition by oral examination may better serve to evaluate the witness's demeanor and credibility, particularly if an opposing party is likely to seek an order allowing in-person participation at the written deposition [*see CCP § 2028.070*].

➡ **Cross Reference:**

Discussion of telephonic depositions and written questions at the end of an oral deposition, see *Ch. 6, Oral Depositions in California*, 6.30, 6.32[4], respectively.

8.04[2] Consider Shortening Time for Cross, Redirect, and Recross Questions. The proponent of a notice of deposition by written questions must take into account the time allowed for propounding cross, redirect, and recross questions [*see CCP § 2028.030*]. However, for good cause shown, the court may extend or shorten the time periods for the interchange of those questions [*CCP § 2028.030*].

A motion to shorten the time for the interchange of questions may be appropriate when the discovery cut-off date is near. Likewise, a motion to shorten the time may be appropriate when only a small number of questions will be exchanged because of a limited amount of information sought from the particular deponent.



Cross References:

Discussion of time for cross-, redirect-, and recross-examination questions, see *8.08*.

Discussion of timing discovery, see *Ch. 1, Strategy and Planning, 1.12, 1.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten Depositions



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8.05 Use by Any Party Instead of Oral Deposition.

Any party may obtain discovery by taking a deposition by written questions instead of by oral examination [*CCP* § 2028.010].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.06 Limitations on Number of Depositions Apply.

The limitations on subsequent depositions [*CCP* § 2025.610] and the number of depositions permitted in limited civil cases [*CCP* § 94(a)] apply to depositions on written questions as well as to oral depositions [*see CCP* § 2028.010].

Cross Reference:

Discussion of limitations on number of depositions, see *Ch. 6, Oral Depositions in California*, 6.07.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.07 Giving Notice of Depositions on Written Questions.

8.07[1] Procedures for Oral Depositions Generally Apply. Except as modified by *CCP § 2028.010 et seq.*, the procedures for taking oral depositions in California [*CCP § 2025.010 et seq.*] and outside of California [*CCP §§ 2026.010, 2027.010*], apply to depositions on written questions [*CCP § 2028.010*].

► **Cross References:**

Discussion, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California.

8.07[2] Notice Must Identify Deposition Officer but Need Not Specify Date, Time, and Place. The notice of a written deposition must comply with the requirements for a notice of an oral deposition [*see CCP §§ 2025.220-2025.240*], except that [*CCP § 2028.020*]:

- The name (or descriptive title) and address of the deposition officer must be stated, and
- The date, time, and place for commencement of the deposition may be left to future determination by the deposition officer.

► **Cross References:**

Form, see 8.17.

Discussion of requirements for deposition notices, see *Ch. 6, Oral Depositions in California, 6.10*.

8.07[3] Questions for Direct Examination Must Accompany Notice. The questions to be propounded to the deponent by direct examination must accompany the notice of written deposition [*CCP § 2028.030(a)*].

► **Cross Reference:**

Form, see 8.18.

8.07[4] Serve Notice on All Appearing Parties. The notice of written deposition must be served on every other

party who has appeared in the action [*see CCP §§ 2025.240, 2028.010*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten Depositions



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8.08 Time for Cross, Redirect, and Recross.

8.08[1] Cross Questions Are Due Within 30 Days of Service of Notice and Questions. A party must serve any cross questions within 30 days after the deposition notice and questions for direct examination are served [*CCP* § 2028.030(b)].

The cross questions must be served on all other parties entitled to notice of the deposition [*CCP* § 2028.030(b)].

8.08[2] Redirect Questions Are Due Within 15 Days of Cross. A party must serve redirect questions on all other parties entitled to notice of the deposition within 15 days after being served with cross questions [*CCP* § 2028.030(c)].

8.08[3] Recross Questions Are Due Within 15 Days of Redirect. A party must serve recross questions on all other parties entitled to notice of the deposition within 15 days after being served with redirect questions [*CCP* § 2028.030(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.09 Advance Review of Written Questions.

8.09[1] Propounding Party May Forward Direct Questions Before Deposition. The party taking a written deposition may (but is not required to) forward to the deponent a copy of the questions on direct examination for study prior to the deposition [*CCP* § 2028.060(a)].

8.09[2] Deponent May Not Preview Cross, Redirect, or Recross Questions. No party or attorney may permit the deponent to preview the form or the substance of any cross, redirect, or recross questions [*CCP* § 2028.060(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.10 Noticing Party Delivers All Questions Served to Deposition Officer.

The party taking the deposition must deliver to the deposition officer designated in the deposition notice [*CCP* § 2028.080]:

- A copy of the deposition notice; and
- All direct, cross, redirect, and recross questions served by the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.11 Deposition Officer Propounds Questions and Records Testimony.

On receipt of the notice of written deposition and written questions, the deposition officer must then proceed promptly to [CCP § 2028.080]:

- Propound, i.e., read the questions to the deponent; and
- Take and record the testimony of the deponent in response to the questions.

Distinguish:

CCP § 2028.080 only requires that the deposition officer "record" deponent's testimony. In 1978 the legislature deleted the sentence: "In addition to any other means specified in the deposition notice, the testimony taken at a written deposition shall be recorded stenographically." Thus, the propounding party may arrange to have electronic recording, only, and may thereby significantly reduce the cost of a lengthy deposition, as well as capture the witness's demeanor and inflection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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III. OBJECTING TO QUESTIONS IN WRITTEN DEPOSITIONS

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8.12 CHECKLIST: Objecting to Questions in Depositions on Written Questions.

☐ Review questions from propounding party.

☐ If objecting to form of any question:

☐ Serve written objection on all parties entitled to notice of deposition.
Written objection must be served within 15 days of service of question.

Authority:
CCP § 2028.040

Discussion:
See 8.14[1], [2]

Form:
See 8.19 (objections to written questions)

☐ Make reasonable, good-faith attempt to resolve issues.

☐ If unable to resolve, prepare motion to sustain objections and impose monetary sanction.

Authority:
CCP § 2028.040

Discussion:
See 8.14[3]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

☐ If objecting to any question on basis of privilege or work product:

☐ Serve written objection on all parties entitled to notice of deposition.

Written objection must be served within 15 days of service of question.

Authority:

CCP § 2028.050

Discussion:

See 8.15[1], [2]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Form:

See 8.19 (objections to written questions)

☐ If propounding party files motion to overrule objection, file opposition to motion and request for monetary sanction.

Authority:

CCP § 2028.050

Discussion:

See 8.15[3]

☐ Determine whether appropriate to seek protective order for any of the following specific forms of relief:

☐ That the deponent's testimony be taken by oral, instead of written, examination;

☐ That one or more of the parties receiving notice of the written deposition be permitted to attend in person or by attorney and to propound questions to the deponent by oral examination;

☐ That objections to questions be sustained or overruled;

☐ That the deposition be taken before an officer other than the one named or described in the deposition notice.

Authority:

CCP § 2028.070

Discussion:

See 8.16[1], [2]

- ☐ Make reasonable, good-faith attempt to resolve issues.
- ☐ If unable to resolve, prepare motion for protective order.

Authority:

CCP § 2028.070

Discussion:

See 8.16

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten Depositions



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III. OBJECTING TO QUESTIONS IN WRITTEN DEPOSITIONS

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8.13 Options and Strategy.

A party served with a notice of deposition by written questions may:

- Object to particular questions for direct examination served with the notice of deposition [*CCP* §§ 2028.040, 2028.050],

➡ **Cross Reference:**

Discussion, see 8.14, 8.15.

- Move for a protective order for any of the relief generally available for oral depositions [*CCP* §§ 2025.420, 2028.040, 2028.050], or

➡ **Cross Reference:**

Discussion, see 8.16[1].

- Move for a protective order specifically directing that the parties [*CCP* § 2028.070]:

- ☐ Have the deposition taken by oral examination;
- ☐ Be able to participate in the deposition in person; or
- ☐ Have the depositions taken before a deposition officer other than the one identified in the notice.

➡ **Cross Reference:**

Discussion, see 8.16[2].

To avoid waiver, objections to particular questions must be timely made in writing [*CCP* §§ 2028.040(a), 2028.050(a)]. Therefore, a party filing a motion for a protective order should also timely serve objections to questions, if any.

**Warning--Objection, Alone, May Be Ineffective:**

Objecting to the form of a question will not prevent the question from being propounded. The objecting party must also move to have the objection sustained [*CCP* § 2028.040(b)]. However, if the objection is based on privilege or work-product protection, the question will not be propounded unless the party seeking discovery moves to have the objection overruled [*CCP* § 2028.050(b)].

**Cross References:**

Discussion of objections as to form, see 8.14.

Discussion of objections based on privilege or work product, see 8.15.

Discussion of motions for protective orders, see 8.16.

Legal Topics:

For related research and practice materials, see the following legal topics:

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8.14 Objections As to Form.

8.14[1] Must Be Made Within 15 Days of Service. A party who objects to the form of any question must serve a specific objection to that question within 15 days after service of the question [CCP § 2028.040(a)].

The objection must be served on all parties entitled to notice of the deposition [CCP § 2028.040(a)].

➡ Cross Reference:

Form, see 8.19.

8.14[2] Objection Not Timely Served Is Waived. A party who fails to serve timely an objection to the form of a question waives the objection [CCP § 2028.040(a)].

8.14[3] Motion to Sustain Objection.

8.14[3][a] Must Be Made Promptly by Objecting Party. The party objecting to the form of a question must promptly move the court to sustain the objection [CCP § 2028.040(b)].

➡ Cross Reference:

Form, see *California Forms of Pleading and Practice*, Ch. 193, *Discovery: Depositions*, § 193.263 (Matthew Bender).

8.14[3][b] Declaration Showing Attempt at Informal Resolution Is Required. A motion to sustain an objection to the form of a question must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the objection and motion [CCP § 2028.040(b)].

8.14[4] Unless Sustained, Deposition Officer Propounds Question. Unless the court sustains the objection, the deposition officer must propound the question to the deponent, subject to the objection as to its form [CCP § 2028.040(b)].

8.14[5] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction

under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to sustain an objection, unless the court finds that [*CCP* § 2028.040(c)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten Depositions



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8.15 Objections Based on Privilege or Work Product.

8.15[1] Must Be Made Within 15 Days of Service. A party who objects to any question on the ground that it calls for information that is privileged or is protected work product [*see CCP § 2018.010 et seq.*] must serve a specific objection to that question within 15 days after service of the question [*CCP § 2028.050(a)*].

The objection must be served on all parties entitled to notice of the deposition [*CCP § 2028.050(a)*].

➡ **Cross Reference:**

Form, see 8.19.

8.15[2] Objection Not Timely Served Is Waived. A party who fails to serve timely an objection based on privilege or work product protection waives the objection [*CCP § 2028.050(a)*].

8.15[3] Motion to Overrule Objection.

8.15[3][a] May Be Made by Party Propounding Question. The party propounding any question to which an objection is made on the grounds of privilege or work product protection may move the court for an order overruling the objection [*CCP § 2028.050(b)*].

➡ **Cross Reference:**

Form, see *California Forms of Pleading and Practice*, Ch. 193, *Discovery: Depositions*, § 193.263 (Matthew Bender).

8.15[3][b] Declaration Showing Attempt at Informal Resolution Is Required. A motion to overrule an objection based on privilege or work-product protection must be accompanied by a declaration stating facts constituting a reasonable and good-faith attempt at an informal resolution of each issue presented by the objection and motion [*CCP § 2028.050(b)*].

8.15[4] Unless Overruled, Deposition Officer Cannot Propound Question. Unless the court has overruled written and served objections on the grounds of privilege or work-product protection, the deposition officer cannot

propound to the deponent any questions subject to such objections [*CCP* § 2028.050(b)].

8.15[5] Sanctions Against Losing Party Are Generally Mandatory. The court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to overrule an objection, unless the court finds that [*CCP* § 2028.050(c)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMisconductCivil
ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork
ProductWaivers



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8.16 Motion for Protective Order.

8.16[1] Orders Available in Oral Depositions Apply to Depositions on Written Questions. The statutory provisions governing protective orders in oral depositions likewise apply to depositions on written questions [*CCP* § 2028.070; *see CCP* § 2025.420]. These provisions include [*CCP* § 2025.420]:

- Persons entitled to move for protective orders;
- Grounds for protective orders;
- Relief available in protective orders;
- Requirements for the motion;
- Sanctions.



Cross Reference:

Discussion/forms, *see Ch. 6, Oral Depositions in California*, 6.28, 6.72, 6.73.

8.16[2] Orders Specifically Available for Depositions on Written Questions. In addition to ordering any of the relief generally available on motion for a protective order [*see CCP* § 2025.420], the court may order any of the following [*CCP* § 2028.070]:

- That the deponent's testimony be taken by oral, instead of written, examination;
- That one or more of the parties receiving notice of the written deposition be permitted to attend in person or by attorney and to propound questions to the deponent by oral examination;
- That objections under *CCP* §§ 2028.040 and 2028.050 be sustained or overruled;

- That the deposition be taken before an officer other than the one named or described in the deposition notice.



Cross References:

Discussion of relief generally available and adaptable forms, see *Ch. 6, Oral Depositions in California*, 6.28[3], 6.72, 6.73.

Forms, see *California Forms of Pleading and Practice*, Ch. 193, *Discovery: Depositions*, § 193.265 (*Matthew Bender*) (clauses for use in notice of motion).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders



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8.17 Notice of Taking Deposition by Written Questions.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NOTICE OF TAKING DEPOSITION
vs.	)	OF _____ [name]
_____ [name],	)	BY WRITTEN QUESTIONS
Defendant.	)	
	)	
	)	

To _____ [list all parties or attorneys for parties]:

PLEASE TAKE NOTICE that _____ [party, e.g., Defendant Mary Jones] will take a deposition, by the attached written questions, of _____ [identify deponent]. The deposition will be taken before _____ [identify deposition officer by name or descriptive title and address]. The deposition will commence _____ [at a date, time, and place to be determined by the deposition officer or specify date, time, and place]. If the deposition is not completed on the date on which it is commenced, the taking of the deposition will be continued from day to day thereafter, except for Sundays and holidays, at the same place, until completed.

[ADD, if deponent is not a natural person]

NOTICE IS FURTHER GIVEN that the matters on which examination is requested, described more fully in the attached written questions, are _____[*specify matters with reasonable particularity*].
 _____[*Name of deponent organization*] must designate and produce at the deposition one or more of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to the above-described matters to the extent of any information known or reasonably available to the deponent. It is hereby requested that _____[*name of deponent organization*] provide prompt notification in writing to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.

[*ADD, if deponent is to produce documents or other tangible things*]

NOTICE IS FURTHER GIVEN that _____[*name of deponent*] shall bring and produce at the deposition, at the time and place _____[*to be determined by the deposition officer or specified in this notice*], _____[*specify with reasonably particularity any materials or category of materials to be produced*].

[*ADD, if noticing party intends to record deposition by audio or video recording*]

NOTICE IS FURTHER GIVEN that _____[*noticing party, e.g., Defendant Mary Jones*] intends to have the testimony at the deposition recorded by _____[*specify recording method, e.g., video*], in addition to being recorded by stenographic method.

[*ADD, if deponent is a treating or consulting physician or expert witness, and noticing party intends to reserve the right to use the video recording of deposition at trial*]

NOTICE IS FURTHER GIVEN that _____[*noticing party, e.g., Defendant Mary Jones*] reserves the right to use the video recording of the deposition at trial under *Code of Civil Procedure Section 2025.620(d)*.

[*CONTINUE*]

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2028.020

Giving Notice of Deposition by Written Questions:

See 8.07

Related Form of Questions to Be Attached to Notice:

See *8.18*



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8.18 Written Questions to Be Propounded at Deposition by Written Questions.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	_____ [DIRECT or CROSS or RE-
_____ [name],	)	DIRECT or RECROSS] QUESTIONS TO BE PRO-
Defendant.	)	POUNDED TO _____ [name] AT
	)	DEPOSITION BY WRITTEN QUESTIONS
	)	

To _____ [list all parties or attorneys for parties]:

The following are _____ [direct or cross or redirect or recross] questions to be propounded on behalf of _____ [propounding party, e.g., Defendant Mary Jones] to _____ [identify deponent by name and party status, if any, and address], at a deposition by written questions to be conducted by _____ [identify deposition officer by name or descriptive title and address].

1. _____ [Set forth question to be answered].

2. _____ [Continue setting forth further questions].

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP §§ 2028.020, 2028.030

Service of Cross, Redirect, and Recross Questions:

See 8.08

Related Form of Notice of Deposition:

See 8.17



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Chapter 8 Depositions on Written Questions
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8.19 Objections to Written Questions.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	OBJECTIONS TO _____ [DIRECT
_____ [name],	)	or CROSS or REDIRECT or RECROSS] QUES-
Defendant.	)	TIONS SERVED BY _____ [identi-
	)	fy party who served questions] TO BE PRO-
	)	POUNDED TO _____ [name] AT
		DEPOSITION BY WRITTEN QUESTIONS

To _____ [list all parties or attorneys for parties]:

[EITHER, if objection is to form of question]

NOTICE IS HEREBY GIVEN that _____ [objecting party, e.g., Plaintiff John Smith] objects to the form of the following _____ [direct or cross or redirect or recross] questions served by _____ [identify party who served questions] on _____ [date], [and attached hereto,] on the grounds set forth below:

1. _____ [Direct or Cross or Redirect or Recross] Question No. _____ is objected

to on the ground that _____ [specify ground for objection as to form, e.g., the question is a "legal contention" question that is improper in a deposition].

2. _____ [Continue with additional objections].

[AND/OR, if objection is based on privilege or work product]

NOTICE IS _____ [HEREBY or FURTHER] GIVEN that _____ [objecting party, e.g., Plaintiff John Smith] objects to the following _____ [direct or cross or redirect or recross] questions served by _____ [identify party who served questions] on _____ [date], [and attached hereto,] on the ground(s) of _____ [privilege and/or work product], set forth below:

1. _____ [Direct or Cross or Redirect or Recross] Question No. _____ is objected to on the ground that it call for information that is _____ [privileged or subject to work product protection], in that _____ [specify].

2. _____ [Continue with additional objections based on privilege or work product].

[CONTINUE]

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP §§ 2028.040, 2028.050

Objections as to Form:

See 8.14

Objections Based on Privilege or Work Product:

See 8.15



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Chapter 9 Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.syn

§ 9.syn Synopsis to Chapter 9: Interrogatories

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9.21[1][e] Agreement Must Be Retained for Six Months After Trial.

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9.26[3][a] Declaration Must Evidence Adequate Attempt at Informal Resolution.

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9.28 CHECKLIST: Postjudgment Use of Interrogatories by Judgment Creditor.

9.29 Parties Other Than Responding Party May Use Answer Against Responding Party at Trial.

9.29[1] Propounding Party May Use Answer Against Responding Party at Trial.

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9.30[1] Responding Party May Serve Amended Answers Containing Later-Acquired, Inadvertently Omitted, or Corrected Information.

9.30[2] Court Will Order Initial Answers Deemed Binding If Substantial Justification Not Shown, and If Prejudice Is Not Otherwise Curable.

9.30[2][a] Propounding Party May File Motion that Initial Answers Be Deemed Binding.

9.30[2][b] Motion Must Include Declaration of Good-Faith Attempt at Informal Resolution.

9.30[2][c] Court Must Grant Motion in Absence of Substantial Justification, and If Prejudice to Propounding Party Not Otherwise Curable.

9.30[2][d] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanction in Absence of Substantial Justification.

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9.43 Separate Statement Supporting Motion for Order Compelling Further Responses to Interrogatories.

9.44 Order on Motion Compelling Further Response to Interrogatories.



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Chapter 9 Interrogatories
I. STRATEGY

1-9 MB Practice Guide: CA Civil Discovery 9.01

9.01 Scope.

This chapter covers:

- Objectives and strategy for interrogatories [see 9.02, 9.04].
- Subject matter and number of interrogatories that may be propounded [see 9.05, 9.06].
- Making [see 9.04 -9.12; Forms: see 9.33 -9.36] and responding to [see 9.13 -9.23; Forms: see 9.37 -9.39] interrogatories, including seeking protective orders [see 9.19; Forms: see 9.38, 9.39].
- Amendment of answers to interrogatories [see 9.22].
- Motions to compel responses to interrogatories [see 9.24, 9.25; Forms: See 9.40, 9.41].
- Motions to compel further responses to interrogatories [see 9.24, 9.26; Forms: See 9.42 -9.44].
- Use of interrogatories at trial and in summary judgment motions [see 9.27, 9.29 -9.31].
- Use of interrogatories to help enforce money judgment [see 9.28, 9.32].

Core Statutes:

CCP §§ 2030.010-2030.410

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview



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Chapter 9 Interrogatories
I. STRATEGY

1-9 MB Practice Guide: CA Civil Discovery 9.02

9.02 Objective and Strategy.

Interrogatories are tools to obtain relevant information that may lead to other admissible evidence. They may be used in conjunction with other forms of discovery to obtain initial information on which to base additional requests for discovery, e.g., to later request production of documents mentioned in the answers; and to augment already known facts, e.g., facts obtained by deposition.

In addition to providing information on which to build a case or defense, interrogatory answers can serve an evidentiary function. During trial the answers may be used against the responding party for any relevant purpose, such as impeachment of a witness [*see CCP § 2030.410*; *see, e.g., Evid Code § 1235* (prior inconsistent statement)]. Although answers may be amended, and the amended answer may be used at trial if the initial answer is used, the propounding party can move for an order that the initial answers be deemed binding in some circumstances [*see CCP § 2030.310*].



Warning--Unlike in Federal Cases There Is No Requirement to Supplement Responses:

California law does not provide the equivalent to the federal requirement to update discovery responses.

Judge's Perspective:

Interrogatories are frequently the first discovery device employed by counsel for either side. When used strategically and surgically they are a cheap and effective method of not only gathering information but also determining the timing and use of other discovery devices. However, frequently interrogatories are misused, misdirected and improperly responded to which, in turn, leads to endless and fruitless discovery battles. In today's litigation climate, counsel should seriously reduce the number of interrogatories used and see if a series of short depositions might suffice for the situation. Additionally, the responding party generally waits until the last minute to respond thereby forcing the use of objections as a means and method of either buying more time in which to provide an answer or alternatively increase the cost and time necessary to complete the discovery process. Many courts are becoming increasingly impatient with boilerplate discovery objections and will be quick to issue compelling orders.



Strategic Points:

- Interrogatories are a very effective way of obtaining basic information prior to taking depositions. The form interrogatories, for example, in an auto v. auto case will provide initial information concerning how the incident occurred. However, you should consider a few, well directed, simple specially prepared interrogatories to obtain more targeted information. Consider a deposition **PRIOR** to filing motions to compel if you are unhappy with the responses. A deposition, in the end, is a far more effective, less expensive than a motion to compel alternative.

- Interrogatories that seek contentions and the facts, witnesses, and documents that support those contentions can provide useful information, particularly when used as a follow-up to requests for admissions. But interrogatories often do little more than test the opposing lawyer's ability to craft objections and answers that are just good enough to avoid a motion to compel, but which also avoid providing any answer that could ever be used against the responding party at trial. The ability of a responding party under *CCP* § 2030.310 to amend an answer without leave of court further weakens the usefulness of interrogatories as a discovery tool.

Cross References:

Forms of interrogatories addressing specific substantive topics, see Bender's Forms of Discovery, Vols. 1 through 10A.

Discussion on interrogatories in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

Interrogatories in federal cases, see Moore's Federal Practice, Ch. 33, Interrogatories to Parties (Matthew Bender 3d ed.); or

11 Bender's Forms of Discovery Treatise, Ch. 3, Interrogatories to Parties--Federal Rules of Civil Procedure (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview



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Chapter 9 Interrogatories
II. PROPOUNDING INTERROGATORIES

1-9 MB Practice Guide: CA Civil Discovery 9.03

9.03 CHECKLIST: Propounding Interrogatories.



Determine timing:

☐ Plaintiff: propound interrogatories beginning 10 days after whichever event occurs

later:

☐ Service of summons on the responding party.

☐ Appearance in the action by the responding party.

Exceptions:

In unlawful detainer actions and other summary proceedings involving possession of real property, plaintiff may propound interrogatories beginning *five* days after the later of the two events set forth above.

Before lapse of 10-day period on motion to propound interrogatories early.

Authority:

CCP § 2030.020

Discussion:

See 9.07[2], [3]

☐ Defendant: propound interrogatories at any time.

Authority:

CCP § 2030.020

Discussion:

See 9.07[1]

- ☐ Determine whether any local court delay reduction rules apply regarding the timing of interrogatories.

Authority:

Cal Rules Ct, Rule 3.20(b)(4) (local rules adopted under the Trial Court Delay Reduction Act not preempted); see, e.g., Humboldt Super Ct Rules, Rule 5.4

Discussion:

See 9.07[4]

- ☐ Determine which parties to question by interrogatories.
- ☐ Determine whether depositions or other methods of discovery would be more appropriate or useful.
- ☐ Determine sequence of different methods of discovery requests that would best achieve your objectives.

Authority:

CCP § 2019.010 et seq.

Discussion:

See 9.04

- ☐ Determine how many interrogatories you may and need to propound.

- ☐ In unlimited civil case:

- ☐ Use Judicial Council Form Interrogatories; and

- ☐ Make up to 35 specially prepared interrogatories.

- ☐ If more than 35 specially prepared interrogatories are needed, prepare Declaration for Additional Discovery to serve with requests.

Restriction: An excessive number of interrogatories may be reduced by protective order on motion by responding party.

Authority:

CCP §§ 2030.030-2030.060

Discussion:

See 9.06

Forms:

See 9.33 (Judicial Council Form Interrogatories), 9.35 (sample specially prepared interrogatories), 9.36 (declaration for additional discovery)

☐ In limited civil case:

☐ Evaluate desired interrogatories in light of restriction to total of 35 of all of the following:

☐ Interrogatories.

☐ Requests for admissions.

☐ Demands to produce documents or things under *CCP § 2031.010 et seq.*

Authority:

CCP §§ 91, 94

Discussion:

See 9.06[4]

Forms:

See 9.34 (Judicial Council Form Interrogatories for Economic Litigation), 9.35 (sample specially prepared interrogatories)

☐ Fill out Judicial Council Form Interrogatories.

☐ If needed, draft specially prepared interrogatories.

☐ Check format:

☐ In the first paragraph immediately below the title of the case, list the identity of the propounding party, the set number, and the identity of the responding party.

☐ List each interrogatory separately.

☐ Identify each interrogatory by number or letter.

☐ Compose each interrogatory so that it is complete internally.

☐ Do not use any preface or instruction unless approved by Judicial Council.

☐ Do not include any subparts, or any compound, conjunctive, or disjunctive questions.

☐ Capitalize any specially defined term.

☐ For multiple sets of interrogatories, number each set consecutively.

Authority:

CCP § 2030.060

Discussion:

See 9.08

Forms:

See 9.33 (Judicial Council Form Interrogatories), 9.34 (Judicial Council Form Interrogatories for economic litigation), 9.35 (sample specially prepared interrogatories)

☐ Serve interrogatories.

☐ Serve a copy on the party to whom they are directed.

☐ Serve a copy on all other parties who have appeared in the action.

Exception:

If serving all other parties would be unduly expensive or burdensome, file a motion for relief from this requirement.

Authority:

CCP § 2030.080

Discussion:

See 9.09

☐ Do not file interrogatories with court.

Authority:

CCP § 2030.280(a)

Discussion:

See 9.11

☐ Calendar to receive responses in 30 days, or longer time if so ordered on responding party's motion.

Exception:

Five days for unlawful detainer actions.

☐ If necessary, file and serve supplemental interrogatories to obtain later-acquired information relating to previous answers.

☐ In each set of supplemental interrogatories, include the following in the first paragraph immediately below the title of the case:

- ☐ Identity of propounding party;
- ☐ Identity of responding party;
- ☐ Set number being propounded; and
- ☐ Nature of the paper.

Restrictions:

Supplemental interrogatories are allowed only twice prior to the initial setting of a trial date, and once afterward, except as ordered on motion with good cause shown.

Authority:

Cal Rules Ct, Rule 3.1000(a)

Discussion:

See 9.10

☐ Retain the following documents in your files until six months after final disposition of the action:

- ☐ The original interrogatories.
- ☐ The original proof of service, affixed to the interrogatories.
- ☐ When received, the original of the sworn response.

Authority:

CCP § 2030.280(b)

Discussion:

See 9.12

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsInterrogatoriesForm



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Chapter 9 Interrogatories
II. PROPOUNDING INTERROGATORIES

1-9 MB Practice Guide: CA Civil Discovery 9.04

9.04 Options and Strategies for Propounding Party.

9.04[1] Determining Whether Interrogatories Would Be Appropriate.

9.04[1][a] Interrogatories Are Useful Initially to Gain Specific Types of Information. A party's first set of interrogatories is useful to obtain, among others, the following types of information:

- Identifying information about the responding party.
- General background information about the responding party.
- Insurance information about the responding party.
- Medical care given to the responding party relevant to the case.
- The existence of any related prior claims by the responding party.
- Information about the identity of witnesses.
- Information about the location of documents.
- Follow-up information concerning prior responses to requests for admissions.
- Complete descriptions of any relevant incidents, e.g., a traffic accident.

➡ **Cross Reference:**

California Judicial Council Form DISC-001 (General Form), see 9.33.

9.04[1][b] Interrogatories Are Useful to Augment Information Already Obtained. Interrogatories are useful to ask further questions about a matter after receiving some information that raises more questions. For example,

interrogatories may be propounded concerning matters provided in answers to requests for admissions. Similarly, further sets of interrogatories may be obtainable after responses to a first set are received.



Strategic Point--Propounding Party:

Make sure when you send a set of requests for admission, you include a Form Interrogatory 17.0 request [see California Judicial Council Form DISC-001]. Otherwise, you will wind up with denials, but no way to have the party explain the basis for the denial. Interrogatory No. 17.0 asks that the responding party to further elaborate on responses to requests for admission that are "not an unqualified admission."

Consider timing the service of interrogatories, or a subsequent set of interrogatories, with the request for admissions or subsequent to the receipt of responses for requests for admission [see, e.g., *Hagen v. Hickenbottom* (1995) 41 CA4th 168, 184-185, 48 CR2d 197, citing *Union Bank v. Superior Court* (1995) 31 CA4th 573, 578-579, 37 CR2d 653] .

Judge's Perspective:

The use of interrogatories coupled with requests for admissions can be extremely effective and does not necessarily need to be done in conjunction with form interrogatories. Counsel is encouraged to be creative and innovative when formulating requests for admissions that are to be followed up with a small specially crafted set of interrogatories. Limiting the number of requests for admissions to less than five with an equally limited number of interrogatories conveys to the court that the information sought is not only important and relevant but also done with thought and care and not just something done to harass the other side. In this manner, the chances of prevailing if a motion to compel becomes necessary are greatly enhanced. Moreover, the motion to compel is much easier and less time consuming to prepare.



Cross References:

Discussion of limitations on number of interrogatories, see 9.06.

Requests for admissions, see Ch. 12, Requests for Admissions.

9.04[2] Determining Whether Interrogatories Are Best Method of Discovery.

9.04[2][a] Interrogatories May Be Propounded Only to Another Party. Interrogatories may be propounded only to another party [see CCP § 2030.010(a)]. Depositions, by contrast, may be taken of any party or other witness [see CCP § 2025.010].



Cross Reference:

Depositions, see Ch. 6, Oral Depositions in California.

9.04[2][b] Interrogatories Allow Time for Responding Party to Investigate and Give Complete Answer, While Depositions Are Preferable for Narratives of Events. Generally interrogatories are better discovery devices than depositions when it is predictable that some amount of investigation is necessary before a complete answer can be provided. Even in a corporate designee deposition where the answer of the deponent is binding on the party, it is difficult to obtain any binding effect if it is obvious that some investigation would be necessary to provide a complete answer. In contrast, interrogatories provide an opportunity for investigation of all sources available to the party and its counsel.

Conversely, depositions are better discovery devices than interrogatories when, for example, the subject of discovery involves a detailed description of a disputed conversation [see Powers, "A Guide to Interrogatories in California Practice" (1975) 48 S Cal L Rev 1221, 1277 ("this is especially true where there are several witnesses to an event or

conversation whose recollections vary"]).

9.04[2][c] Interrogatories, Unlike Deposition Questions, May Inquire About Party's Contention.

Interrogatories may ask about a party's contentions. By contrast, deposition questions may not. If a party wishes to discover information concerning another party's contention, it must do so through interrogatories [see *CCP* § 2030.010(b); *Rifkind v. Superior Court* (1994) 22 CA4th 1255, 1261, 27 CR2d 822] .



Strategic Point:

Contention interrogatories are a very important tool. You can not ask a party/witness questions in a deposition that call for a legal conclusion. However, interrogatories specifically allow the requesting party to require a response to a legal conclusion. For example: Do you contend that you were not negligent for the subject incident? You can follow this up with "if your answer to interrogatory # X was anything other than an unqualified 'yes' state all facts upon which you base your answer." This is a very powerful discovery tool and when properly used can help narrow and frame the legal dispute.

Example:

In a case involving a fee dispute between two attorneys, the plaintiff deposed the defendant, who was then represented by counsel. The plaintiff asked "legal contention" questions, calling on defendant to state all facts support defendant's affirmative defenses, list all witnesses with knowledge of supporting facts, and identify any documents pertaining to the facts or witnesses. In overturning the trial court's order compelling responses, the appellate court stated that the problem with legal contention questions is not whether the information is discoverable. The information is clearly discoverable if sought by written interrogatory under *CCP* § 2030.010(b). The basic vice of legal contention questions at a deposition is that they are unfair. They call on the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory [*Rifkind v. Superior Court* (1994) 22 CA4th 1255, 1262, 27 CR2d 822] .



Cross References:

Discussion of contention interrogatories, see 9.05[2].

Depositions, see Ch. 6, Oral Depositions in California.

9.04[3] Determining Which Parties to Question. Generally, a party may propound interrogatories to other parties to the action [see *CCP* § 2030.010(a)].

Exception:

A party may not serve interrogatories on a member of a class who is not a party representative or who has not appeared, without a court order [*Cal Rules Ct, Rule 3.768(c)*].



Strategic Point:

In multi-party cases, the selection of the parties to whom interrogatories are directed is part of an overall strategic issue as to the strength of the respective parties' positions and the parties with which it is desirable to align your interests and which it is desirable to press for concessions. Defendants with indemnity rights against other parties often must choose between defending against the plaintiff's claims

or proving their indemnity claim in other words, choosing between arguing that the plaintiff's claim is invalid or arguing that the other party is ultimately responsible for satisfying plaintiff's claim.

 Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.1 (Matthew Bender 6th ed.).

9.04[4] Determining Sequence of Interrogatories with Respect to Other Methods of Discovery. Absent Judicial Council or local court rule or local uniform written policy to the contrary, the methods of discovery may be used in any sequence. The fact that a party is conducting discovery, whether by deposition or another method, does not delay the discovery of any other party [CCP § 2019.020(a)].

Exception:

On motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice [CCP § 2019.020(b)].

Although the Judicial Council has generally preempted local court rules relating to discovery [*Cal Rules Ct, Rule 3.20(a)*], preemption does not apply to local court rules adopted under the Trial Court Delay Reduction Act [*Cal Rules Ct, Rule 3.20(b)(4)*].

Example--Local Delay Reduction Rule Governing Sequence of Discovery:

Under the Humboldt County Superior Court delay reduction program, special rules facilitate discovery in personal injury and/or wrongful death cases. Each plaintiff must, when the complaint is filed, or within 10 days thereafter, file with the court and promptly serve on all defendants, written answers to a standard list of interrogatories that are available from the county clerk's office to give information about the plaintiff, the incident, and damages. The plaintiff must sign the answers under penalty of perjury. Along with the answers plaintiff serves on each defendant, the plaintiff must serve interrogatories, also available from the county clerk, that the defendant is to answer to give information about the defendant, the incident, and any defenses claimed. Each defendant must file and serve answers to those interrogatories along with their answer to the complaint, or within 10 days thereafter. The defendant must sign the answers under penalty of perjury [Humboldt Super Ct Rules, Rule 5.4].

 Cross Reference:

General timing of discovery, see Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesUse



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9.05 Subject Matter of Interrogatories.

9.05[1] Parties May Discover Permissible Relevant Matter Not Privileged. Any party may obtain discovery by propounding to any other party to the action written interrogatories to be answered under oath [CCP § 2030.010(a); see also CCP §§ 2017.010 et seq., 2019.010 et seq. (discovery scope and restrictions)].

Unless otherwise limited by court order, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence [CCP § 2017.010].

➤ Cross References:

Discussion of restrictions under CCP § 2019.010 et seq., see *Ch. 1, Strategy and Planning, 1.16*.

Discussion of the scope of discovery under CCP § 2017.010 et seq., see *Ch. 2, Scope of Discovery, 2.03-2.08*.

9.05[2] Interrogatory May Relate to Party's Contention. An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial [CCP § 2030.010(b); see *Rifkind v. Superior Court (1994) 22 CA4th 1255, 1261*].

"Liberal use of interrogatories for the purpose of clarifying and narrowing the issues made by the pleadings should be permitted and encouraged by the courts" [*Burke v. Superior Court (1969) 71 C2d 276, 281, 78 CR 481, 455 P2d 409* (quoting Moore's Federal Practice (2nd ed.) para. 33.17, pp. 2311-2312)]. This observation is even more pertinent in California because California, unlike the federal system, does not provide for a motion for more definite statement [*Burke v. Superior Court (1969) 71 C2d 276, 281, 78 CR 481, 455 P2d 409* (overturning denial of motion to compel further responses)].

Legal contention questions require the party interrogated to make a law-to-fact application that is beyond the competence of most lay persons. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied on for each of its contentions [*Rifkind v. Superior Court* (1994) 22 CA4th 1255, 1262].



Timing:

Consider the most appropriate time to propound contention interrogatories. They may be most effective after substantial discovery has been completed. One federal judge would apply a rebuttable presumption against using contention interrogatories early in the case. The presumption could be overcome by clearly showing that answers would substantially contribute to one or more of: "a) clarifying issues in the case; b) narrowing the scope of the dispute; c) improving prospect for settlement; or d) providing a real basis for motions that would remove a party from the case or dispose of significant parts of the litigation" [see *McCaugherty v. Siffermann* (ND Cal 1990) 132 FRD 234, 249] .

On the other hand, the same judge has recognized that in some cases contention interrogatories at the end of the discovery process may be the most cost-effective discovery device [see *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.* (ND Cal 1991) 134 FRD 275, 287 (appropriate in patent infringement action); see also *Cable & Computer Tech. v. Lockheed Sanders, Inc.* (CD Cal 1997) 175 FRD 646, 652 (treating contention interrogatories same as any other)].



Cross References:

Interrogatories relating to a party's contentions, contrasted to deposition questions, see 9.04[2][c].

Hogan & Weber, California Civil Discovery, Ch. 5, Interrogatories to a Party (Matthew Bender 6th ed.).



Warning--Interrogatory Relating to Contention May Invoke Work Product Protection:

One court, without reaching the issue, has mentioned that some interrogatories relating to contentions may raise the question of the proper borderline between attorney work product protection and allowable contention interrogatories. In that case, the plaintiff, after having been deposed for eight days, posed interrogatories to the defendant such as the following: "For each of [plaintiff's] answers to any questions asked of her in any volumes of her deposition taken on or before [date], which you contend [plaintiff] answered untruthfully, identify all persons with knowledge of any of the facts which support or controvert your contention" [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1162, 54 CR2d 280 (finding interrogatories improper on other grounds); see also CCP § 2018.030(a) (work product protection)].



Cross References:

Work product protection, see Ch. 2, *Scope of Discovery*, 2.25-2.33.

Interrogatories relating to contentions, see Hogan & Weber, California Civil Discovery, § 5.8 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.06 Number of Interrogatories Is Regulated.

9.06[1] Number Is Different for Unlimited and Limited Civil Cases. Cases in California trial courts are classified as unlimited or limited civil cases. Limited civil cases, generally, involve disputes in which the amount or value of property in controversy is \$25,000 or less. In addition, certain types of relief, such as a permanent injunction, are not available in limited civil cases unless otherwise authorized by statute [see *CCP* §§ 85-86.1, 580(b)]. All other cases are unlimited civil cases [see *CCP* § 88].

Most limited civil cases are subject to the economic litigation rules in *CCP* §§ 90-100. These rules include restrictions on the number of discovery requests [see *CCP* §§ 94, 95].

➡ Cross Reference:

Detailed discussion of what constitutes a limited civil case, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

9.06[2] Unlimited Civil Cases.

9.06[2][a] Party May Propound 35 Specially Prepared Interrogatories Plus Official Form Interrogatories to Another Party. A party may propound to another party 35 specially prepared interrogatories and any additional number of official form interrogatories [see *CCP* §§ 2033.710-2033.740] that are relevant to the subject matter of the pending action [*CCP* § 2030.030; see *Fairmont Ins. Co. v. Superior Court* (2000) 22 C4th 245, 254, 92 CR2d 70, 991 P2d 156]. This rule has been termed the "rule of 35" [see, e.g., *Catanese v. Superior Court* (1996) 46 CA4th 1159, 1165, 54 CR2d 280].

9.06[2][b] 35 Specially Prepared Interrogatories Includes All Sets. As a general rule, the litigant seeking discovery may propound no more than 35 specially prepared interrogatories on each party. If an initial set of interrogatories does not exhaust the 35-interrogatory limit, the balance may be propounded in subsequent sets [*CCP* § 2030.030(b); but see *CCP* § 2030.070 (exception permitting additional or supplemental interrogatories)].

9.06[2][c] Party May Not Pose More Than 35 Separate Questions Within 35 or Fewer Specially Prepared Interrogatories. A party violates the "rule of 35" by posing 35 or fewer interrogatories that require more than 35

answers [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1162-1163, 54 CR2d 280]. This practice also violates the rule that no specially prepared interrogatory may contain subparts, or a compound, conjunctive, or disjunctive question [CCP § 2030.060(f)].

Example:

After plaintiff was deposed for eight days, she propounded fewer than 35 specially prepared interrogatories to the defendant, such as the following:

"11. For each of [plaintiff's] answers to any questions asked of her in any volumes of her deposition taken on or before [date], which you contend [plaintiff] answered untruthfully, identify all facts which support your contention.

"12. For each of [plaintiff's] answers to any questions asked of her in any volumes of her deposition taken on or before [date], which you contend [plaintiff] answered untruthfully, identify all documents [as defined in *Evid Code* § 250] which support or controvert your contention."

The court stated that assuming an average of 300 questions and answers per volume of deposition, multiplied by the 8 days of deposition, and multiplied again by the 5 interrogatories that inquired about each deposition question and answer, plaintiff's interrogatories effectively posed upwards of 10,000 separate questions. The interrogatories violated the rule allowing only 35 specially prepared interrogatories in that the plaintiff filed no supporting declaration under CCP § 2030.050 [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1161-1165, 54 CR2d 280 (overturning order granting motion to compel further answers)].



Cross Reference:

Rule that interrogatory may not contain subparts, or a compound, conjunctive, or disjunctive question, see 9.08[4].

9.06[2][d] Declaration for Additional Discovery Is Required to Exceed 35 Specially Prepared

Interrogatories. Subject to the responding party's right to seek a protective order, any party who attaches a supporting declaration may propound a greater number of specially prepared interrogatories to another party if this greater number is warranted because of any of the following [CCP § 2030.040(a); see also CCP §§ 2030.050 (requirements for supporting declaration), 2030.090 (protective orders)]:

- The complexity or the quantity of the existing and potential issues in the particular case.
- The financial burden on a party entailed in conducting the discovery by oral deposition.
- The expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.



Strategic Point:

When preparing a declaration for additional discovery, do not rely on a pro forma statement of necessity to carry the day. The judge will be more likely to uphold a necessity for more than 35 interrogatories if there is a specific statement and supporting facts showing the necessity or expediency of interrogatories in the particular case.

Unless a declaration for additional discovery has been made and attached to the interrogatories, a party need only

respond to the first 35 specially prepared interrogatories served, if that party states an objection to the balance on the ground that the limit has been exceeded [*CCP* §§ 2030.030(c), 2030.050; *see also* *CCP* § 2030.240 (objection)].

9.06[2][e] Request to Propound More Than 35 Specially Prepared Interrogatories Is Subject to Protective Order. The propounding party's ability to propound more than 35 specially prepared interrogatories is subject to the responding party's right to seek a protective order [*CCP* § 2030.040; *see* *CCP* § 2030.090 (protective orders)].



Strategic Point:

CCP § 2030.040 appears to require a motion for a protective order to challenge the adequacy of a declaration for additional discovery served with more than 35 interrogatories, rather than allowing objection and later review on motion to compel. However, if the propounding party poses more than 35 questions but numbers them 35 or fewer (e.g., by including complex questions or compound questions with subparts) and fails to file the necessary declaration for additional discovery, an objection on the ground of improperly compound and complex interrogatories under *CCP* § 2030.060, instead of a motion for protective order, may well preserve the responding party's right to protect himself or herself against violations of the "rule of 35" under *CCP* § 2030.030 and the rule against compound questions under *CCP* § 2030.060(f) [*see* *Catanese v. Superior Court* (1996) 46 CA4th 1159, 1166, 54 CR2d 28].



Cross Reference:

Protective orders, *see* 9.19.

9.06[2][f] Propounding Party Has Burden of Justifying Number of Interrogatories If Protective Order Sought. If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party has the burden of justifying the number of these interrogatories [*CCP* § 2030.040(b)].



Cross Reference:

Protective orders, *see* 9.19.

9.06[2][g] Declaration for Additional Discovery Is Not Filed Unless Offered to Determine Issue in Motion Proceeding or Other Hearing. A declaration for additional discovery may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or is ordered filed for good cause [*Cal Rules Ct*, Rule 3.250(a)(17)].



Strategic Point--Stipulation to Allow Greater Number of Interrogatories:

Consider attempting to obtain a stipulation between the parties to allow a greater number of interrogatories [*see Cal Rules Ct*, Rule 3.250(a)(18) (stipulation to enlarge number of discovery requests not filed unless offered as relevant to determination of an issue in law and motion proceeding or other hearing, or ordered filed for good cause)].

9.06[3] Limited Civil Cases.

9.06[3][a] Number of Discovery Demands Is Restricted in Limited Civil Cases. In limited civil cases, a party is limited to any combination of 35 of the following forms of discovery [*CCP* §§ 91, 94(a)]:

- Interrogatories under *CCP* § 2030.010 *et seq.*;

- Demands to produce documents or things under *CCP § 2031.010 et seq.* [see Ch. 10, Inspection of Documents, Tangible Things, and Land]; and
- Requests for admission (with no subparts) under *CCP § 2033.010 et seq.* [see Ch. 12, Requests for Admission].

A party may be relieved of these strict limits on noticed motion [see 9.06[3][b]].

Exception:

These limitations do not apply to small claims or unlawful detainer cases [*CCP § 91(a), (b)*].

9.06[3][b] Party May Move to Withdraw Case From Restrictions. A party may make a noticed motion to withdraw a limited civil case from the restrictions on discovery on the ground that it is impractical to prosecute or defend the action within the limitations of the economic litigation rules of *CCP §§ 90-100* [*CCP § 91(c)*].

Distinguish:

Without withdrawing the case from the restrictions altogether, a party may seek additional discovery under *CCP § 95*, [see 9.06[3][c]].

Drawback:

Withdrawing the case from the economic litigation provisions will remove the restrictions on pleadings and discovery from all parties to the lawsuit. The moving party's needs and the potential for other parties to run up the moving party's costs must be evaluated to ensure that this will not ultimately work to the disadvantage of the moving party. It may be more useful to move for additional discovery on a case-by-case basis under *CCP § 95*.

 Cross Reference:

Discussion/Form, see Ch. 1, Strategy and Planning.

9.06[3][c] Party May Move to Allow Additional Discovery. A party may seek leave to conduct further discovery by noticed motion on the grounds that the party will be unable to prosecute or defend the action effectively without the additional discovery [*CCP § 95*].

Distinguish:

Complete withdrawal from the economic litigation limitations under *CCP §§ 90-100* [see 9.06[3][b]].

 Cross Reference:

Discussion/Form, see Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.07 Timing of Interrogatories.

9.07[1] Defendant May Propound Interrogatories to Party at Any Time. A defendant may propound interrogatories to a party to the action without leave of court at any time [CCP § 2030.020(a)].

➤ **Cross Reference:**

Discussion of discovery cut-off dates, see *Ch. 1, Strategy and Planning, 1.17*.

9.07[2] Plaintiff May Propound Interrogatories to Party 10 Days After Summons Served or Party Makes Appearance, or Five Days for Unlawful Detainer Action.

9.07[2][a] Plaintiff May Propound Interrogatories to Party 10 Days After Summons Served or Party Makes Appearance. A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, or appearance by, that party, whichever occurs first [CCP § 2030.020(b)].

➤ **Cross References:**

Discovery cut-off dates, see *Ch. 1, Strategy and Planning, 1.17*.

Timing of interrogatories in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation, 5.23[2][a]*.

9.07[2][b] In Unlawful Detainer Action, Plaintiff May Propound Interrogatories to Party Five Days After Summons Served or Party Makes Appearance. In unlawful detainer actions and other summary proceedings involving possession of real property, a plaintiff may propound interrogatories to a party without leave of court at any time that is five days after service of the summons on or appearance by, that party, whichever occurs first [CCP § 2030.020(c)].

9.07[3] Court May Shorten Time on Motion. On motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to propound interrogatories at an earlier time [CCP § 2030.020(d); see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)].

 Cross Reference:

Timing of interrogatories, see Hogan & Weber, *California Civil Discovery*, § 5.2 (Matthew Bender 6th ed.).

9.07[4] Local Court Delay Reduction Rules May Require Different Procedure. Although local court rules relating to discovery are generally preempted [*Cal Rules Ct, Rule 3.20(a)*], the preemption does not apply to local court rules adopted under the Trial Court Delay Reduction Act [*Cal Rules Ct, Rule 3.20(b)(4)*]. Local delay reduction rules may provide for different procedure than that set forth in *CCP § 2030.010 et seq.*, especially for specific types of cases.

 Cross Reference:

Example based on Humboldt Super Ct Rules, Rule 5.4, see 9.04[4].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesForm



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9.08 Format of Interrogatories.

9.08[1] Interrogatories Must Be Numbered and Identify Parties. A party propounding interrogatories must number each set of interrogatories consecutively. The first paragraph immediately below the title of the case must specify the identity of the propounding party, the set number, and the identity of the responding party. Each interrogatory in a set must be separately set forth and identified by number or letter [CCP § 2030.060(a)-(c)].

9.08[2] Each Interrogatory Must Be Full and Complete.

9.08[2][a] Self-Containment Rule Requires Full and Complete Interrogatory, with No Instructions Unless Preapproved. Each interrogatory must be full and complete in and of itself. No preface or instruction may be included with a set of interrogatories unless it has been approved by the Judicial Council pursuant to CCP § 2033.710 *et seq.* [CCP § 2030.060(d)]. This rule has been termed the "self-containment rule" [see *Catanese v. Superior Court* (1996) 46 CA4th 1159, 1164, 54 CR2d 280].

9.08[2][b] Interrogatory May Not Refer to Other Materials to Complete Question. An interrogatory is not "full and complete in and of itself" when resort must necessarily be made to other materials in order to complete the question [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1164, 54 CR2d 280]. This rule is designed to prevent evasion of the statutory limit on the number of interrogatories that one party may propound to another [*Clement v. Alegre* (2009) 177 CA4th 1277, 1287-1288, 99 CR3d 791 (interrogatory that referred to response to prior interrogatory did not violate rule against referring to other materials)].

Exception:

A supplemental interrogatory seeking later-acquired information may refer to previously served interrogatories [see CCP § 2030.070].



Cross Reference:

Supplemental interrogatories, see 9.10[1].

9.08[3] Specially Defined Terms Must Be Capitalized. Any term specially defined in a set of interrogatories must be typed with all letters capitalized wherever that term appears [CCP § 2030.060(e)].

9.08[4] Specially Prepared Interrogatories May Not Contain Subparts nor Be Complex. A specially prepared interrogatory must not contain subparts, or a compound, conjunctive, or disjunctive question [CCP § 2030.060(f)].

Example:

In one case, after the plaintiff was deposed for eight days, she propounded fewer than 35 specially prepared interrogatories to the defendant without filing a supporting declaration for additional discovery pursuant to CCP § 2030.050. The interrogatories posed questions such as the following: "11. For each of [plaintiff's] answers to any questions asked of her in any volumes of her deposition taken on or before [date], which you contend [plaintiff] answered untruthfully, identify all facts which support your contention. [P]12. For each of [plaintiff's] answers to any questions asked of her in any volumes of her deposition taken on or before [date], which you contend [plaintiff] answered untruthfully, identify all documents [as defined in *Evid Code* § 250] which support or controvert your contention." After receiving these interrogatories, defendant objected on the ground, among others, that the interrogatories were "compound and complex" and "impermissibly overbroad and therefore oppressive and burdensome." In a proceeding for writ of mandate following the trial court's granting of plaintiff's motion to compel further answers, the appellate court stated that assuming an average of 300 questions and answers per volume of deposition, multiplied by the eight days of deposition, and multiplied again by the five interrogatories that inquired about each deposition question and answer, plaintiff's interrogatories effectively posed upwards of 10,000 separate questions [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1162-1164, 54 CR2d 280 (letting a peremptory writ of mandate issue directing the court to vacate its order granting plaintiff's motion to compel further answers to interrogatories, and issue a new and different order denying the motion)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.09 Service of Interrogatories.

9.09[1] Propounding Party Must Serve Interrogatories on Party to Whom They Are Directed. The party propounding interrogatories must serve a copy of them on the party to whom they are directed [*CCP* § 2030.080(a)].

9.09[2] Propounding Party Must Serve Interrogatories on All Parties Unless Court on Motion Finds It Too Burdensome or Expensive. The party propounding interrogatories must serve a copy of them on all other parties who have appeared in the action, unless the court on motion, with or without notice, has relieved that party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome [*CCP* § 2030.080(b); see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)].



Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.3 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.10 Propounding Supplementary Interrogatories.

9.10[1] Party May Propound Supplemental Interrogatories for Later-Acquired Information Concerning Previous Answers.

9.10[1][a] Party May Propound Supplemental Interrogatories Twice Prior to Setting of Trial Date.

Exceeding the usual 35-interrogatory per party limit, a party may propound a supplemental interrogatory to elicit any later-acquired information bearing on all answers previously made by any party in response to interrogatories twice prior to the initial setting of a trial date [*CCP* § 2030.070].

9.10[1][b] Party May Propound Supplemental Interrogatories Once After Setting of Trial Date. Exceeding the usual 35-interrogatory per party limit, a party may propound a supplemental interrogatory to elicit any later-acquired information bearing on all answers previously made by any party in response to interrogatories once after the initial setting of a trial date. This rule is subject to the usual time limits on discovery proceedings and motions [*CCP* § 2030.070; *see also CCP* §§ 2024.010-2024.060 (discovery cut-off)].

Example:

"Please review your response to each interrogatory previously served in this action. If any response is no longer correct and complete, identify the response and provide all information necessary to make your response correct and complete as of the date of your response to this supplemental interrogatory."



Strategic Point:

It is good practice to serve supplemental interrogatories near the close of discovery seeking the identity of witnesses not identified in previous interrogatory responses. A party cannot prevent a witness from testifying on the ground that the witness was not identified in interrogatory responses unless the propounding party can show that the responding party gave not just incomplete responses, but responses that were "willfully false." Near the close of discovery, it is more likely that the responding party will have actual knowledge of all persons who have knowledge of the facts. The propounding party should serve supplemental interrogatories sufficiently far in advance of the discovery cut-off to allow time to

notice the depositions of persons who are identified in the responses.



Cross Reference:

Discovery cut-off dates, see *Ch. 1, Strategy and Planning, 1.17*.

9.10[1][c] Party May Propound Additional Supplemental Interrogatories on Motion With Good Cause

Shown. On motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental interrogatories [*CCP § 2030.070(c)*; see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)].

9.10[1][d] Format of Supplemental Interrogatories: Identity of Parties, Set Number, Nature of Paper

Required. In each set of supplemental interrogatories, the following must appear in the first paragraph immediately below the title of the case [*Cal Rules Ct, Rule 3.1000(a)*]:

- The identity of the propounding party.
- The identity of the responding party.
- The set number being propounded.
- The nature of the paper.

9.10[2] Interrogatories May Not Require Later Supplement to Previously Correct Answer. An interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information [*CCP § 2030.060(g)*; see *Biles v. Exxon Mobil Corp. (2004) 124 CA4th 1315, 1328* (responding party has no duty to supplement interrogatory response upon receipt of new information); *R & B Auto Center, Inc. v. Farmers Group, Inc. (2006) 140 CA4th 327, 356-358, 44 CR3d 426* (court erred in excluding testimony of witnesses not identified in interrogatory responses because responding party had not yet discovered those witnesses when it responded to interrogatories)]. However, the responding party may amend the answer to provide later acquired information [*CCP § 2030.310*].

Distinguish:

- Although interrogatories cannot put the responding party under a duty to update the answers, the propounding party can propound supplemental interrogatories for that purpose [*CCP § 2030.070*].
- Under the Federal Rules of Civil Procedure, there is a continuing duty to supplement interrogatory answers with later-acquired information [*Fed R Civ P 26(e)(2)*].



Cross Reference:

Discussion of amended answers, see 9.22.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesForm



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Chapter 9 Interrogatories
II. PROPOUNDING INTERROGATORIES

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9.11 Original Interrogatories Are Not Filed With Court.

Interrogatories and the response to the interrogatories may not be filed with the court [*CCP* § 2030.280(a); *Cal Rules Ct*, Rule 3.250(a)(8)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview



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9.12 Propounding Party Must Retain Original Documents for Six Months After Trial.

The propounding party must retain the following documents until six months after final disposition of the action [*CCP § 2030.280(b)*; *Cal Rules Ct, Rule 3.250(b)*]:

- The original interrogatories, with the original proof of service affixed to them.
- The original of the sworn response.

Once the six months has elapsed, both originals may be destroyed, unless the court on motion of any party and for good cause shown orders that the originals be preserved for a longer period [*CCP § 2030.280(b)*; see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 9 Interrogatories
III. RESPONDING TO INTERROGATORIES

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9.13 CHECKLIST: Responding to Interrogatories.

- ☐ Determine whether you need more time for response.
 - ☐ Attempt to obtain a written agreement to extend time.
 - ☐ If agreement is reached, do not file the written agreement with the court.
 - ☐ Keep the agreement in your own file for possible later use at trial.

Authority:

CCP § 2030.270; Cal Rules Ct, Rule 3.250(a)(7)

Discussion:

See 9.14[1]

- ☐ If an agreement is not reached, consider bringing a motion for protective order to extend the time for response.
 - ☐ Retain all evidence of efforts to reach agreement as proof of good-faith attempt at informal resolution.
 - ☐ If a motion for protective order is appropriate, file and serve motion papers:
 - ☐ Follow standard noticed motion procedure.

Content Note:

Motion must include declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion.

Authority:

CCP § 2030.090

Discussion:

See 9.19

Forms:

See 9.38, 9.39

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

☐ Determine whether any interrogatories are unduly annoying, embarrassing, or oppressive, or burdensome and expensive.

☐ If so, attempt to reach informal resolution of the issues.

☐ If attempt is unsuccessful, bring a motion for protective order.

☐ Retain all evidence of efforts to reach agreement, as proof of good-faith attempt at informal resolution.

☐ File and serve motion papers:

☐ Follow standard noticed motion procedure.

Content Note:

Motion must include declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion.

Authority:

CCP § 2030.090

Discussion:

See 9.19

Forms:

See 9.38, 9.39

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

☐ Respond to the interrogatories.

☐ Determine appropriate responses to each interrogatory: answer, objection, or option to produce writings.

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☐ For answers:

☐ Draft each answer as completely as possible.

☐ State if the responding party does not have sufficient personal knowledge to answer completely; and make a reasonable, good-faith effort to obtain the information, unless it is equally available to the propounding party.

☐ If part of the interrogatory is objectionable, answer the part that is not objectionable.

☐ Follow any guidelines provided by local court rules.

☐ For objections:

☐ Specify the ground for the objection clearly.

☐ Specify any privilege asserted.

☐ Follow any guidelines set forth under local court rules.

☐ For option to produce writings:

☐ Refer to *CCP § 2030.230*.

☐ Specify the writings from which the answer may be derived or ascertained.

Authority:

CCP §§ 2030.210-2030.240

Discussion:

See 9.15

Form:

See 9.37

☐ Draft responses.

☐ Identify the responding party.

☐ Identify the propounding party.

☐ Include the set number of the interrogatories.

☐ Provide responses in same order as interrogatories, using same numbers or letters.

☐ If local rules require, provide text of each interrogatory prior to each answer; otherwise, do not do so.

☐ Obtain respondent's signature under oath; however, if responses are entirely objections, respondent need not sign.

☐ Affix attorney's signature to objections.

Authority:

CCP §§ 2030.210-2030.250

Discussion:

See 9.16 (format of responses), 9.17 (signature of responses)

Form:

See 9.37

☐ Serve responses.

☐ Serve propounding party.

☐ Serve all other parties, unless to do so would be unduly expensive or burdensome.

☐ File and serve motion for relief from requirement to serve all other parties, if necessary.

Responses must be served within 30 days after service of interrogatories, or in unlawful detainer, forcible entry, and forcible detainer actions within five days after service of interrogatories; or by another deadline pursuant to order shortening or extending time.

Exception--Extension for Manner of Service:

For service by mail, add: five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; 20 calendar days if either the place of mailing or the place of address is outside the U.S. For service by Express Mail, add two court days; for service by fax, add two court days. If service is by electronic transmission pursuant to a local court rule permitting electronic service, add two court days.

Exception--Check Local Court Delay Reduction Rules:

See, e.g., Humboldt Super Ct Rules, Rule 5.4

Authority:

CCP §§ 1013(a), (c), (e), 1010.6(a)(6), 2016.050, 2030.260

Discussion:

See 9.20

☐ If necessary, file amended answers:

Grounds:

Amended answers may be provided with respect to information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory.

Authority:

CCP § 2030.310

Discussion:

See 9.22

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil
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9.14 Options and Strategies for Responding Party.

9.14[1] Requiring More Time for Responses. The responding party may request an extension of time in which to file any response. The easiest and least expensive method of obtaining an extension is to obtain the agreement of the propounding party, and reduce the agreement to writing [see *CCP* § 2030.270].

Even if the attempt to reach an agreement fails, the attempt itself is necessary to support a motion for protective order to extend time, if that becomes necessary [see *CCP* § 2030.090].

Strategic Points:



- If a motion for protective order is filed in an attempt to extend the time to respond to interrogatories, always serve objections containing privilege objections in order to preserve the privilege if the motion is denied.
- Professional courtesy dictates at least one extension, in normal circumstances, for the responding to interrogatories. Typically the extension will be 14 days but, in appropriate circumstances an additional thirty days may well be warranted. However, counsel for the party on whom interrogatories have been served should consider that in light of the lengthy notice period for motions for summary adjudication/judgment, as well as fast track guidelines, agreements for further time to respond may be difficult to get. Thus, counsel would be well advised to assume that an agreement to extend time may not be achievable.



Cross References:

Agreement to extend time, see 9.21[1].

Protective orders, see 9.19.

9.14[2] Attacking Propriety of Interrogatories.

9.14[2][a] Interrogatories That Are Completely Inappropriate Are Subject to Protective Order.

Interrogatories are subject to a protective order if they are unduly annoying, embarrassing, or oppressive, or burdensome and expensive [see CCP § 2030.090; see *Fairmont Ins. Co. v. Superior Court* (2000) 22 C4th 245, 255, 92 CR2d 70, 991 P2d 156].

Convincing the propounding party to compromise with respect to interrogatories such as these is the least time-consuming and expensive method of avoiding these types of interrogatories. A good-faith attempt to reach an informal resolution is also a prerequisite to obtaining a protective order. Counsel for responding party must therefore contact opposing counsel to attempt to reach an agreement with respect to the offensive interrogatories [see CCP § 2030.090].

Restriction--Incompetent Party May Not Obtain Protective Order on General Ground of Incompetence:

One appellate court has held that an incompetent party for whom a guardian ad litem has been appointed is not exempted from the obligation to respond to discovery requests on the ground of incompetence; and may not obtain a protective order on this ground. Rather, the guardian ad litem has the authority, subject to the court's ultimate supervision, to verify proper responses to interrogatories on behalf of the ward. Ensuring that the defendant's interrogatories are properly answered is one of the duties of a guardian ad litem [*Regency Health Servs., Inc. v. Superior Court* (1998) 64 CA4th 1496, 1500, 1504-1505, 76 CR2d 95 (overturning order granting motion for a protective order)].

Cross Reference:

Protective order, see 9.19.

9.14[2][b] Interrogatories That Are Objectionable May Be Responded to With Objection. If an interrogatory is subject to a valid objection, the responding party need not answer that interrogatory, but may rather enter an objection in the proper form [see CCP §§ 2030.210-2030.240].

Example:

A party's objection, among others, on grounds that interrogatories were "compound and complex" and "impermissibly overbroad and therefore oppressive and burdensome" were sufficient to preserve the party's rights regarding both self-containment and the "rule of 35" [*Catanese v. Superior Court* (1996) 46 CA4th 1159, 1166, 54 CR2d 280].

Cross Reference:

Objections, see 9.15.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.15 Response to Interrogatories.

9.15[1] Party Must Respond in Writing, and May Provide Answer or Writings, or Raise Objection. The party to whom interrogatories have been propounded must respond in writing under oath separately to each interrogatory by the following methods [*CCP § 2030.210(a)*]:

- An answer containing the information sought to be discovered.
- An exercise of the party's option to produce writings.
- An objection to the particular interrogatory.



Warning:

It is important to serve timely responses to interrogatories. Failure to do so waives all objections, including those based on privilege or work product [*CCP § 2030.290(a)*].



Judge's Perspective:

While most courts are loathe to make a finding of waiver of privileges, depending on the facts and circumstances that have given rise to the tardiness of the responses, a finding of waiver could occur. Trial judges must be mindful that unless there is a clear basis for the waiver, most appellate courts are not predisposed to support such a result. Moreover, the trial judge must likewise be mindful of a potential *CCP § 473* motion for relief based upon attorney neglect. All in all, findings of waiver must be approached with caution and in many instances the statute itself will not support such a result.



Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.15 (Matthew Bender 6th ed.).

9.15[2] Answer Must Be Complete.

9.15[2][a] Each Answer Must Be As Complete As Possible. Each answer in the response must be as complete and straightforward as the information reasonably available to the responding party permits. If the responding party cannot answer the interrogatory completely, the party must answer it to the extent possible [CCP § 2030.220].

Parties must "state the truth, the whole truth, and nothing but the truth in answering written interrogatories" [*Scheiding v. Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 76, 81 CR2d 360 ; *Deyo v. Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499] . When the question is specific and explicit, an answer that supplies only a portion of the information sought is insufficient [*Deyo v. Kilbourne* (1978) 84 CA3d 771, 783, 149 CR 499].

9.15[2][b] Responding Party Must State Lack of Personal Knowledge and Make Good-Faith Effort to Obtain Missing Information Unless Equally Available to Propounding Party. If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party must so state. That party must make a reasonable and good-faith effort to obtain the information by inquiry to other natural persons or organizations, except when the information is equally available to the propounding party [CCP § 2030.220(c)].

9.15[2][c] Responding Party Must Answer Part of Interrogatory That Is Not Objectionable. If only a part of an interrogatory is objectionable, the responding party must answer the remainder of the interrogatory [CCP § 2030.240(a)].

 Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.16 (Matthew Bender 6th ed.).

9.15[3] Grounds for Objection Must Be Asserted in Response.

9.15[3][a] Grounds Must Be Stated With Specificity. A responding party objecting to an interrogatory or to part of an interrogatory must clearly set forth the specific ground for the objection in the response [CCP § 2030.240(b)].

9.15[3][b] Objection to Number of Specially Prepared Interrogatories. When the propounding party has exceeded the 35-interrogatory limit without serving a declaration for additional discovery, the responding party may object to any interrogatories exceeding the 35-interrogatory limit. The responding party must, however, respond to the first 35 specially prepared interrogatories served, unless those interrogatories are objectionable on other grounds [CCP §§ 2030.030(c), 2030.240].

 Cross Reference:

Limit on number of specially prepared interrogatories, see 9.06[2].

Distinguish:

If a declaration for additional discovery accompanies the service of more than 35 specially prepared interrogatories, the responding party may move for a protective order on the ground that the interrogatories in excess of 35 constitute unwarranted annoyance, or oppression, or undue burden and expense [CCP § 2030.090(b)(2)].

 Cross Reference:

Protective order when number of specially prepared interrogatories is unwarranted, see 9.19[3][d].

9.15[3][c] Objection Based on Privilege or Work Product Protection. Discovery privileges and work product protection may be asserted in objections. If an objection is based on a claim of privilege, the party must clearly state the particular privilege invoked. If an objection is based on a claim that the information sought is protected work product under CCP § 2018.010 *et seq.*, the party must expressly assert that claim [CCP § 2030.240(b)].

**Warning:**

The existence of a document containing privileged information is not privileged [*Mitchell v. Superior Court* (1984) 37 C3d 591, 601-602, 208 CR 886, 691 P2d 642 ; *Hernandez v. Superior Court* (2003) 112 CA4th 285, 293].

**Cross References:**

Discussion of privileges, see *Ch. 2, Scope of Discovery*, 2.09-2.24.

Discussion of attorney work product protection, see *Ch. 2, Scope of Discovery*, 2.25-2.33.

9.15[3][d] Objection Based on Relevance. An objection to interrogatories may be based on relevance. Any nonprivileged matter is discoverable through interrogatories only to the extent that it is relevant to the subject matter of the action or the determination of any motion made in the action [see CCP §§ 2017.010, 2030.010(a)].

Distinguish:

Relevance to the subject matter of the action is broader in scope than relevance to the issues, so that far more can be discovered than will be admissible as relevant at trial [see *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 372, 15 CR 90, 364 P2d 266] . It is not ground for objection that the answer to an interrogatory will be inadmissible at the trial, so long as the answer appears reasonably calculated to lead to the discovery of admissible evidence [see CCP §§ 2017.010, 2030.010(a)].

**Cross Reference:**

Relevance standard, see *Ch. 2, Scope of Discovery*, 2.03-2.08.

9.15[3][e] Objection Based on Form of Question. A specially prepared interrogatory may be subject to objection if it contains either subparts or a compound, conjunctive, or disjunctive question [see CCP § 2030.060(f)].

Distinguish:

Interrogatories are not subject to objection in regard to the form of the question to the same extent that a question in a deposition might be. Unlike the immediate oral response that is called for at a deposition, an answer to an interrogatory is made in writing, after due deliberation and consultation with counsel, and the answer may be framed in a way that avoids the pitfalls inherent in the form of the question [*West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 421, 15 CR 119, 364 P2d 295].

9.15[3][f] Objection to Question Imposing Duty to Supplement. An objection may be made to an interrogatory that imposes on the responding party a continuing duty to supplement an answer that was initially correct and complete it with later-acquired information [see CCP § 2030.060(g)].

**Cross Reference:**

Proper uses of supplementary interrogatories, see 9.10.

9.15[3][g] Objection Based on Burden or Oppression. An interrogatory that is burdensome or oppressive may be subject to objection. Burden by itself is not a valid objection, because some burden is inherent in all forms of discovery. To be a valid ground for objection, a burdensome quantum of work required to respond to interrogatories must also be oppressive in that it results in an injustice. Interrogatories may be deemed oppressive when they are shown to be not only burdensome but also either intended to create an unreasonable burden or resulting in a burden the ultimate effect of which is incommensurate with the result sought [*West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 417-418, 15 CR 119, 364 P2d 295].

**Strategic Point:**

Even if the objection that interrogatories are burdensome or oppressive is not sufficient by itself to strike the interrogatories, it can result in an order modifying the interrogatories so as to make the burden more reasonable [see, *West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 417-418, 15 CR 119, 364 P2d 295 ; *Borse v. Superior Court* (1970) 7 CA3d 286, 289, 86 CR 559].

**Cross Reference:**

Objecting to burdensome discovery request, see *Ch. 2, Scope of Discovery*, 2.07[4].

9.15[3][h] Examples of Illegitimate Objections. Courts have expressly rejected the following types of objections to interrogatories:

- The interrogatory assumes the existence of facts not in evidence [see *West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 421, 15 CR 119, 364 P2d 295].
- The answer is known to the party seeking the information [see *Singer v. Superior Court* (1960) 54 C2d 318, 324, 5 CR 697, 353 P2d 305].

Distinguish:

The fact that the requested material is available to the propounding party, while not a proper objection per se, may support an objection that, under the circumstances, it would be unjust or inequitable to require a response [see *Bunnell v. Superior Court* (1967) 254 CA2d 720, 723-724, 62 CR 458].

- The interrogatory pertains to the pleadings [*Singer v. Superior Court* (1960) 54 C2d 318, 323, 5 CR 697, 353 P2d 305].
- The answer may compel the responding party to give hearsay evidence [see *Durst v. Superior Court* (1963) 218 CA2d 460, 464, 32 CR 627].
- The interrogatory calls for an opinion or conclusion of a witness [see *Durst v. Superior Court* (1963) 218 CA2d 460, 464, 32 CR 627].
- The answer will preclude the responding party from offering subsequently discovered facts at variance with the answer [*Singer v. Superior Court* (1960) 54 C2d 318, 325-326, 5 CR 697, 353 P2d 305].

An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial [CCP § 2030.010(b)].

9.15[4] Responding Party May Allow Inspection of Documents Too Voluminous to Produce. If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, the responding party may properly refer to CCP § 2030.230, and specify the writings from which the answer may be derived or ascertained [CCP § 2030.230].

This specification must be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained. The responding party must then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them [CCP § 2030.230].

Distinguish:

An answer to an interrogatory consisting of a broad statement that the information is available from a mass of documents is insufficient [*Deyo v. Kilbourne* (1978) 84 CA3d 771, 784, 149 CR 499].

**Cross Reference:**

Hogan & Weber, California Civil Discovery, § 5.17 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:

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9.16 Format of Response to Interrogatories.

9.16[1] Response Must Include Interrogatory Set Number and Identify Parties. In the first paragraph of the response immediately below the title of the case, the respondent must provide the following [*CCP § 2030.210(b)*]:

- Identity of the responding party.
- Identity of the propounding party.
- The set number of the interrogatories.

9.16[2] Each Response Must Be Sequential and Numbered. Each answer, exercise of option, or objection in the response must bear the same identifying number or letter and be in the same sequence as the corresponding interrogatory. However, the text of that interrogatory need not be repeated [*CCP § 2030.210(c)*].



Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.15 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.17 Responding Party Must Sign Response; Attorney Must Sign Objections.

9.17[1] Party to Whom Interrogatories Are Directed Must Sign Response Unless Response Contains Only Objections. The party to whom the interrogatories are directed must sign the response under oath unless the response contains only objections [*CCP* § 2030.250(a)].

► **Cross Reference:**

Hogan & Weber, California Civil Discovery, § 5.15 (Matthew Bender 6th ed.).

9.17[2] Officer or Agent of Business Entity or Governmental Agency Must Sign Response. If the responding party is a public or private corporation, or a partnership, association, or governmental agency, one of its officers or agents must sign the response under oath on behalf of that party [*CCP* § 2030.250(b)].

9.17[3] Guardian Ad Litem Must Sign Response for Incompetent Party Subject to Court Supervision. One appellate court has held that a guardian ad litem has the authority, subject to the court's ultimate supervision, to verify proper responses to interrogatories on behalf of the ward [*Regency Health Servs., Inc. v. Superior Court* (1998) 64 CA4th 1496, 1504-1505, 76 CR2d 95 , citing dictum in *De Los Santos v. Superior Court* (1980) 27 C3d 677, 683-684, 166 CR 172, 613 P2d 233 ; see also *CCP* § 2030.010(a)].

9.17[4] Attorney Must Sign Objections. The attorney for the responding party must sign any responses that contain an objection [*CCP* § 2030.250(c)].

9.17[5] Attorney Signing As Officer or Agent May Waive Attorney-Client Privilege or Work-Product Protection. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for the party, that party waives any lawyer-client privilege and any protection for work product during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response [*CCP* § 2030.250(b); see also *CCP* § 2018.010 et seq. (protection for work product)].

► **Cross Reference:**

Discussion of privileges, see *Ch. 2, Scope of Discovery*, 2.09-2.24.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.18 Responses Must Be Verified.

The responses to interrogatories must be verified [see CCP §§ 2030.210-2030.240; *Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1613-1614, 26 CR2d 786].



Warning:

Do not obtain presigned verification forms for use in discovery responses without first obtaining assurance from the client that the responses provided and served with the verification form are true and correct. In one case, responding party's attorney, who could not locate his client and had received deadline extensions for responses, drafted interrogatory answers based on information gleaned from the client's file and affixed a verification form the client had previously signed. The attorney's custom was to have clients sign a number of undated, blank verification forms. (He also "signed" and served responses to requests for documents in the same manner.) In a State Bar disciplinary hearing, the Supreme Court held that the use of a presigned verification in discovery proceedings, without first consulting with the client to assure that any assertions of fact are true, was a serious violation of the statutes and rules [*Drociak v. The State Bar of Cal.* (1991) 52 C3d 1085, 1087-1090, 278 CR 86, 804 P2d 711].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesForm



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1-9 MB Practice Guide: CA Civil Discovery 9.19

9.19 Obtaining Protective Order.

9.19[1] Motion for Protective Order.

9.19[1][a] Responding Party and Others May Move for Protective Order. When interrogatories have been propounded, the responding party, and any other party or affected natural person or organization may promptly move for a protective order [*CCP § 2030.090(a)*].

Cross References:

Form, see 9.38.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 84, Discovery: Interrogatories, § 84.30 (Matthew Bender)*.

9.19[1][b] Declaration of Good-Faith Attempt at Informal Resolution Required. A motion for a protective order must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*CCP § 2030.090(a)*].

9.19[1][c] Format: Identify Interrogatories by Set and Number. A motion concerning interrogatories must identify the interrogatories by set and number [*Cal Rules Ct, Rule 3.1345(d)*].

Cross Reference:

Hogan & Weber, *California Civil Discovery*, § 5.14 (Matthew Bender 6th ed.).

9.19[2] Protective Order Protects Party From Unwarranted Annoyance, Embarrassment, Oppression, or Undue Burden and Expense. The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*CCP § 2030.090(b)*; see also *CCP § 2019.030* (protective orders for all forms of discovery)].



Warning:

An objection that compiling data required by an interrogatory is burdensome may not be accepted if the compilation would have to have been done prior to the filing of the complaint if the litigation was commenced in good faith [*Fuss v. Superior Court* (1969) 273 CA2d 807, 817 n2, 78 CR 583 (overturning order denying motion to compel further responses)].

9.19[3] Protective Order May Direct Relief Including That Provided in Statute.

9.19[3][a] Statutory Relief Is Not Exclusive. The types of relief provided in *CCP* § 2030.090(b) are not exclusive [see *CCP* § 2030.090(b)].

9.19[3][b] Court Has Discretion to Order Rewriting or Rephrasing of Interrogatories. In exercising its discretion on a motion for protective order, When the form of an interrogatory is burdensome, a court may direct a party to rewrite or rephrase it [see *West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 418-419, 15 CR 119, 364 P2d 295] .

For example, if interrogatories are phrased in a manner that will require the reader to spend extra unnecessary time and effort to be sure he or she has not overlooked the impact of references back to preceding interrogatories or subinterrogatories, the court may require the interrogatories to be rephrased [see *West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 419, 15 CR 119, 364 P2d 295] .

Cross Reference:

Burden as basis for objection to interrogatories, see 9.15[3][g].

9.19[3][c] Protective Order May Direct That Interrogatories Need Not Be Answered. The protective order may direct that the set of interrogatories, or particular interrogatories in the set, need not be answered [*CCP* § 2030.090(b)(1)].

9.19[3][d] Protective Order May Direct That Number of Specially Prepared Interrogatories Is Unwarranted. The protective order may direct that, contrary to the representations made in a declaration submitted under *CCP* § 2030.050, the number of specially prepared interrogatories is unwarranted [*CCP* § 2030.090(b)(2)].

Cross Reference:

Discussion of *CCP* § 2030.050 declaration, see 9.06[2].

9.19[3][e] Protective Order May Allow Extension of Time to Respond. The protective order may direct that the time specified in *CCP* § 2030.260 to respond to the set of interrogatories, or to particular interrogatories in the set, be extended [*CCP* § 2030.090(b)(3)].

Cross Reference:

Timing of response, see 9.20.

9.19[3][f] Protective Order May Direct Terms and Conditions for Response. The protective order may direct that the response be made only on specified terms and conditions [*CCP* § 2030.090(b)(4)].

9.19[3][g] Protective Order May Substitute Oral Deposition for Interrogatories. The protective order may direct that the method of discovery be an oral deposition instead of interrogatories to a party [*CCP* § 2030.090(b)(5)].

9.19[3][h] Protective Order May Prevent or Limit Disclosure of Trade or Other Secret. The protective order may direct that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a certain way [*CCP* § 2030.090(b)(6)].

9.19[3][i] Protective Order May Require Sealing of Answers. The protective order may direct that some or all of the answers to interrogatories be sealed and thereafter opened only on order of the court [*CCP* § 2030.090(b)(7)].

9.19[4] Court May Order Discovery If Motion Denied. If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on terms and conditions that are just [*CCP* § 2030.090(c)].

9.19[5] Court Must Impose Monetary Sanctions Against Unsuccessful Party in Motion Absent Substantial Justification. The court will impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust [*CCP* § 2030.090(d); see also *CCP* § 2023.030 (monetary sanctions)].

However, this sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust [*CCP* § 2030.090(d)].



Cross Reference:

Monetary and other discovery sanctions, see Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMisconductCivil
ProcedureDiscoveryProtective Orders



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1-9 MB Practice Guide: CA Civil Discovery 9.20

9.20 Time for Response.

9.20[1] General Rule Is to Serve Response Within 30 Days. Within 30 days after service of interrogatories the responding party must serve the original of the response to them on the propounding party [*CCP § 2030.260(a)*].

The responding party must also serve a copy of the response on all other parties who have appeared in the action, unless the court on motion with or without notice has relieved that party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome [*CCP § 2030.260(c)*; see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)].

9.20[2] Exceptions.

9.20[2][a] Five Days in Unlawful Detainer. For unlawful detainer and forcible entry or detainer cases, the response must be served within five days [*CCP § 2030.260(b)*].

➤ **Cross Reference:**

Timing of interrogatories in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation, 5.23[2][a]*.

9.20[2][b] As Shortened or Extended by Court. If, on motion, the court has shortened the time for response, or if, on motion, the court has extended the time for response, the time for responding will be altered accordingly [*CCP § 2030.260(a)*].

➤ **Cross References:**

Motion to shorten time, see *9.07[3]*.

Motion for protective order to extend time, see *9.19[3][e]*.

Extension of time based on how interrogatories served, see *9.20[3]*.

Agreement to extend time, see 9.21[1].

Discovery cut-off dates, see *Ch. 1, Strategy and Planning*, 1.17.

Timing of responses, see Hogan & Weber, *California Civil Discovery*, § 5.13 (Matthew Bender 6th ed.).

9.20[3] Extensions Based on Method of Service.

9.20[3][a] Service by Regular Mail. For service of interrogatories by mail, the time period for response is extended by five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; and 20 calendar days if either the place of mailing or the place of address is outside the U.S. [*CCP* §§ 1013(a), 2016.050; see *Trail v. Cornwell* (1984) 161 CA3d 477, 486 n12, 207 CR 679 (five calendar days, if by mail; construing prior discovery law)].

9.20[3][b] Service by Express Mail. For service of interrogatories by express mail, the time period for response is extended by two calendar days [*CCP* §§ 1013(c), 2016.050].

9.20[3][c] Service by Fax. For service of interrogatories by fax, the time period for response is extended by two calendar days [*CCP* §§ 1013(e), 2016.050].

9.20[3][d] Service by Electronic Transmission Pursuant to Local Court Rule. For service of interrogatories by electronic transmission pursuant to a local court rule permitting such electronic service, the period for response is extended by two court days [*CCP* § 1010.6(a)(6)].

9.20[4] Effect of Local Court Delay Reduction Rules. Local court delay reduction rules may impose timing requirements for responses to interrogatories. For example, in Humboldt County, in personal injury and wrongful death cases assigned to the delay reduction program, the plaintiff must file and serve answers to court-provided interrogatories with the complaint or within 10 days afterward; and the defendant must file and serve answers to court-provided interrogatories with the answer to the complaint, or within 10 days afterward. A party who fails to comply may be subject to sanctions [see Humboldt Super Ct Rules, Rule 5.4].



Cross Reference:

See 9.07[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesForm



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9.21 Time to Respond May Be Extended by Stipulation or Motion.

9.21[1] Parties May Stipulate.

9.21[1][a] Agreement May Apply to Individual Interrogatories or Set of Interrogatories. The party propounding interrogatories and the responding party may agree to extend the time for service of a response to a set of interrogatories, or to particular interrogatories in a set, to a date beyond that provided in *CCP* § 2030.260 [*CCP* § 2030.270(a)].

9.21[1][b] Agreement Must Eventually Be Expressed in Writing. An agreement to extend the time for response may be informal, but it must be confirmed in a writing that specifies the extended date for service of a response [*CCP* § 2030.270(b)].

9.21[1][c] Agreement Preserves Right to Respond. Unless an agreement to extend time for response expressly states otherwise, it is effective to preserve to the responding party the right to respond to any interrogatory to which the agreement applies in any manner specified in *CCP* §§ 2030.210-2030.240 [*CCP* § 2030.270(c)].



Cross References:

Acceptable responses, see 9.15.

Timing of responses, see 9.20.

9.21[1][d] Agreement Not Filed Unless Offered to Determine Issue in Motion Proceeding or Other Hearing. An agreement to extend time for response to interrogatories may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or are ordered filed for good cause [*Cal Rules Ct*, Rule 3.250(a)(7)].

9.21[1][e] Agreement Must Be Retained for Six Months After Trial. The original agreement to extend time for response to interrogatories must be retained until six months after the final disposition of the case, unless the court on motion of any party and for good cause shown orders the original papers preserved for a longer period [*Cal Rules Ct*, Rule 3.250(b)].

9.21[2] Responding Party May Move for Extension. A responding party may seek an extension of time to respond to interrogatories by filing a motion for a protective order [*CCP* § 2030.090(b)(3)].



Cross Reference:

Discussion of protective order allowing extension of time to respond, see 9.19[3][e].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesForm



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1-9 MB Practice Guide: CA Civil Discovery 9.22

9.22 Responding Party May Serve Amended Answers.

9.22[1] Amended Answers May Contain Later-Acquired, Inadvertently Omitted, or Corrected Information.

Without leave of court, a party may serve an amended answer to any interrogatory that contains information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory [CCP § 2030.310(a)].



Warning:

Although amended answers to interrogatories are not required, the responding party should consider that the failure to file amended answers may leave him or her vulnerable in a summary judgment motion proceeding, if additional information supports the responding party's position [see *Union Bank v. Superior Court* (1995) 31 CA4th 573, 580 n4, 37 CR2d 653 ; see also *Tomko Woll Group Architects, Inc. v. Superior Court* (1996) 46 CA4th 1326, 1338, 54 CR2d 300 (plaintiff's amended answers failed to create triable issue of material fact in summary judgment motion proceedings with respect to expiration of limitations period)].

Example:

In a writ of mandate proceeding in which the defendant petitioned the appellate court to compel the trial court to enter a summary judgment against plaintiff in its fraud case, the court presumed that plaintiffs had answered the interrogatories propounded by defendant "fully and truthfully," and could infer that they had no other evidence to support their claims. Among other factors, the plaintiffs did not ask for a continuance to obtain further evidence, which is mandatory under the summary judgment statute; and there was no attempt to serve any supplemental response. The court concluded that defendant could rely on plaintiffs' Judicial Council form interrogatory answers as an evidentiary basis for its separate statement. Despite a request for that information, the interrogatory answers contained no evidence to support a theory of liability on defendant's part. The interrogatory responses, when relied on by defendant in its separate statement of undisputed facts, were sufficient to shift the burden of proof to plaintiffs pursuant to the summary judgment statute, to demonstrate there was a triable issue concerning the correctness of their claims; and plaintiffs failed to present sufficient evidence to create a triable issue of material fact [*Union Bank v. Superior Court* (1995) 31 CA4th 573, 593-594, 37 CR2d 653 ; see also CCP § 437c(h) (continuance to obtain further evidence), (p)(2) (shifting of burden of proof)].

9.22[2] Format of Amended Answers: Identity of Parties, Set Number, Nature of Paper Required. In each set of amended answers to interrogatories, the following must appear in the first paragraph immediately below the title of the case [*Cal Rules Ct, Rule 3.1000(a)*]:

- Identity of the propounding party.
- Identity of the responding party.
- Set number being propounded.
- Nature of the paper.



Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.21 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
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9.23 Effect of Failure to Serve Timely Response.

9.23[1] Responding Party Who Fails to Serve Timely Response Waives Option to Produce Writings. A party to whom interrogatories have been directed who fails to serve a timely response, waives any right to exercise the option to produce writings under *CCP* § 2030.230 [*CCP* § 2030.290].

➤ **Cross Reference:**

Option to produce writings, see 9.15[5].

9.23[2] Responding Party Who Fails to Serve Timely Response Waives Right to Object. A party to whom interrogatories have been directed who fails to serve a timely response, waives any right to object to the interrogatories, including the assertion of a privilege or work product protection under *CCP* § 2018.010 *et seq.* [*CCP* § 2030.290; see also *CCP* §§ 2018.010-2018.080 (work product protection)].

9.23[3] Responding Party May Move for Relief From Waiver. The court, on motion, may relieve the responding party from a waiver caused by failure to serve a timely response. The court may grant the motion on the following determinations [*CCP* § 2030.290; see *Cal Rules Ct, Rule 3.1345(d)* (motion concerning interrogatories must identify them by set and number)]:

- That the party has subsequently served a response that is in substantial compliance with *CCP* §§ 2030.210-2030.240; and
- That the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

➤ **Cross Reference:**

Hogan & Weber, California Civil Discovery, § 5.19 (Matthew Bender 6th ed.).

9.23[4] Service of Untimely Response Does Not Divest Court of Authority to Grant Motion to Compel Response. Once a party has failed to serve a timely interrogatory response, the court has the authority to hear a

propounding party's motion to compel a response under *CCP* § 2030.290(b), regardless of whether a party serves an untimely response. Whether the trial court should proceed with a motion to compel a response after the responding party serves an untimely interrogatory response is within the discretion of the trial court [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 CA4th 390, 408-409, 55 CR3d 751] .

A party who has served an untimely response may move for relief from waiver of the right to assert objections.



Cross Reference:

Discussion on relief from waiver, see 9.23[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview



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IV. COMPELLING RESPONSE AND FURTHER RESPONSE TO INTERROGATORIES

1-9 MB Practice Guide: CA Civil Discovery 9.24

9.24 CHECKLIST: Compelling Response and Further Response to Interrogatories.

9.24[1] Compelling Response: Moving Party's Checklist.

☐ Ascertain whether party has failed to respond to interrogatories within allowable time:

Party generally has 30 days to respond; five days in unlawful detainer case.

☐ Time for response can be impacted by method of service, governing local rules, and agreement of parties

Authority:

CCP §§ 1010.6(a)(6), 1013, 2016.050, 2030.010 et seq.

Discussion:

See 9.20, 9.21

☐ If party does not provide any responses within allowable time, consider filing motion for order compelling response.

Time for motion to compel response is not prescribed by *CCP §§ 2030.010-2030.410*. Discovery motions generally must be heard on or before the 15th day before the date initially set for trial of the action [see *CCP §§ 2024.020(a), 2024.050*]. Unless otherwise ordered or specifically provided by law, all moving and supporting papers on the motion must be served and filed at least 16 court days before the time appointed for the hearing [*CCP § 1005(b); Cal Rules Ct, Rule 3.1300(a)*].

☐ Draft:

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- ☐ Motion and notice of motion to compel responses and to impose monetary sanctions.
- ☐ Supporting declaration including showing of attempt at informal resolution of issue.
- ☐ Supporting memorandum.
- ☐ Proposed order.
- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.
- ☐ If opposing party fails to comply with order compelling responses:
 - ☐ Draft motion for sanctions.

Authority:*CCP § 2030.290***Discussion:**

See 9.25

Standard Procedure Checklist:See *Ch. 4, Law and Motion Procedure, 4.03***Forms:**

See 9.40, 9.41

9.24[2] Compelling Response: Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.
- ☐ Prepare opposition.
 - ☐ Draft declarations opposing motion.
 - ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response:

- ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2030.290

Discussion:

See 9.25

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

9.24[3] Compelling Further Response: Moving Party's Checklist.

- ☐ Review responses to interrogatories.
- ☐ If party provided incomplete or evasive answers, inappropriately exercised the option of producing documents, or inadequately specified documents, consider filing motion for order compelling further responses.



Time Limit:

45 days from receipt of response to serve motion to compel further response.

Authority:

CCP § 2030.300

- ☐ Make reasonable, good-faith effort to resolve issue.
- ☐ Draft:
- ☐ Motion and notice of motion to compel further responses and to impose monetary sanctions.
- ☐ In motion papers, identify interrogatories by set and number.

Authority:

Cal Rules Ct, Rule 3.1345(d)

- ☐ Supporting declaration including showing of attempt at informal resolution of issue.
- ☐ Memorandum.
- ☐ Separate statement supporting motion.

Authority:

Cal Rules Ct, Rule 3.1345(a)(2), (c)

- ☐ Proposed order.
- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.
- ☐ If opposing party fails to comply with order compelling further responses:
 - ☐ Draft motion for sanctions.

Authority:

CCP § 2030.300

Discussion:

See 9.26

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Forms:

See 9.42-9.44

9.24[4] Compelling Further Response: Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.

**Strategic Point:**

Consider the possibility of a countermotion for a protective order with an ex parte motion for an order shortening time so it can be heard at the same time as the motion to compel [discussion of protective orders, 9.19; form for shortening time, *Ch. 4, Law and Motion Procedure, 4.58*].

- ☐ Prepare opposition.
 - ☐ Draft declarations opposing motion.
 - ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response.

- ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2030.290

Discussion:

See 9.25

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMotions to Compel



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9.25 Motion for Order Compelling Response.

9.25[1] Propounding Party May Move for Order Compelling Response. The party propounding the interrogatories may move for an order compelling response to the interrogatories [*CCP* § 2030.290(b)].

Strategic Point:



Consider a deposition prior to filing motions to compel if you are unhappy with the responses. A deposition, in the end, is a far more effective, less expensive alternative than a motion to compel.

Strategic Point--Subsequent Exclusion of Evidence.



A motion to compel may be important to assure that fact witnesses not identified by the other side can be excluded [*see Saxena v. Goffney* (2008) 159 CA4th 316 ; 71 CR 3d 469 (trial court's exclusion of witnesses as a sanction for failure to identify them in response to interrogatories was an abuse of discretion when violation was not willful and there was no order compelling further response, but error was harmless when testimony would have been cumulative or would have dealt with matters of little relevance); *but see Pate v. Channel Lumber Co.* (1997) 51 CA4th 1447, 1456, 59 CR2d 919 (after plaintiffs served defendant with three separate requests for production of documents and received repeated assurances from defendant that all documents had been produced, plaintiffs were not required to move to compel further responses before court could impose evidence sanction)].

Distinguish--No Meet & Confer:

Unlike other motions, there is no need to "meet and confer" before filing this motion as there was a failure to respond, not just inadequate responses.

9.25[2] Moving Papers.

9.25[2][a] Required Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct, Rule 3.1112(a)*],
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [*CCP* §§ 2002, 2003, 2015.5, 2030.090(a)],
- A memorandum in support of the motion [*Cal Rules of Ct, Rule 3.1112(a)*].

Distinguish--No Separate Statement:

Because the motion is based on failure to respond, the moving party is not required to provide a *Cal Rules of Ct, Rule 3.1345* separate statement [*Cal Rules of Ct, Rule 3.1345(b)*].

 Cross References:

Forms, see 9.40, 9.41.

Form for memorandum supporting motion, see *California Points and Authorities, Ch. 84, Discovery: Interrogatories, § 84.10 (Matthew Bender)*.

9.25[2][b] Local Court Delay Reduction Rules May Require Attachment of Discovery Documents. In addition to the supporting declaration and supporting memorandum required for all motions, local court delay reduction rules may require additional papers particular to this motion.

Example:

In Placer County Superior Court's Civil Case Management System (implemented pursuant to the court's Trial Court Delay Reduction Act), for any motion to compel answers to interrogatories, when no response to the discovery has been received, the moving party must attach to the motion a copy of the discovery documents at issue, together with a copy of the proof of service of the discovery documents [Placer Super Ct Rules, Rule 20.2.4(B)].

9.25[3] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions. The court will impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2030.290(c); see *CCP* § 2023.030 (monetary sanctions)].

Example:

In a breach of contract and unfair competition case, defendants responded to plaintiff's form interrogatories by stating that they could not respond because the allegations in plaintiff's complaint were uncertain. The court ordered defendants (who did not appear at the hearing) to respond to the interrogatories. When defendants did not respond, the court found granted monetary sanctions against defendants and their attorney. The Court of Appeal upheld the monetary sanction, finding that defendants' statement of inability to respond to the interrogatories was legally invalid [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 CA4th 390, 409-412, 55 CR3d 751] .

9.25[4] Failure to Comply With Order Compelling Response Subjects Party to Issue, Evidence, or Terminating Sanction. If a party fails to obey a court order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. In lieu of or in addition to that sanction, the court may impose a monetary sanction [*CCP* § 2030.290(c); see also *CCP* § 2023.010 et seq. (discovery sanctions)].

Example:

In a bad-faith insurance case, plaintiffs failed to respond to interrogatories, and failed to oppose either defendant's motion to compel or subsequent motion for a dismissal sanction. Plaintiffs eventually provided some answers, although the number of days between the propounding of interrogatories to the receipt of answers was more than three times that allowed. Moreover, the answers consisted of either "No," or "Defendants breached the agreement when they refused to pay sums due and owing to plaintiff for losses caused by the accidental fire which date is known to defendants." The appellate court upheld the dismissal sanction, based on the culmination of a history of acts in which plaintiffs obstructed discovery, failed to honor their stipulation to comply, and defied a court order [*Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 CA3d 481, 486-491, 282 CR 530].

Distinguish:

A court is not authorized to impose an evidence sanction based on the mere failure to supplement a response promptly when no order compelling further answers has been sought or entered [*Biles v. Exxon Mobil Corp.* (2004) 124 CA4th 1315, 1327]. However, when a party repeatedly fails to respond to discovery despite court orders and monetary sanctions, the trial court may properly impose terminating sanctions after the party violated a stipulation requiring it to provide overdue interrogatory responses; the stipulation was tantamount to the court order required by CCP § 2030.290(c) [*Mileikowsky v. Tenet Healthsystem* (2005) 128 CA4th 262, 278-280].

**Cross References:**

Discovery cut-off dates, see *Ch. 1, Strategy and Planning, 1.17.*

Discovery sanctions, see *Ch. 3, Sanctions.*

DeMeo, California Deposition and Discovery Practice, Ch. 42, Sanctions for Misuse of Discovery Process (Matthew Bender).

Hogan & Weber, California Civil Discovery, Ch. 15, Sanctions (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to Compel



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Chapter 9 Interrogatories
IV. COMPELLING RESPONSE AND FURTHER RESPONSE TO INTERROGATORIES

1-9 MB Practice Guide: CA Civil Discovery 9.26

9.26 Motion for Order Compelling Further Response.

9.26[1] Propounding Party May Move for Order Compelling Further Response. The propounding party, on receipt of a response to interrogatories, may move for an order compelling a further response if he or she deems any of the following [CCP § 2030.300(a); see *Fairmont Ins. Co. v. Superior Court* (2000) 22 C4th 245, 255, 92 CR2d 70, 991 P2d 156]:

- An answer to a particular interrogatory is evasive or incomplete.
- An exercise of the option to produce documents under CCP § 2030.230 is unwarranted or the required specification of those documents is inadequate.
- An objection to an interrogatory is without merit or too general.

Example:

In a case resulting in the imposition of sanctions striking the defendant's pleadings, the defendant failed to verify its answers to plaintiff's special interrogatories. Moreover, as to the interrogatories concerning the facts underlying defendants' general denial and affirmative defenses, each defendant repeatedly invoked the stock phrase: "Defendant is compiling the information requested by this interrogatory. Defendant has not finished this compilation. Defendant will provide this information to plaintiff as soon as defendant has finished this compilation." After repeated delays and failures to respond to several methods of discovery requests, plaintiff filed separate motions to compel the production of documents, further responses to the interrogatories, and requests for admissions. In upholding the imposition of drastic sanctions, the appellate court likened the plaintiff's attempts at discovery to "pulling teeth" [*Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1613-1614, 26 CR2d 786].



Cross References:

Forms, see 9.42-9.44.

Form of memorandum supporting motion, see *California Points and Authorities*, Ch. 84, Discovery:

Interrogatories, § 84.11 (Matthew Bender).

Hogan & Weber, California Civil Discovery, Ch. 5, Interrogatories to a Party, § 5.20 (Matthew Bender 6th ed.).

9.26[2] Moving Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct*, Rule 3.1112(a)];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [*CCP* §§ 2002, 2003, 2015.5, 2030.300];
- A memorandum in support of the motion [*Cal Rules of Ct*, Rule 3.1112(a)]; and
- A separate statement with all information necessary to understand each discovery request and all responses to it that are at issue [*Cal Rules of Ct*, Rule 3.1345(a), (c)].

The motion papers must identify specific interrogatories by set and number [*Cal Rules of Ct*, Rule 3.1345(d)].



Cross References:

Forms, see 9.42-9.44.

Declaration of good-faith attempt at informal resolution, see 9.26[3].

Discussion of separate statement, see 9.26[4].

Discussion of motion papers generally, see Ch. 4, Law and Motion Procedure.

9.26[3] Declaration of Good-Faith Attempt at Informal Resolution Required.

9.26[3][a] Declaration Must Evidence Adequate Attempt at Informal Resolution. A motion for an order compelling a further response to interrogatories must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [*CCP* § 2030.300(b)].

The level of effort at informal resolution that satisfies the "reasonable and good-faith attempt" standard depends on the circumstances of the case [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 431, 79 CR2d 62] .

Examples:

- After defendant served interrogatory responses consisting of a mixture of factual answers and objections plaintiff did nothing in reaction until more than five weeks later. Then approximately 13 days before the deadline for filing a motion to compel, plaintiff sent a letter requesting further responses. Nine days later, defendant responded by asserting essentially the same objections as it had before. Plaintiff received defendant's response one day before the deadline for filing a motion to compel. In light of the short time left before the deadline, plaintiff filed her motion to compel without making further contact with defendant. In opposition to the motion to compel, the defendant stated in his declaration that:
 - Plaintiff's interrogatories were grossly overbroad;

- Plaintiff allowed defendant an extension of only seven days;
- After responding to the interrogatories, defendant received no contact regarding the them until plaintiff's letter 13 days before the motion filing deadline;
- Defendant's responsive letter offered several alternative solutions to resolve the discovery disputes;
- Defendant expected plaintiff's counsel to contact him regarding his suggestions, rather than filing the motion; and
- Plaintiff did not request an extension of time to file motions even though extensions had previously been granted.

On a proceeding for writ of mandate, the appellate court found that the trial judge permissibly found plaintiff's informal resolution efforts inadequate under the circumstances. It also noted, however, that the trial judge denied the motion to compel simply on the basis that plaintiff made an insufficient effort at informal resolution. The court therefore directed the trial court to consider the proper remedy for plaintiff's insufficient efforts in lieu of denying further discovery outright [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 429-436, 79 CR2d 62].

■ Plaintiffs objected that defendant's interrogatory requesting a description of "all economic damages you claim to have sustained" was vague and ambiguous because it did not refer to the definition of the term "economic damages" provided in the Civil Code. Even after defendant's counsel advised that the term was being used as defined in the statute plaintiffs had cited, plaintiffs did not answer the question, but demanded that defendant supply the definition in writing and allow them an extra 30 days from the date of receipt in which to respond. The defendant refused, and the discovery referee granted defendant's motion to compel further responses and for sanctions. The Court of Appeal rejected plaintiffs' claim that the defendant's refusal to compromise his position represented a failure to meet and confer, given the plaintiffs' "game-playing" and the correspondence between the parties [*Clement v. Alegre* (2009) 177 CA4th 1277, 1294, 99 CR3d 791] .



Cross References:

Form, see 9.42.

Adequacy of attempt to resolve dispute informally to avoid sanctions, see *Ch. 3, Sanctions*, 3.06[9].

9.26[3][b] Request for Extension of Time in Which to File Motion May Evidence Good-Faith Attempt at Resolution. A party attempting to obtain further responses to interrogatories should consider requesting an extension of time in which to file a motion to compel, if the extra time would allow the parties to reach an informal agreement settling the discovery dispute. If the effort is ultimately futile, the extension may then be used to support the moving party's good-faith attempt to resolve the dispute without resorting to the motion to compel [see, e.g., *Obregon v. Superior Court* (1998) 67 CA4th 424, 430, 79 CR2d 62] .

9.26[4] Separate Statement Describing Circumstances of Motion Is Required.

9.26[4][a] Separate Statement Must Be Filed With Motion to Compel Further Responses. A motion for an order compelling further responses to interrogatories must be accompanied by a separate statement [Cal Rules Ct, Rule 3.1345(a)(2)].

 Cross Reference:

Form, see 9.43.

9.26[4][b] Separate Statement Must Describe All Pertinent Information and Be Full and Complete. A separate statement is a document filed and served with the discovery motion that provides all the information necessary to understand each discovery request and all the responses to it that are at issue. The statement must be full and complete so that no person is required to review any other document to determine the full request and the full response. Material may not be incorporated by reference [*Cal Rules Ct, Rule 3.1345(c)*; see *Mills v. U.S. Bank (2008) 166 CA4th 871, 893, 83 CR3d 146* (failure to include discovery responses in separate statement violated former Rule 335 (now 3.1345); attaching responses to separate statement was insufficient)].

9.26[4][c] Separate Statement Must Specify Contents of Relevant Discovery Papers. The separate statement must include, for each discovery request, the following [*Cal Rules Ct, Rule 3.1345(c)*]:

- The text of the interrogatory.
- The text of each response, answer, or objection, and any further responses or answers.
- A statement of the factual and legal reasons for compelling further responses as to each matter in dispute.
- If necessary, the text of all definitions, instruction, and other matters required to understand each discovery request and the responses to it.
- If the response to a particular discovery request depends 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 must be set forth.
- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.

9.26[4][d] No Separate Statement Required When No Response Provided. No separate statement is required when no response has been provided to the request for discovery [*Cal Rules Ct, Rule 3.1345(b)*].

9.26[5] Motion Must Be Filed With 45 Days of Service of Response. Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response to the interrogatories [*CCP § 2030.300(c)*; see *Sexton v. Superior Court (1997) 58 CA4th 1403, 1409, 68 CR2d 708* (discussing *CCP § 2030.300* in conjunction with *CCP § 2031.300*)].

Exception:

For service by mail, the time period is extended by five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; 20 calendar days if either the place of mailing or the place of address is outside the U.S. [*CCP §§ 1013(a), 2016.050*]. For service by express mail, the time period is extended by two court days; for service by fax, the time period is extended by two court days [*CCP § 1013(c), (e)*].



Strategic Point--Propounding Party:

If the responding party agrees during the meet and confer to supplement some responses, that agreement does not automatically extend the 45-day period as to other interrogatory responses. If it is necessary to extend the time for all responses, an agreement to that effect should be obtained.



Cross Reference:

Discovery cut-off dates, see *Ch. 1, Strategy and Planning, 1.17*.

9.26[6] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanctions.

9.26[6][a] Sanctions Are Mandatory Unless Party Had Substantial Justification. The court will impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP § 2030.300(d)*; see also *CCP § 2023.010 et seq.* (monetary sanctions)].

An attorney litigating in propria persona is not liable to pay consideration for the legal representation; consequently, such an attorney may not be awarded monetary discovery sanctions under *CCP §§ 2023.030(a)* and *2030.300* for "time and effort" expended as a result of an adversary's misuse of the discovery process [*Argaman v. Ratan* (1999) 73 CA4th 1173, 1179-1180, 86 CR2d 917].

Distinguish:

Pro se litigants may nevertheless be awarded monetary discovery sanctions in the amount of those reasonable expenses *actually incurred*, including photocopying, computer-assisted legal research, and other identifiable and allocable costs [see *Kravitz v. Superior Court* (2001) 91 CA4th 1015, 1020-1021, 111 CR2d 385 ; *Argaman v. Ratan* (1999) 73 CA4th 1173, 1180, 86 CR2d 917].



Cross Reference:

Monetary sanctions, see *Ch. 3, Sanctions*.

9.26[6][b] Moving Party Is Subject to Sanctions Even in Unopposed Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

The failure to file a written opposition or to appear at a hearing, or the voluntary provision of discovery is not deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

9.26[7] Failure to Comply With Order Compelling Further Response Subjects Party to Monetary, Issue, Evidence, or Terminating Sanction. If a party fails to obey an order compelling further response to interrogatories, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. In lieu of or in addition to that sanction, the court may impose a monetary sanction [*CCP § 2030.300(e)*; see also *CCP § 2023.010 et seq.* (discovery sanctions)].

Distinguish:

Even if a party disregards an order compelling further responses, a court may not order a waiver of attorney-client or work product privilege. That sanction is not authorized by *CCP § 2030.300(e)* [*Best Prods., Inc. v. Superior Court* (2004) 119 CA4th 1181, 1189-1190].



Cross Reference:

Discovery sanctions, see Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMotions to Compel



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

1-9 MB Practice Guide: CA Civil Discovery 9.27

9.27 CHECKLIST: Use of Interrogatories at Trial by Any Party Other Than Responding Party.

- ☐ If responding party has filed amended answers, consider moving for an order that the initial answer to that interrogatory be deemed binding.

Content Note:

The motion must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion.

Authority:

CCP § 2030.310

Discussion:

See 9.30

- ☐ If summary judgment motion is filed, use any answer or part of any answer to any interrogatory against the responding party, if appropriate.

Authority:

CCP § 437c(b)(1), (2)

Discussion:

See 9.31

- ☐ If appropriate, prepare any answer or part of any answer to any interrogatory for use against the responding party during trial:

- ☐ Follow any relevant local court rules regarding the preparation of interrogatory answers for use at trial.

Authority:

CCP § 2030.410; see also Los Angeles Super Ct Rules, Rule 8.70 (use of interrogatories in Los Angeles Superior Court trials)

Discussion:

See 9.29

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUse



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

1-9 MB Practice Guide: CA Civil Discovery 9.28

9.28 CHECKLIST: Postjudgment Use of Interrogatories by Judgment Creditor.

☐ If you are the judgment creditor pursuant to a money judgment that is enforceable, consider propounding interrogatories to the judgment debtor to secure information about his or her assets.

☐ Consider using official form interrogatories.

☐ Consider drafting specially prepared interrogatories.

Authority:

CCP §§ 708.020(a), 2030.010 et seq.

Discussion:

See 9.05-9.08 (drafting of interrogatories)

Form:

See 9.35 (sample specially prepared interrogatories)

Checklist:

See 9.03 (checklist for propounding interrogatories)

☐ If you have propounded previous postjudgment interrogatories to this judgment debtor in this case, wait until 120 days after receipt of the last responses before serving this set.

Authority:

CCP § 708.020(b)

Discussion:

See 9.32[3]

☐ Limit the number of interrogatories to the following:

- ☐ Official form interrogatories.
- ☐ 35 specially prepared interrogatories.

Authority:

CCP §§ 708.020(d), 2030.030-2030.070, 2033.710-2033.740

Discussion:

See 9.06

Form:

See 9.35 (sample specially prepared interrogatories)

☐ Limit the substance of the interrogatories to matters relevant to enforcement of the money judgment.

Authority:

CCP § 2030.010(b)

Discussion:

See 9.05

☐ If the judgment debtor does not respond to the interrogatories, consider bringing a motion for an order compelling responses.

Authority:

CCP §§ 708.020(c), 2030.290

Discussion:

See 9.25 (motion for order compelling responses), 9.32[5] (enforcement of interrogatories)

Checklist:

See 9.24 (motion to compel responses)

Form:

See 9.40 (motion for order compelling responses)

☐ If the judgment debtor does not respond adequately to the interrogatories, consider bringing a motion for an order compelling further responses.

- ☐ Attempt to resolve the matter informally, documenting all attempts to do so.
- ☐ If necessary, file a motion for an order compelling further responses.

Authority:

CCP §§ 708.020(c), 2030.300

Discussion:

See 9.26 (motion for order compelling further response), 9.23[5] (enforcements of interrogatories)

Checklist:

See 9.24 (motion to compel responses)

Forms:

See 9.42-9.44 (motion for order compelling further response, separate statement, and order)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUse



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

1-9 MB Practice Guide: CA Civil Discovery 9.29

9.29 Parties Other Than Responding Party May Use Answer Against Responding Party at Trial.

9.29[1] Propounding Party May Use Answer Against Responding Party at Trial. At the trial or any other hearing in the action, the propounding party may use any answer or part of an answer to an interrogatory only against the responding party. This rule is subject to admissibility under the rules of evidence [*CCP* § 2030.410].

Example--Prior Inconsistent Statement.

An answer to an interrogatory may be used at trial as evidence of a prior inconsistent statement, under *Evid Code* § 1235.

➤ Cross Reference:

Hearsay rule and exceptions, including prior inconsistent statement, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

9.29[2] Any Party Other Than Responding Party May Use Answer Against Responding Party at Trial. At the trial or any other hearing in the action, any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. This rule is subject to admissibility under the rules of evidence [*CCP* § 2030.410].

9.29[3] Responding Party's Availability to Testify Is Not Ground of Objection to Use of Interrogatory Answer at Trial. No party may object to the use of an answer to an interrogatory on the ground that the responding party is available to testify, has testified, or will testify at the trial or other hearing [*CCP* § 2030.410].

➤ Cross Reference:

Hogan & Weber, California Civil Discovery, § 5.22 (Matthew Bender 6th ed.).

9.29[4] Local Court Rules May Provide Procedure for Use of Interrogatory Answers at Trial. Local court rules may provide procedure for use of interrogatory answers at trial [*Cal Rules Ct, Rule 3.20(b)(1)*] (general preemption of local court rules relating to "discovery" does not apply to trial proceedings)].

Example--Los Angeles County Superior Court:

The following procedure is required before reading into evidence any portion of any interrogatories (or depositions, requests for admissions, or video deposition) [Los Angeles Super Ct Rules, Rule 8.70]:

- Counsel must first obtain leave of court.
- Counsel must then advise the court and opposing counsel as to the numbers of the interrogatories to be read.
- Prior to the reading, opposing counsel must be given a reasonable opportunity to read the same and interpose any objections to it.

If there are multiple interrogatories, a party intending to read some of them into evidence should make extracts of the pertinent portions of questions and answers before the reading and furnish sufficient copies of the interrogatories for adversaries and the court [Los Angeles Super Ct Rules, Rule 8.70].

The extracts should be prepared in a form so that the question answered immediately precedes the answer and the date or other description of the particular set of interrogatories appears on the extract [Los Angeles Super Ct Rules, Rule 8.70].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesUse



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

1-9 MB Practice Guide: CA Civil Discovery 9.30

9.30 If Responding Party Serves Amended Answers, Propounding Party May Move for Order Deeming Initial Answer Binding.

9.30[1] Responding Party May Serve Amended Answers Containing Later-Acquired, Inadvertently Omitted, or Corrected Information. Without leave of court, a party may serve an amended answer to any interrogatory that contains information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory [CCP § 2030.310(a)].



Cross Reference:

Discussion, see 9.22.

9.30[2] Court Will Order Initial Answers Deemed Binding If Substantial Justification Not Shown, and If Prejudice Is Not Otherwise Curable.

9.30[2][a] Propounding Party May File Motion that Initial Answers Be Deemed Binding. The party who propounded an interrogatory to which an amended answer has been served may move for an order that the initial answer to that interrogatory be deemed binding on the responding party for the purpose of the pending action [CCP § 2030.310(b)].

9.30[2][b] Motion Must Include Declaration of Good-Faith Attempt at Informal Resolution. A motion for an order that the initial answer to that interrogatory be deemed binding must be accompanied by a declaration stating facts showing a reasonable and good-faith attempt at an informal resolution of each issue presented by the motion [CCP § 2030.310(b)].

9.30[2][c] Court Must Grant Motion in Absence of Substantial Justification, and If Prejudice to Propounding Party Not Otherwise Curable. The court will grant the motion if it determines the following [CCP § 2030.310(c)]:

- The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory;

- The responding party has failed to show substantial justification for the initial answer to that interrogatory; and
- The prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer under *CCP* § 2030.410.

9.30[2][d] Unsuccessful Party in Motion Is Subject to Mandatory Monetary Sanction in Absence of Substantial Justification. The court will impose a monetary sanction under against any party, person, or attorney who unsuccessfully makes or opposes a motion to deem binding an initial answer to an interrogatory [*CCP* § 2030.310(d); *see also CCP* § 2023.030 (monetary sanctions)].

However, the sanction will not be imposed if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2030.310(d)].



Cross Reference:

Monetary sanction, see Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesUse



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

1-9 MB Practice Guide: CA Civil Discovery 9.31

9.31 Use of Answers to Interrogatories in Summary Judgment Motion.

9.31[1] Answers to Interrogatories May Be Used in Support of Summary Judgment Motion. A motion for summary judgment must be supported by affidavits and papers specified in *CCP* § 437c(b)(1), including, when appropriate, answers to interrogatories [see *CCP* § 437c(b)(1); see, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 CA4th 308, 312-313, 125 CR2d 499 ; *Aguilar v. Atlantic Richfield Co.* (2001) 25 C4th 826, 857, 107 CR2d 841, 24 P3d 493 ; *Union Bank v. Superior Court* (1995) 31 CA4th 573, 592-593, 37 CR2d 653].

Example:

In an asbestos exposure action, the defendant propounded a series of special interrogatories requesting all facts regarding the plaintiff's exposure to asbestos from the defendant's products. Plaintiffs' answers were so devoid of facts it was clear that plaintiffs did not have specific evidence of such an exposure. The defendant was able to rely on plaintiffs' interrogatory responses to meet its initial burden of presenting evidence sufficient to make a prima facie showing that no triable issues of fact existed regarding causation [*Andrews v. Foster Wheeler LLC* (2006) 138 CA4th 96, 104-107, 41 CR3d 229] .

9.31[2] Answers to Interrogatories May Be Used in Opposition to Summary Judgment Motion. A party opposing a motion for summary judgment may support the opposition by use of answers to interrogatories, when appropriate [see *CCP* § 437c(b)(2)].

Judge's Perspective:

Trial courts keenly scrutinize prior interrogatory answers that are used against a party in support of motions for summary judgment/adjudication. This is especially so where the answer to the interrogatory in question is dispositive of the point or points sought to be adjudicated yet a sworn declaration is supplied by the responding party which seeks to contradict the answer provided in the interrogatory. Courts do not permit self-impeaching declarations to create triable issues of fact.



Cross Reference:

See California Forms of Pleading and Practice, Ch. 537, Summary Judgment (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureSummary JudgmentSupporting
MaterialsDiscovery Materials



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Chapter 9 Interrogatories

V. USING INTERROGATORIES ON SUMMARY JUDGMENT, AT TRIAL AND AFTER MONEY JUDGMENT

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9.32 Postjudgment Use of Interrogatories.

9.32[1] Procedures for Propounding Interrogatories to Judgment Debtor Are Available Whenever Money Judgment Is Enforceable. Postjudgment interrogatories may be used to secure information to aid in the enforcement of a money judgment [*see TMS, Inc. v. Aihara* (1999) 71 CA4th 377, 378, 83 CR2d 834]. The procedures for examining a judgment debtor, including the propounding of written interrogatories, are available whenever a money judgment is enforceable, except as provided in CCP § 708.010 and CCP § 708.020(b) [CCP § 708.010(a)].

➡ Cross Reference:

Judgment debtor proceedings, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

9.32[2] Judgment Creditor May Propound Interrogatories to Judgment Debtor. The judgment creditor may propound written interrogatories to the judgment debtor in the manner provided in CCP §§ 2030.010-2030.410 requesting information to aid in enforcement of the money judgment. The judgment debtor must answer the interrogatories in the manner and within the time provided by CCP §§ 2030.010-2030.410 [CCP § 708.020(a)].

➡ Cross Reference:

Requirements for propounding interrogatories, see 9.05-9.08.

9.32[3] Frequency of Interrogatories Is Limited to Every 120 Days From Response or Examination. The judgment creditor may not serve interrogatories pursuant to CCP § 708.020 within 120 days after the judgment debtor has responded to interrogatories previously served pursuant to CCP § 708.020; or within 120 days after the judgment debtor has been examined pursuant to CCP §§ 708.110-708.205. The judgment debtor is not required to respond to any interrogatories so served [CCP § 708.020(b); *see also* CCP § 708.030(b)].

9.32[4] Number of Interrogatories Is Limited Per Set But Not Cumulatively. The limitation provided by CCP § 2030.010 *et seq.* on the number of interrogatories that may be propounded applies to each set of interrogatories propounded from time to time pursuant to CCP § 708.020, but does not apply cumulatively to interrogatories propounded by the judgment creditor to the judgment debtor [CCP § 708.020(d)].

A party may propound to another party 35 specially prepared interrogatories and any additional number of official form interrogatories [see *CCP* § 2033.710 *et seq.*] that are relevant to the subject matter of the pending action [*CCP* § 2030.030; see *Fairmont Ins. Co. v. Superior Court* (2000) 22 *C4th* 245, 254, 92 *CR2d* 70, 991 *P2d* 156].

 Cross Reference:

Permitted number of interrogatories, see 9.06.

9.32[5] Interrogatories Are Enforceable As in Civil Action. Postjudgment interrogatories may be enforced, to the extent practicable, in the same manner as prejudgment interrogatories in a civil action. [*CCP* § 708.020(c)].

 Warning:

Failure to respond to written postjudgment interrogatories may result in the dismissal of the judgment debtor's appeal of the case [see *TMS, Inc. v. Aihara* (1999) 71 *CA4th* 377, 378-381, 83 *CR2d* 834 (willful disobedience of trial court's order to answer postjudgment interrogatories resulted in dismissal of appeal)].

 Cross Reference:

Dismissal of appeal, see California Forms of Pleading and Practice, Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview



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Chapter 9 Interrogatories
VI. FORMS
A. Propounding Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.33

9.33 Judicial Council Form DISC-001 Form Interrogatories.

[Click here to view image.](#)

NOTES.

Authority:

California Judicial Council Form DISC-001, pictured above, has been approved for optional use [see *CCP* §§ 2030.010-2030.070, 2033.710-2033.740; *Cal Rules of Ct*, Rule 1.35]



Timing:

See 9.07

Related Judicial Council Forms:

California Judicial Council Form DISC-004 (Form Interrogatories--Limited Civil Cases (Economic Litigation)), see 9.34; California Judicial Council Form DISC-003 (Form Interrogatories, Unlawful Detainer);

California Judicial Council Form DISC-002 (Form Interrogatories, Employment Law)

Related Form of Sample Specially Prepared Written Interrogatories:

See 9.35



Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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Chapter 9 Interrogatories
VI. FORMS
A. Propounding Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.34

9.34 Judicial Council Form DISC-004 Form Interrogatories--Limited Civil Cases (Economic Litigation).

Click here to view image.

Go to Interactive Fillable Form.

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

California Judicial Council Form DISC-004, pictured above, has been approved for optional use [see CCP §§ 2030.010-2030.070, 2033.710-2033.740; Cal Rules Ct, Rule 1.35]

Limitations on Discovery in Limited Civil Cases:

See 9.06[3]

Related Judicial Council Form:

California Judicial Council Form DISC-001 (General Form), see 9.33

➡ Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.



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Chapter 9 Interrogatories
VI. FORMS
A. Propounding Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.35

9.35 Sample Specially Prepared Written Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs. _____ [name],	)	_____ [Identify propounding party,
Defendant.	)	e.g., PLAINTIFF JOHN SMITH]'S
	)	_____ [specify interrogatories, e.g.,
	)	FIRST SET OF INTERROGATORIES TO
		_____ [identify responding party,
		e.g., DEFENDANT MARY JONES]

Propounding Party: _____ [Identify propounding party, e.g., Plaintiff John Smith].

Set Number: _____ [of Supplemental Interrogatories].

Responding Party: _____ [Identify responding party, e.g., Defendant Mary Jones] and to his/her attorneys:

_____ [Identify propounding party, e.g., Plaintiff John Smith] requests that
_____ [identify responding party, e.g., Defendant Mary Jones] respond to the following interrogatories separately and fully in writing and under oath, pursuant to CCP § 2030.010 et seq., and that the response be signed by

the person making them and be served on _____ [identify propounding party, e.g., Plaintiff John Smith] within _____ [number] days [, pursuant to the court's order shortening or extending the time to respond,] after service of those interrogatories.

[In answering these interrogatories, furnish all information that is available to you. If you cannot answer an interrogatory completely, answer it to the extent possible. If you do not have personal knowledge sufficient to respond fully to an interrogatory, so state, but make a reasonable and good-faith effort to obtain the information by inquiry to other natural persons or organizations, unless the information is equally available to the propounding party, pursuant to CCP § 2030.220.]

[Set forth questions as follows, numbering each separately and consecutively. Do not include a preface, instructions, or subparts; or compound, conjunctive, or disjunctive questions. Do not include any continuing interrogatories. Set forth any specially defined terms completely in capital letters.]

Interrogatory No. 1: _____ [Set forth the first question].

Interrogatory No. 2: _____ [Set forth the second question].

[Continue in this manner, numbering sequentially].

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [propounding party]

NOTES.

Authority:

CCP §§ 2030.010-2030.070



Timing:

See 9.07

Drafting Interrogatories:

See 9.08

Number of Interrogatories Allowed:

See 9.06

Related Declaration for Additional Discovery:

See 9.36

Related Judicial Council Forms:

California Judicial Council Form DISC-001 (General Form), see 9.33

California Judicial Council Form DISC-004 (Form Interrogatories, Limited Civil Cases (Economic Litigation)), see 9.34

California Judicial Council Form DISC-003 (Form Interrogatories, Unlawful Detainer)

California Judicial Council Form DISC-002 (Form Interrogatories, Employment Law)



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Chapter 9 Interrogatories
VI. FORMS
A. Propounding Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.36

9.36 Declaration for Additional Discovery.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION
_____ [name],	)	OF _____ [name]
Defendant.	)	FOR ADDITIONAL DISCOVERY
	)	
	)	

I, _____ [name] declare:

1. I am _____ [a party to this action or proceeding appearing in propria persona or presently the attorney for _____ (name), a party to this action or proceeding].
2. I am propounding to _____ [name] the attached set of interrogatories.
3. This set of interrogatories will cause the total number of specially prepared interrogatories propounded to the party to whom they are directed to exceed the number of specially prepared interrogatories permitted by *Section 2030.030 of the Code of Civil Procedure*.

4. I have previously propounded a total of _____ interrogatories to this party, of which _____ interrogatories were not official form interrogatories.
5. This set of interrogatories contains a total of _____ specially prepared interrogatories.
6. I am familiar with the issues and the previous discovery conducted by all of the parties in the case.
7. I have personally examined each of the questions in this set of interrogatories.
8. This number of questions is warranted under *Section 2030.040 of the Code of Civil Procedure* because _____ *[state each factor described in CCP § 2030.040 that is relied on, and the reasons why any factor relied on is applicable to the instant lawsuit].*
9. None of the questions in this set of interrogatories is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on _____ *[date]*.

_____ *[signature]*

_____ *[typed name]*

Attorney for _____
[name of propounding party]

NOTES.

Authority:

CCP § 2030.050

Requirement of Declaration for Additional Discovery:

See 9.06[2][d]

Related Form of Sample Specially Prepared Written Interrogatories:

See 9.35

Related Judicial Council Form:

California Judicial Council Form DISC-001 (General Form), *see 9.33*



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Chapter 9 Interrogatories
VI. FORMS
B. Responding to Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.37

9.37 Sample Response to Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	RESPONSE TO _____ [Identify
Defendant.	)	<i>propounding party in possessive case, e.g.,</i>
	)	PLAINTIFF JOHN SMITH'S]
	)	_____ [specify interrogatories,
		<i>e.g., FIRST SET OF INTERROGATORIES] TO</i>
		_____ [identify responding party,
		<i>e.g., DEFENDANT MARY JONES]</i>

Responding Party: _____ [Identify responding party, e.g., Defendant Mary Jones].

Propounding Party: _____ [Identify propounding party, e.g., Plaintiff John Smith].

Set Number: _____ [of Supplemental Interrogatories].

_____ [Identify responding party, e.g., Defendant Mary Jones] responds to the interrogatories served on him/her by _____ [identify propounding party, e.g., Plaintiff John Smith] as follows:

1. _____ [If answering, state each answer by the same number and in the same sequence as the corresponding interrogatory, e.g., My name is Mary Jones; I reside at 1000 Main Street, Coast City, California].
2. _____ [If stating an objection, clearly set forth the specific ground for it; if invoking a privilege, clearly state which one, e.g., Objection on the ground that the subject matter concerns privileged lawyer-client communications, in that the communications consist of information transmitted in confidence from defendant to her lawyer in the course of the lawyer-client relationship].
3. _____ [If exercising the option to refer to documents under Section 2030.230 of the Code of Civil Procedure, state: Pursuant to CCP § 2030.230, the writings from which the answer may be derived or ascertained are identified as investigation reports regarding traffic accidents involving Metro Transit System buses for the years 1998-1999]], and may be examined on or after _____ [date], between the hours of _____ and _____ at _____ [location], or at any other time and place pursuant to stipulation.

[CONTINUE setting forth appropriate responses]

_____ [date]

[EITHER, attorney signs if response contains one or more objections]

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [responding party]

[AND/OR, party, its agent, or its officer signs and verifies, unless response contains only objections]

_____ [signature of responding party or agent or officer]

_____ [typed name]

VERIFICATION

I, _____ [name], am the _____ [identify, e.g., defendant] in the above-entitled action. I have read the foregoing Response to Interrogatories and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and concerning those matters, I believe it to be true.

1-9 MB Practice Guide: CA Civil Discovery 9.37

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

_____ [date]

_____ [signature of responding party]

_____ [typed name]

[OR]

I, _____ [name], am _____ [the agent or an officer] of _____ [name of responding party], which is a _____ [specify type of entity, e.g., corporation] and a/the _____ [identify, e.g., defendant] in the above-entitled action. I have read the foregoing Response to Interrogatories and know the contents thereof. Based on information available to _____ [name of responding party], I am informed and believe that the matters stated therein are true.

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

_____ [date]

_____ [signature of agent or officer]

_____ [typed name]

NOTES.

Authority:

CCP §§ 2030.210-2030.250



Timing:

See 9.20

Drafting Responses:

See 9.15-9.17

Related Judicial Council Form:

California Judicial Council Form DISC-001 (General Form), see 9.33

Related Form of Sample Specially Prepared Written Interrogatories:

See 9.35



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Chapter 9 Interrogatories
VI. FORMS
B. Responding to Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.38

9.38 Notice of Motion and Motion for Protective Order Concerning Response to Interrogatories With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER RESTRICTING DISCOVERY
) AND IMPOSING MONETARY SANCTION, SUP-
) PORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) (Interrogatories)
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order _____ [specify order sought, e.g., that Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones, Interrogatories Nos. 8, 9 and 10, served on Defendant Mary Jones on July 2, 2006, need not be answered], and an order imposing a monetary sanction against _____ [propounding party and/or his/her attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] in the amount of \$ _____. The motion will be made on the grounds that _____ [specify grounds for protective order, e.g., the interrogatories request commercial information that could harm defendant's business if it becomes public], and that _____ [identify moving party, e.g., Defendant Mary Jones] made a reasonable and good-faith attempt to resolve informally the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the memorandum set forth below, on the records and files herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Propounding party's status and name, e.g., Defendant Mary Jones]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. On _____ [date], _____ [identify propounding party, e.g., Plaintiff John Smith] served his/her _____ [specify, e.g., first set of interrogatories] on _____ [identify moving party, e.g., Defendant Mary Jones]. A copy of _____ [specify all or some interrogatories, e.g., Interrogatories 8, 9 and 10 of that set] is attached hereto as Exhibit A and made a part hereof.

3. Good cause exists for the protective order sought by _____ [moving party, e.g., Defendant Mary Jones] in that _____ [set forth facts showing good cause for particular order sought, e.g., Interrogatories 8, 9 and 10 refer to secret commercial information relating to licensing agreements entered into by defendant, including licensing fees. Defendant's business is highly competitive. Its competitors have systematically attempted to persuade defendant's customers to patronize them instead of defendant. Divulging the terms of defendant's licensing arrangements would enable defendant's competitors to offer better terms and thereby to take away these customers].

4. On _____ [date], I _____ [specify actions taken to confer with opposing party in a reasonable and good-faith attempt to resolve the issues covered by the motion informally, e.g., sent a letter to plaintiff's attorney asking that plaintiff withdraw Interrogatories 8, 9 and 10. A copy of the letter is attached as Exhibit A and made a part of this declaration. To date, I have not received an answer to the letter, nor have my subsequent telephone calls to plaintiff's attorney been returned].

5. _____ [Identify moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the total amount of \$_____ on the following _____ [itemize and explain reasonable expenses related to efforts made to oppose the interrogatories in question, including attorney's fees].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2030.090

Grounds for Protective Order:

See 9.19[2]

Relief Available by Protective Order:

See 9.19[3]

Prerequisite to Motion:

See 9.19[1]

Related Form of Order:

See 9.39

Related Form of Memorandum:

See *California Points and Authorities, Ch. 84, Discovery: Interrogatories, § 84.30 (Matthew Bender)*



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Chapter 9 Interrogatories
VI. FORMS
B. Responding to Interrogatories

1-9 MB Practice Guide: CA Civil Discovery 9.39

9.39 Order on Motion for Protective Order Concerning Response to Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for a protective order directing that _____ [describe motion, e.g., the answers to Interrogatories Number of Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones] and for monetary sanctions came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [state order, e.g., Interrogatories Number _____ of Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones], need not be answered].

[AND EITHER, if imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] _____ [acted without substantial justification or specify other circumstances making imposition of a sanction just],

IT IS FURTHER ORDERED that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] pay forthwith to _____ [successful party, e.g., Defendant Mary Jones] the sum of \$_____ as reasonable expenses and attorney's fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Robert Roe] _____ [acted with substantial justification or specify other circumstances making imposition of a sanction unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith or his attorney Robert Roe].

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2017.020, 2019.030, 2030.090

Related Form of Motion:

See 9.38



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Chapter 9 Interrogatories

VI. FORMS

C. Compelling Responses and Further Responses

*1-9 MB Practice Guide: CA Civil Discovery 9.40***9.40 Notice of Motion for Order Compelling Response to Interrogatories and Declaration.**

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER COMPELLING RESPONSE TO INTERROG-
) ATORIES AND FOR MONETARY SANCTION,
) SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [identify party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
thereafter as the matter may be heard, in [_____ (Department or Division) _____]

of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order compelling _____ [identify party, e.g., Defendant Mary Jones] to serve on him/her a response to _____ [specify interrogatories, e.g., Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones, served on _____ (date)], and an order imposing a monetary sanction against responding party and/or his/her attorney _____ [identify party and/or attorney, e.g., Defendant Mary Jones and her attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground that _____ [identify party, e.g., Defendant Mary Jones] has failed to serve a timely response to the above-described interrogatories.

The motion will be based on this notice of motion, the declaration(s) of _____ [name(s)], and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Propounding party's status and name, e.g., Plaintiff John Smith]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. On _____ [date], _____ [identify moving party, e.g., Plaintiff John Smith] served his/her _____ [specify number, e.g., first] set of interrogatories on _____ [identify responding party, e.g., Defendant Mary Jones].

3. _____ [Identify moving party, e.g., Plaintiff John Smith] has received no response to these interrogatories.

[If seeking monetary sanction, add:]

4. As a result of the failure of _____ [identify responding party, e.g., Defendant Mary Jones] to respond to the above-described interrogatories, _____ [identify moving party, e.g., Plaintiff John Smith] has incurred expenses as follows: _____ [itemize and explain reasonable expenses, including attorney's fees], for a total of \$ _____.

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2030.290

Grounds for Order to Compel Response:

See 9.25[1]

Related Form of Order:

See 9.41

Related Form of Memorandum:

See California Points and Authorities, Ch. 84, Discovery: Interrogatories, § 84.10 (Matthew Bender)



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Chapter 9 Interrogatories

VI. FORMS

C. Compelling Responses and Further Responses

1-9 MB Practice Guide: CA Civil Discovery 9.41

9.41 Order on Motion Compelling Response to Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Plaintiff John Smith] for an order compelling _____ [identify party, e.g., Defendant Mary Jones] to serve on him/her a response to _____ [specify interrogatories, e.g., Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones, served on _____ (date)], and for monetary sanctions] came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____[*specify each order, e.g., Defendant Mary Jones serve on Plaintiff John Smith responses to Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones*] on or before _____[*date*].

[AND EITHER, if imposing sanctions]

On further proof made to the satisfaction of the court that _____[*unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe*] _____[acted without substantial justification or *specify other circumstances making imposition of a sanction just*],

IT IS FURTHER ORDERED that _____[*unsuccessful party, person, or attorney, e.g., Defendant Mary Jones and her attorney Tom Doe*] payforthwith to _____[*successful party, e.g., Plaintiff John Smith*] the sum of \$_____ as reasonable expenses and attorney's fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____[*unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe*] _____[acted with substantial justification or *specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____[*unsuccessful party, person, or attorney, e.g., Defendant Mary Jones or her attorney Tom Doe*].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2030.290

Related Form of Motion:

See 9.40



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Chapter 9 Interrogatories

VI. FORMS

C. Compelling Responses and Further Responses

1-9 MB Practice Guide: CA Civil Discovery 9.42

9.42 Notice of Motion for Order Compelling Further Response With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER COMPELLING FURTHER RESPONSE TO
) INTERROGATORIES AND IMPOSING MONET-
) ARY SANCTION, SUPPORTING DECLARATION
) OF _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
thereafter as the matter may be heard, in [_____ (Department or Division) _____]

of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order compelling further responses to _____ [specify interrogatories, e.g., Number _____ of Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones, served on _____ (date)], and an order imposing a monetary sanction against _____ [responding party and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Tom Doe] in the amount of \$ _____. The motion will be made on the ground[s] that _____ [the purported answers are evasive and incomplete and/or the exercise of the option to produce documents under Section 2030.230 of the Code of Civil Procedure is unwarranted and/or the required specification of documents under Section 2030.230 of the Code of Civil Procedure is inadequate and/or the objection(s) to the interrogatories is/are _____ (without merit and/or too general)]. The motion will be made on the further ground that _____ [identify moving party, e.g., Plaintiff John Smith] made a reasonable and good-faith attempt at informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name], on the separate statement served and filed herewith pursuant to *Cal Rules of Ct, Rule 3.1345*, on the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Propounding party's status and name, e.g., Plaintiff John Smith]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. On _____ [date], _____ [identify moving party, e.g., Plaintiff John Smith] served his/her _____ [specify number, e.g., first] set of interrogatories on _____ [identify responding party, e.g., Defendant Mary Jones].

3. On _____ [date], _____ [identify responding party, e.g., Defendant Mary Jones] served _____ [identify moving party, e.g., Plaintiff John Smith] with his/her purported responses to these interrogatories. _____ [Describe insufficiency of responses, e.g., Defendant Mary's responses to Interrogatories No. 8 were evasive and incomplete because they do not directly address the matters raised in the interrogatories.

[CONTINUE]

4. On _____ [date], I _____ [specify actions taken to confer with opposing party in a

reasonable and good-faith attempt to resolve the issues covered by the motion informally, e.g., first telephoned, then sent a letter to defendant's attorney Tom Doe, asking that defendant provide a direct and further response to the above-described interrogatories. A copy of the letter is attached as Exhibit A and made a part of this declaration. To date, I have not received an answer to the letter, nor have my subsequent telephone calls to plaintiff's attorney been returned].

5. As a result of the failure of _____ [*identify responding party, e.g., Defendant Mary Jones*] to respond sufficiently to the above-described interrogatories, _____ [*identify moving party, e.g., Plaintiff John Smith*] has incurred expenses as follows: _____ [*itemize and explain reasonable expenses, including attorney's fees*], for a total of \$_____.

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

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Set out memorandum here*]

NOTES.

Authority:

CCP § 2030.300

Grounds for Order to Compel Further Response:

See 9.26[1]

Related Form of Separate Statement:

See 9.43

Related Form of Order:

See 9.44

Related Form of Memorandum:

See California Points and Authorities, Ch. 84, Discovery: Interrogatories, § 84.11 (Matthew Bender)



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Chapter 9 Interrogatories

VI. FORMS

C. Compelling Responses and Further Responses

1-9 MB Practice Guide: CA Civil Discovery 9.43

9.43 Separate Statement Supporting Motion for Order Compelling Further Responses to Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	SEPARATE STATEMENT IN SUPPORT OF MO-
_____ [name],	)	TION FOR ORDER COMPELLING FURTHER RE-
Defendant.	)	SPONSES TO INTERROGATORIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

This separate statement is submitted in support of the motion by _____ [identify moving party, e.g., Plaintiff John Smith] to compel _____ [identify responding party, e.g., Defendant Mary Jones] to serve an adequate response to the _____ [specify interrogatories, e.g., Interrogatories Number _____ in Plaintiff John Smith's First Set of Interrogatories to Defendant Mary Jones, served on _____ (date)]. As required pursuant to *Cal Rules of Ct, Rule 3.1345*, this statement provides information relating to the interrogatories and responses at issue in the motion, as follows:

INTERROGATORY _____ [specify interrogatory, e.g., NO. 7 IN PLAINTIFF'S FIRST SET OF INTERROGATORIES]

1. Text of Interrogatory: _____ [set forth text verbatim].

2. Text of Response: _____ [set forth response verbatim]

[3. Related Definitions and Instructions: _____ (specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific interrogatory and the responses to it)].

[4. Related Demands and Responses: _____ (if the response to the specific interrogatory is dependant on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the response to it)].

[Repeat the foregoing paragraphs, including heading, as necessary, and renumber the following accordingly]

[5. Related Pleadings and Other Documents: _____ [Summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.]].

6. Statement of Reasons for Compelling Further Response(s): _____ [State factual and legal reasons for compelling further responses to the specific interrogatory)].

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Propounding party's status and name, e.g., Plaintiff John Smith]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1345(a)(2)

Requirement of Separate Statement:

See 9.26[3]

Related Form for Motion:

See 9.42



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Chapter 9 Interrogatories

VI. FORMS

C. Compelling Responses and Further Responses

1-9 MB Practice Guide: CA Civil Discovery 9.44

9.44 Order on Motion Compelling Further Response to Interrogatories.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Plaintiff John Smith] for an order compelling _____ [identify party, e.g., Defendant Mary Jones] to serve on him/her a further response to _____ [specify interrogatories, e.g., interrogatories Number _____ in Plaintiff John Smith's First Set of Interrogatories, served on Defendant Mary Jones on _____ (date)], and for monetary sanctions came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [specify each order, e.g., Defendant Mary Jones serve on Plaintiff John Smith response to Interrogatories Number _____ in Plaintiff John Smith's First Set of Interrogatories] on or before _____ [date].

[AND EITHER, if imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe] _____ [acted without substantial justification or specify other circumstances making imposition of a sanction just],

IT IS FURTHER ORDERED that _____ [unsuccessful party, person, or attorney, e.g., Defendant Mary Jones and her attorney Tom Doe] pay forthwith to _____ [successful party, e.g., Plaintiff John Smith] the sum of \$_____ as reasonable expenses and attorney's fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones and her attorney Tom Doe] _____ [acted with substantial justification or specify other circumstances making imposition of a sanction unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [unsuccessful party, person, or attorney, e.g., Plaintiff Defendant Mary Jones or her attorney Tom Doe].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2030.300

Related Form of Motion:

See 9.42



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Chapter 10 Inspection of Documents, Tangible Things, and Land

1-10 MB Practice Guide: CA Civil Discovery 10.syn

§ 10.syn Synopsis to Chapter 10: Inspection of Documents, Tangible Things, and Land

10.01 Scope.

10.02 Objective and Strategy.

10.03 CHECKLIST: Making Demands for Inspection, Copying, Testing, and Sampling

10.04 Options and Strategies for Propounding Party.

10.04[1] Consider Early Demand for Inspection.

10.04[2] Consider Motion to Shorten Time to Respond.

10.04[3] Use Preliminary Discovery to Aid in Describing Documents With Reasonable Particularity.

10.04[4] Pursue Discovery From Parties Before Nonparties.

10.05 Scope of Demands.

10.05[1] Must Relate to Document, Thing, Land, or Electronically Stored Information in Possession, Custody or Control of Party.

10.05[2] Must Be Relevant and Not Privileged.

10.05[3] May Demand Inspection and Copying of Documents.

10.05[4] May Demand Inspection of Tangible Things and Related Activities.

10.05[5] May Demand Entry on Property, Inspection, and Related Activities.

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10.06 Direct Demands to Other Parties.

10.07 Number of Demands Is Regulated.

10.07[1] Number Differs for Unlimited and Limited Civil Cases.

10.07[2] No Numerical Limit on Number of Demands for Production in Unlimited Civil Cases.

10.07[3] Limited Civil Cases.

10.07[3][a] Number of Discovery Demands Is Restricted in Limited Civil Cases.

10.07[3][b] Party May Move to Withdraw Case From Restrictions.

10.07[3][c] Party May Move to Allow Additional Discovery.

10.08 Timing of Demands.

10.08[1] Plaintiff May Make Demand Without Leave of Court After Service of Summons or Appearance.

10.08[1][a] General Rule Is 10 Days.

10.08[1][b] Exception Is Five Days in Unlawful Detainer.

10.08[1][c] May Make Earlier Demand for Good Cause With Leave of Court.

10.08[2] Defendant May Make Demand at Any Time.

10.08[3] Response Must Be Due and Any Motions Heard by Discovery Cut-Off Date.

10.09 Format of Demands for Inspection.

10.09[1] Number Each Set of Demands Consecutively.

10.09[2] Identify Parties and Set Number.

10.09[3] State Each Demand Separately.

10.09[4] Describe Each Item or Category of Item.

10.09[5] Specify Time for Inspection, Copying, Testing, or Sampling.

10.09[5][a] General Rule Is at Least 30 Days After Service.

10.09[5][b] Exception Is Five Days in Unlawful Detainer.

10.09[5][c] May Specify Earlier Time With Leave of Court.

10.09[6] Specify Place for Inspection, Copying, Testing or Sampling.

10.09[7] Specify Demand for Related Activity.

10.09[8] Specify Form for Electronically Stored Information.

10.10 Serve Demand on Target Party and All Other Parties That Have Appeared.

10.11 Do Not File Demand.

10.12 Propounding Party Retains Original Papers.

10.12[1] Requesting Party Retains Responses for Statutory Retention Period.

10.12[2] Originals May Be Destroyed After Retention Period.

10.12[3] Related Papers Must Be Similarly Retained.

10.13 Propounding Supplemental Demands.

10.13[1] Discovery Tool Available for Inspection of Later Acquired or Discovered Evidence.

10.13[2] Statutory Limit on Number of Supplemental Demands.

10.13[3] Court May Allow Additional Supplemental Demands.

10.14 Other Discovery Methods Available to Obtain Inspection of Tangible Evidence.

10.14[1] Production of Documents or Things at Depositions.

10.14[1][a] May Be Demanded in Notice of Deposition to Party.

10.14[1][b] May Be Demanded in Deposition Subpoena to Nonparty.

10.14[2] Production of Documents in Response to Interrogatories.

10.14[3] Informal Investigation of Public Places.

10.15 CHECKLIST: Responding to Demands for Inspection, Copying, Testing, and Sampling.

10.16 Options and Strategy.

10.17 Time for Response.

10.17[1] General Rule Is to Serve Response Within 30 Days.

10.17[2] Exceptions.

10.17[2][a] Five Days in Unlawful Detainer.

10.17[2][b] Time Shortened or Extended by Court.

10.17[3] Extensions Based on Method of Service.

10.17[3][a] Service by Regular Mail.

10.17[3][b] Service by Express Mail.

10.17[3][c] Service by Fax.

10.17[3][d] Service by Electronic Transmission Pursuant to Local Court Rule.

10.18 Time to Inspect or Respond May Be Extended by Stipulation or Motion.

10.18[1] Parties May Stipulate.

10.18[1][a] Must Be in Writing.

10.18[1][b] All Types of Response Allowed When Time Is Extended Unless Otherwise Agreed.

10.18[2] Responding Party May Move for Extension.

10.19 Effect of Failure to Respond Timely.

10.19[1] Objections Waived.

10.19[2] Responding Party May Move for Relief From Waiver.

10.20 Response to Demand for Inspection.

10.20[1] Response.

10.20[1][a] Must Respond Separately to Each Item or Category.

10.20[1][b] Must State Intention to Comply, Representation of Inability to Comply, or Objection.

10.20[2] Stating Intention to Comply.

10.20[3] Stating Inability to Comply.

10.20[3][a] Diligent Search and Reasonable Inquiry Are Prerequisite.

10.20[3][b] Specify Reason for Inability to Comply.

10.20[3][c] Identify Person or Organization Known or Believed to Have the Item Demanded.

10.20[4] Asserting Objections.

10.20[4][a] Identify Item or Category of Item Objected to and State Ground.

10.20[4][b] Expressly State Objections Based on Privilege or Work Product.

10.20[4][c] Respond to Unobjectionable Parts.

10.20[5] Grounds for Objection.

10.20[5][a] Potential Grounds for Objection.

10.20[5][b] Relevance Is Ground for Objection.

10.20[5][c] Burden or Oppression Are Grounds for Objection.

10.20[5][d] Violation of Privacy Rights Is Ground for Objection.

10.20[5][e] Other Statutory Privileges May Apply In Appropriate Situations.

10.20[5][f] Request May Be Barred by Failure To Make Earlier Motion To Compel.

10.20[5][g] Time for Completion of Discovery May Have Expired.

10.21 Format of Response.

10.22 Signature.

10.22[1] Party Must Verify Unless Response Contains Only Objections.

10.22[2] Officer or Agent Signs on Behalf of Entity.

10.22[3] Attorney Signs Objections.

10.23 Production of Documents.

10.23[1] Time for Production.

10.23[2] Manner in Which Documents Must Be Produced.

10.24 Obtain Protective Order.

10.24[1] Objective and Grounds.

10.24[2] Relief Available in Protective Order.

10.24[3] Procedure.

10.24[3][a] Make Motion Promptly.

10.24[3][b] Declaration Showing Attempt at Informal Resolution Is Required.

10.24[3][c] Moving Papers.

10.24[4] Court May Qualify Denial of Motion.

10.24[5] Sanctions Against Losing Party Are Generally Mandatory.

10.25 CHECKLIST: Compelling Response to Demand for Inspection, Copying, Testing, and Sampling.

10.25[1] Moving Party's Checklist.

10.25[2] Opposing Party's Checklist.

10.26 Motion to Compel Response.

10.26[1] Available When No Response Has Been Made.

10.26[2] Motion Papers.

10.26[3] Sanctions Against Losing Party Are Generally Mandatory.

10.26[4] Sanctions Are Available for Failure to Comply With Order.

10.26[5] Sanctions Are Available Even If No Opposition to Motion.

10.27 CHECKLIST: Compelling Further Response to Demand for Inspection, Copying, Testing, and Sampling.

10.27[1] Moving Party's Checklist.

10.27[2] Opposing Party's Checklist.

10.28 Motion to Compel Further Response.

10.28[1] Grounds.

10.28[2] Motion Must Show Good Cause for Demand.

10.28[3] Attempt At Informal Resolution Is Required.

10.28[4] Motion Must Be Made Within 45 Days of Response.

10.28[5] Motion Papers.

10.28[6] Sanctions Against Losing Party Are Generally Mandatory.

10.28[7] Sanctions Are Available for Failure to Comply With Order.

10.28[8] Sanctions Are Available Even If No Opposition to Motion.

10.29 CHECKLIST: Compelling Compliance With Response to Demand for Inspection, Copying, Testing, and Sampling.

10.29[1] Moving Party's Checklist.

10.29[2] Opposing Party's Checklist.

10.30 Motion to Compel Compliance With Response.

10.30[1] Grounds.

10.30[2] Motion Papers.

10.30[3] Sanctions Against Losing Party Are Generally Mandatory.

10.30[4] Sanctions Are Available for Failure to Comply With Order.

10.30[5] Sanctions Are Available Even in Absence of Opposition to Motion.

10.30[6] Monetary Sanctions May Be Available Post Trial.

10.31 Demand for Production of Documents or Tangible Things for Inspection.

10.32 Demand for Permission to Enter Onto Land or Other Property for Inspection.

10.33 Notice of Motion and Motion for Leave to Make Early Demand for Inspection.

10.34 Notice of Motion and Motion to Shorten Time for Response to Demand for Inspection with Supporting Declaration.

10.35 Notice of Motion and Motion for Leave to Propound Supplemental Demand for Inspection.

10.36 Response to Demand for Inspection.

10.37 Stipulation to Extend Time to Inspect or Respond.

10.38 Notice of Motion and Motion for Protective Order Concerning Demand for Inspection With Supporting Declaration.

10.39 Order on Motion for Protective Order Concerning Demand for Inspection.

10.40 Notice of Motion and Motion to Relieve Party From Waiver of Objections to Demand for Inspection With Supporting Declaration.

10.41 Notice of Motion and Motion to Compel Response to Demand for Inspection With Supporting Declaration.

10.42 Notice of Motion and Motion to Compel Further Response to Demand for Inspection With Supporting Declaration.

10.43 Notice of Motion and Motion to Compel Compliance With Response to Demand for Inspection With Supporting Declaration.



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Chapter 10 Inspection of Documents, Tangible Things, and Land
I. STRATEGY

1-10 MB Practice Guide: CA Civil Discovery 10.01

10.01 Scope.

This chapter covers:

- Objectives and strategy for demands for production and inspection, copying, testing, and sampling of documents and other tangible evidence, and demands for entry onto property for inspection [see 10.02].
- Scope of demands for inspection, copying, testing, and sampling [see 10.05].
- Propounding [see 10.03 -10.13; Forms: see 10.31 -10.35] and responding to [see 10.15 -10.24; Forms: see 10.36 -10.40] demands for inspection, copying, testing, and sampling, including seeking protective orders [see 10.24].
- Effect of the failure to respond timely to demands for inspection, copying, testing, and sampling [see 10.19].
- Motions to compel responses to demands for inspection, copying, testing, and sampling [see 10.25, 10.26; Form: see 10.41].
- Motions to compel further responses to demands for inspection, copying, testing, and sampling [see 10.27, 10.28; Form: see 10.42].
- Motions to compel compliance with responses to demands for inspection, copying, testing, and sampling [see 10.29, 10.30; Form: see 10.43].

Discovery of electronic data is specifically covered in Ch. 5, Discovery of Electronic Information.

Core Statutes:

CCP §§ 2031.010-2031.510

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land
I. STRATEGY

1-10 MB Practice Guide: CA Civil Discovery 10.02

10.02 Objective and Strategy.

Demands for inspection, copying, testing, and sampling are the tools for obtaining the production of documents and other tangible evidence from an opposing party prior to, or apart from, a deposition. The demand may also request activities related to the tangible evidence, such as photocopying, photographing, or testing. Demands for inspection are also used for the inspection of land or other property, and the conduct of relevant related activities on the property. In addition, a party may inspect, copy, test, or sample electronically stored information. These demands are governed by *CCP §§ 2031.010-2031.510*.



Strategic Points--Propounding Party:

Making a demand for inspection promptly is important if tangible evidence or property is likely to become damaged or deteriorate with the passage of time. When demanding to inspect personal property, involve an expert at the earliest opportunity. The expert looking at a stove burner or an airbrake may see things the attorney would not recognize, e.g., in a product liability matter that the defective component was not manufactured by the defendant or that the object was modified sometime after it was manufactured.

Demanding production and inspection of documents early in litigation gives the demanding party the opportunity to analyze documents and to assess the strength of the written evidence supporting the opposing party's case. Observation of the actual documents can provide insight that might not be apparent from a copy, e.g., signs of tampering on a negotiable instrument or entries allegedly written over a period of time that appear to be in identical ink.



Warning--Act to Prevent Spoliation:

To guard against spoliation of evidence, as soon as litigation commences, send a letter to the party in possession of the evidence cautioning that it be preserved. If, on a subsequent demand for inspection, the responding party reports the object or document to have been destroyed, seek an issue or terminating sanction on the ground that the destruction has rendered proof impossible.

Caution--Inadvertent Disclosure of Privileged Information.

If a lawyer receives a document in the course of discovery that appears to be protected by the attorney-client privilege or is protected attorney work product, and it is apparent that the materials were provided or made available through inadvertence, the lawyer receiving the documents should refrain from examining the materials and promptly notify the sender that he or she possesses material that appears to be privileged [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 817, 68 CR3d 758, 171 P.3d 1092 ; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 CA4th 644, 656-657, 82 CR2d 799] . Failure to take such steps can result in disqualification of counsel [*Rico v. Mitsubishi Motors Corp.* (2007) 42 C4th 807, 819, 68 CR3d 758, 171 P.3d 1092 ; see also *Bak v. MCL Financial Group, Inc.* (2009) 170 CA4th 1118, 1122, 88 CR3d 800 (attorney sanctioned \$7,500 for reviewing and copying inadvertently produced privileged documents and sending copies to arbitration panel before returning them)].



Strategic Point--Responding Party:

Respond within the required time period. Failure to respond can result in a waiver of objections to the demand, including objections based on privilege or work product [see 10.19].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 195, Discovery: Inspection of Tangible Evidence (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 61, Demand for Inspection of Documents, Things, and Land (Matthew Bender).



Cross References:

Discussion of issues specific to electronic data, see Ch. 5, Discovery of Electronic Information.

Production of documents and things and entry on land in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery; Moore's Federal Practice, Ch. 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes (Matthew Bender 3d ed.); or 12 Bender's Forms of Discovery Treatise, Ch. 4, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land
II. MAKING DEMANDS FOR INSPECTION, COPYING, TESTING, AND SAMPLING

1-10 MB Practice Guide: CA Civil Discovery 10.03

10.03 CHECKLIST: Making Demands for Inspection, Copying, Testing, and Sampling



Determine timing:

- ☐ Plaintiff may serve demands beginning the earlier of 10 days after:
 - ☐ Service of summons on the responding party; or
 - ☐ Appearance by the responding party.

Exceptions:

- Five days if unlawful detainer; or
- In any action, if requesting party obtains order to make a demand for inspection at an earlier time.

Authority:

CCP § 2031.020

Discussion:

See 10.04[1], 10.08[1]

Form:

See 10.33 (motion for leave to make early demand for inspection)



Defendant may make a demand at any time.

Authority:*CCP § 2031.020(a)***Discussion:***See 10.08[2]*

- ☐ Decide whether to file motion to shorten time for response.

Authority:*CCP § 2031.260***Discussion:***See 10.04[2]***Form:***See 10.34*

- ☐ Determine how many requests you can make
- ☐ In unlimited cases:
- ☐ Propound as many demands as needed.
- ☐ In limited civil case, evaluate desired demands in light of the restriction to total of 35 of all of the following:
- ☐ Requests for admissions.
- ☐ Interrogatories.
- ☐ Demands to produce documents or things.

Authority:*CCP §§ 91, 94, 2031.010 et seq.***Discussion:***See 10.07*

- ☐ Determine items or property to be inspected and requested related activities.
- ☐ Identify documents to be inspected and copied.
- ☐ Identify other tangible items to be inspected and related activities to be conducted.

- ☐ Identify land or other property to be entered and inspected, and related activities to be conducted.
- ☐ Identify electronically stored information to be inspected, copied, tested, or sampled.

Authority:

CCP §§ 2031.010, 2031.030

Discussion:

See 10.05

☐ Prepare demand☐ Check format:

- ☐ Number of set.
- ☐ Caption.
- ☐ State each demand separately.
- ☐ Describe each item or category of item.
- ☐ Specify time for inspection.
- ☐ Specify place for inspection.
- ☐ Specify any related activity to be conducted.
- ☐ Specify form of production for electronically stored information.

Authority:

CCP § 2031.030

Discussion:

See 10.09

Forms:

See 10.31 (demand for production of documents or tangible things for inspection), 10.32 (demand for permission to enter onto land or other property for inspection)

☐ Serve copies of demand on:

- ☐ Responding party.

- ☐ All parties who have appeared in the action.

Authority:

CCP § 2031.040

Discussion:

See 10.10

- ☐ Calendar receipt of responses in 30 days.

Exception:

Five days in unlawful detainer, forcible entry, and forcible detainer actions. In any action, as otherwise ordered by court.

Authority:

CCP § 2031.260

Discussion:

See 10.17

- ☐ Retain original of requests with proof of service and, when received, responses.

- ☐ If desired, destroy original demand and responses six months after final disposition of the action.

Exception:

Retain as ordered by court if motion to preserve originals for longer period for good cause shown is granted.

Authority:

CCP § 2031.290

Discussion:

See 10.12[2]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land
II. MAKING DEMANDS FOR INSPECTION, COPYING, TESTING, AND SAMPLING

1-10 MB Practice Guide: CA Civil Discovery 10.04

10.04 Options and Strategies for Propounding Party.

10.04[1] Consider Early Demand for Inspection. Making a demand for inspection of tangible evidence at the earliest opportunity is advisable if there is a possibility that evidence will be altered or destroyed, either intentionally or negligently, with the passage of time. If the party making the demand receives no response or an inadequate response, or the party to whom the demand is directed fails to allow the inspection in accordance with his or her response of compliance, the party making the demand may then promptly move for an order to compel [see *CCP* §§ 2031.300-2031.320].



Strategic Point--Propounding Party:

The propounding party should use the *CCP* § 2031.010 *et seq.* demand procedure to obtain discovery and to counteract litigation misconduct by an opposing party, including the procedures for court orders to compel and to impose sanctions.

The timely use of these procedures is particularly important in light of California's rejection of a tort action for spoliation of tangible evidence:

- No action for intentional spoliation against party if spoliation was or should have been discovered before end of litigation [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 *C4th* 1, 17-18, 74 *CR2d* 248, 954 *P2d* 511 (expressly leaving open question of action if spoliation could not have been discovered during the litigation)].
- No action for negligent spoliation against party, although there may be breach of contractual duty to preserve [*Coprish v. Superior Court* (2000) 80 *CA4th* 1081, 1089-1090, 95 *CR2d* 884].
- No action for intentional spoliation against third party [see *Temple Cmty. Hosp. v. Superior Court* (1999) 20 *C4th* 464, 466, 84 *CR2d* 852, 976 *P2d* 223].
- No action for negligent spoliation against third party [*Lueter v. State* (2002) 94 *CA4th* 1285, 1295,

115 CR2d 68].

In lieu of the tort, the California Supreme Court has pointed to the substantial deterrent and substantial protection afforded parties by the evidentiary inferences of *Evid Code* § 413 and the discovery remedies of *CCP* § 2023.030 [see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 17-18, 74 CR2d 248, 954 P2d 511]. Because these remedies are internal to the action affected by the spoliation, it is important to lay the groundwork as promptly as possible.



Cross Reference:

Discussion of seeking sanctions for spoliation of evidence, see *Ch. 5, Discovery of Electronic Evidence*, 5.60 -5.65.

10.04[2] Consider Motion to Shorten Time to Respond. On motion, the party making the demand for inspection, copying, testing, or sampling may request the court to shorten the time for response to the demand [*CCP* § 2031.260(a)]. The party making the demand may want to move to shorten the time for response if the discovery cut-off date is close, so there will be time to file a motion to compel further responses or other discovery matters.



Cross Reference:

Form, see 10.34.

Discussion of cut off dates, see *Ch. 1, Strategy and Planning*, 1.17.

10.04[3] Use Preliminary Discovery to Aid in Describing Documents With Reasonable Particularity. A request for documents must describe them with reasonable particularity. An overbroad request will be subject to a protective order [*CCP* § 2031.060; *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 223 (decided under *CCP* §§ 2020.410-2020.440)].



Warning:

One court has stated that it may be appropriate to use section 2020.410 et seq. or 2031.010 et seq. to determine whether documents exist, but that the great burden of doing so should generally rest on the party seeking discovery. The party seeking discovery should ascertain the existence of documents informally or through preliminary discovery, such as depositions of record custodians, and interrogatories directed to parties. The court noted that if a deposition is needed to identify documents, and a later deposition of the same person is needed after the records have been examined, courts should liberally permit a second deposition on a showing that the earlier one was necessitated by the party's failure to cooperate in agreeing to less formal procedures [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 222-223 (decided under *CCP* §§ 2020.410-2020.440)].

10.04[4] Pursue Discovery From Parties Before Nonparties. The burden of discovery should be placed on a nonparty only if a party does not possess the material sought to be discovered [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 225 (decided under *CCP* §§ 2020.410-2020.440)].

Exception:

If the material obtained from the party is unreliable and material in the possession of a nonparty might be used to impeach it, the party seeking discovery should be able to obtain the material from the nonparty [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 225 (decided under *CCP* §§ 2020.410-2020.440)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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10.05 Scope of Demands.

10.05[1] Must Relate to Document, Thing, Land, or Electronically Stored Information in Possession, Custody or Control of Party. Any party may serve any other party with a written demand to inspect, copy, test, or sample documents, tangible things, land or other property, and electronically stored information that are in the possession, custody, or control of the party to whom the demand is directed [*CCP § 2031.010*].

Distinguish:

In a civil action brought by the People of the state of California, the defendant could not obtain documents from a nonparty state agency by serving a request for production of documents on the People under *CCP § 2031.010 et seq.*, unless the documents requested related to the investigation by that state agency regarding the litigation at issue. The People, merely by prosecuting an action, were not deemed to have possession, custody or control over documents of state agencies; thus a defendant seeking documents from a nonparty state agency was required to serve a subpoena directly on the agency under *CCP § 2020.410 et seq.* [*People ex rel. Lockyer v. Superior Court (2004) 122 CA4th 1060*].

10.05[2] Must Be Relevant and Not Privileged. A demand for inspection may be made as to any non-privileged document, tangible thing, property, or electronically stored information that is [*CCP § 2017.010*]:

- Relevant to the subject matter of the pending action, or
- Relevant to the determination of any motion in the action, or
- Admissible evidence, or
- Appears reasonably calculated to lead to the discovery of admissible evidence.

Example:

A city attorney's tentative opinion draft concerning a city ordinance's legality was neither relevant admissible evidence nor reasonably calculated to lead to such evidence because the ordinance's language was clear and the individual legislator's intent was inadmissible [*City & County of San Francisco v.*

Superior Court (1982) 130 CA3d 481, 484-486, 181 CR 775 (prior law)].

Cross Reference:

Discussion, see Ch. 2, Scope of Discovery.

10.05[3] May Demand Inspection and Copying of Documents. A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made [CCP § 2031.010(b)].

The term "document" includes handwriting, typewriting, printing, photostating, photographing, and every other means of recording on any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof [CCP § 2016.020(c); Evid Code § 250].

Example:

Transcripts of testimony given before the SEC in the course of an investigation were discoverable when the party from whom the transcripts were sought had possession of or ready access to them [*Kirkland v. Superior Court (2002) 95 CA4th 92, 93, 115 CR2d 279*].



Strategic Point--Propounding Party:

Sometimes there is no substitute for viewing evidence at the location where the original documents are located, because the originals may reveal things you would not otherwise see. For example, at the location you may see relevant notations on the folder containing the documents subject to the demand. Or there may be variations (or the absence of variation) in ink used to make entries on a form that are inconsistent with the alleged history of the entries (i.e., if supposedly made at one time or over a long period of time).

Cross Reference:

Form, see 10.31.

10.05[4] May Demand Inspection of Tangible Things and Related Activities. A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made [CCP § 2031.010(c)].

Examples:

Within the scope of demands for inspection:

- The face and body of a person, subject to production for photographing [*Shepherd v. Superior Court (1976) 17 C3d 107, 118, 130 CR 257, 550 P2d 161 (prior law)*].

Not within the scope of demands for inspection:

- Human remains [*Holm v. Superior Court (1986) 187 CA3d 1241, 1247, 232 CR 432 (prior law)*].
- A compelled reenactment of an event for any means of visual recordation [*Bailey v. Superior Court (1978) 79 CA3d 444, 447, 144 CR 875 (prior law)*].

 Cross Reference:

Form, see 10.31.

10.05[5] May Demand Entry on Property, Inspection, and Related Activities. A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it [CCP § 2031.010(d)].

Drawback:

Inspection of private premises can raise issues that need to be considered. For example, the owner of premises often will insist on identification of all persons inspecting the premises. This could have the unintended effect of disclosing consulting experts before deciding whether to designate them as testifying experts, thus, providing information ordinarily protected as work product.



Strategic Point:

If the private premises to be inspected are hazardous, for example, a construction site or location of a structural failure, the owner may require a release and an agreement to indemnify against any liability for injury to the persons performing the inspections.

 Cross References:

Form, see 10.32.

Informal investigation of property open to the public, see 10.14[3].

10.05[6] May Demand Production of Electronically Stored Information. Any party may demand that any other party produce electronically stored information for inspecting, copying, testing, or sampling [CCP § 2031.010(e)]. "Electronically stored information" is defined as "information that is stored in an electronic medium" [see CCP § 2016.020(e)]. "Electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" [see CCP § 2016.020(d)].

 Cross Reference:

Discussion of demanding production of electronically stored information, see *Ch. 5, Discovery of Electronic Information*, 5.03 -5.12.

10.05[7] Subject to Protective Orders. Demands for inspection may warrant protective orders if the demands are unreasonably cumulative, duplicative, or unduly burdensome or expensive [CCP §§ 2019.030, 2031.010, 2031.060].

 Cross Reference:

Discussion, see 10.24.

10.05[8] Subject to Court Order on Sequence and Timing. Demands for inspection may be subject to a court order establishing the sequence and timing of discovery for the convenience of the parties and witnesses and in the interests of justice [CCP §§ 2019.020, 2031.010].

 Cross Reference:

Discussion, see Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders



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10.06 Direct Demands to Other Parties.

Demands for the inspection of tangible evidence are directed to other parties to the action [*CCP* § 2031.010]. Any demand to a nonparty within California for inspection of tangible evidence must be made by deposition subpoena [see *CCP* §§ 2020.220-2020.240, 2020.510]. Any demand to a nonparty outside California must be made under *CCP* § 2026.010.



Cross References:

Discussion of demands for inspection to nonparty in California, see *Ch. 6, Oral Depositions in California*, 6.06[3].

Discussion of demands for inspection to nonparty outside California, see *Ch. 7, Oral Depositions Outside of California*, 7.09.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.07 Number of Demands Is Regulated.

10.07[1] Number Differs for Unlimited and Limited Civil Cases. Cases in California trial courts are classified as unlimited or limited civil cases. Limited civil cases, generally, involve disputes in which the amount or value of property in controversy is \$25,000 or less. In addition, certain types of relief, such as a permanent injunction, are not available in limited civil cases unless otherwise authorized by statute [see *CCP* §§ 85-86.1, 580(b)]. All other cases are unlimited civil cases [see *CCP* § 88].

Most limited civil cases are subject to the economic litigation rules in *CCP* § 90 *et seq.* These rules include restrictions on the number of discovery requests [see *CCP* §§ 94, 95].

Cross Reference:

Discussion of what constitutes a limited civil case, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

10.07[2] No Numerical Limit on Number of Demands for Production in Unlimited Civil Cases. The number of demands for production which may be propounded is not limited [*CCP* § 2031.010 *et seq.*]; however, a protective order may be utilized to restrict the number or type of demands [*CCP* § 2017.020; see 10.24].

10.07[3] Limited Civil Cases.

10.07[3][a] Number of Discovery Demands Is Restricted in Limited Civil Cases. In limited civil cases, a party is limited to any combination of 35 of the following forms of discovery [*CCP* §§ 91, 94(a)]:

- Interrogatories under *CCP* § 2030.010 *et seq.* [see Ch. 9, Interrogatories];
- Demands to produce documents or things under *CCP* § 2031.010 *et seq.*;
- Requests for admission (with no subparts) under *CCP* § 2033.010 *et seq.* [see Ch. 12, Requests for Admission].

A party may be relieved of these strict limits on noticed motion [*see 10.07[3][b]*].

Exception:

These limitations do not apply to small claims or unlawful detainer cases [*CCP §§ 91(a), (b)*].

10.07[3][b] Party May Move to Withdraw Case From Restrictions. A party may make a noticed motion to withdraw a limited civil case from the restrictions on discovery on the ground that it is impractical to prosecute or defend the action within the limitations of the economic litigation rules of *CCP §§ 90-100* [*CCP § 91(c)*].

Distinguish:

Without withdrawing the case from the restrictions altogether, a party may seek additional discovery under *CCP § 95* [*see 10.07[3][c]*].

Drawback:

Withdrawing the case from the economic litigation provisions will remove the restrictions on pleadings and discovery from all parties to the lawsuit. The moving party's needs and the potential for other parties to run up the moving party's costs must be evaluated to ensure that this will not ultimately work to the disadvantage of the moving party. It may be more useful to move for additional discovery on a case-by-case basis under *CCP § 95*.

 Cross Reference:

Discussion/form, see Ch. 1, Strategy and Planning.

10.07[3][c] Party May Move to Allow Additional Discovery. A party may seek leave to conduct further discovery by noticed motion on the grounds that the party will be unable to prosecute or defend the action effectively without the additional discovery [*CCP § 95*].

Distinguish:

Complete withdrawal from the economic litigation limitations under *CCP §§ 90-100* [*see 10.07[3][b]*].

 Cross Reference:

Discussion/form, see Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.08 Timing of Demands.

10.08[1] Plaintiff May Make Demand Without Leave of Court After Service of Summons or Appearance.

10.08[1][a] General Rule Is 10 Days. A plaintiff may make a demand for inspection, copying, testing, or sampling without leave of court at any time beginning the earlier of 10 days after service of summons on, or appearance by, the party to whom the demand is directed [CCP § 2031.020(b)].

10.08[1][b] Exception Is Five Days in Unlawful Detainer. In unlawful detainer, forcible entry, and forcible detainer cases, a plaintiff may make a demand for inspection, copying, testing, or sampling without leave of court beginning the earlier of five days after service of the summons on, or appearance by, the party to whom the demand is directed [CCP § 2031.020(c)].



Cross Reference:

Timing of demands for inspection in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][c].

10.08[1][c] May Make Earlier Demand for Good Cause With Leave of Court. A plaintiff may move, with or without notice and for good cause shown, for leave of court to make a demand for inspection, copying, testing, or sampling at an earlier time [CCP § 2031.020(d)].



Strategic Point--Plaintiff:

Consider requesting an early demand for inspection if the evidence to be inspected is likely to be damaged or to deteriorate within the time allowed for response.



Cross Reference:

Form, see 10.33.

10.08[2] Defendant May Make Demand at Any Time. A defendant may make a demand for inspection, copying,

testing, or sampling without leave of court at any time [CCP § 2031.020(a)].

10.08[3] Response Must Be Due and Any Motions Heard by Discovery Cut-Off Date. Discovery must be completed on or before the 30th day prior to the date initially set for trial. All motions regarding discovery must be heard on or before the 15th day prior to the date initially set for trial [CCP § 2024.020(a)]. Discovery is "complete" on the day a response is due [CCP § 2024.010].

Exception:

Discovery has an earlier imposed cut-off date if the case is judicially arbitrated [CCP § 2024.040(a)].



Cross Reference:

Discussion of cut-off dates, see *Ch. 1, Strategy and Planning, 1.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.09 Format of Demands for Inspection.

10.09[1] Number Each Set of Demands Consecutively. Each set of demands for inspection, copying, testing, or sampling must be numbered consecutively [*CCP* § 2031.030(a)(1)].

10.09[2] Identify Parties and Set Number. The first paragraph, immediately below the title of the case, must identify [*CCP* § 2031.030(b)]:

- The party making the demand.
- The set number.
- The responding party.

10.09[3] State Each Demand Separately. Each demand in a set must be separately set forth and identified by letter or number [*CCP* § 2031.030(c)].

10.09[4] Describe Each Item or Category of Item. Each demand in a set must designate the documents, tangible things, land or other property, or electronically stored information to be inspected, copied, tested, or sampled either by specifically describing each individual item or by reasonably particularizing each category of item [*CCP* § 2031.030(c)(1); see *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 223 (decided under *CCP* §§ 2020.410-2020.440; "reasonably particularity" is based on standpoint of party required to produce materials)].

A description using reasonable particularity must apprise a person of ordinary intelligence of the document desired. The certainty required is to reasonably inform the opposing party or custodian of the records what is desired. It is not relevant whether the description would be uncertain or unintelligible to a person not concerned with compliance with the demand [see *Union Trust Co. v. Superior Court* (1938) 11 C2d 449, 457-459, 81 P2d 150 (prior law; description was adequate)].



Warning:

A request for all documents pertaining to, relating to, reflecting, evidencing a specific issue begs for objection as over-inclusive. Similarly, extensive "definitions" and "instructions" that are incorporated in each request--even without other all-encompassing language--may be unduly burdensome [see *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 223, 61 CR2d 567 (decided under CCP §§ 2020.410-2020.440)].

10.09[5] Specify Time for Inspection, Copying, Testing, or Sampling.

10.09[5][a] General Rule Is at Least 30 Days After Service. Each demand in a set must specify a reasonable time for the inspection, copying, testing, or sampling that is at least 30 days after service of the demand [CCP § 2031.030(c)(2)].

10.09[5][b] Exception Is Five Days in Unlawful Detainer. In unlawful detainer, forcible entry, and forcible detainer cases, a demand for inspection, copying, testing, or sampling must specify a reasonable time that is at least five days after service of the demand [CCP § 2031.030(c)(2)].

Cross Reference:

Timing of demands for inspection in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][c].

10.09[5][c] May Specify Earlier Time With Leave of Court. A demand may specify an earlier time for inspection, copying, testing, or sampling if the court has granted leave to specify an earlier date [CCP § 2031.030(c)(2)]. The party making the demand must demonstrate good cause to specify an earlier date [CCP § 2031.030(c)(2)].

10.09[6] Specify Place for Inspection, Copying, Testing or Sampling. Each demand must specify a reasonable place for making the inspection, copying, testing, or sampling or performance of any related activity [CCP § 2031.030(c)(3)].

10.09[7] Specify Demand for Related Activity. Each demand must specify any inspection, copying, testing, sampling, or related activity that is being demanded, including [CCP § 2031.030(c)(4)]:

- The manner in which the related activity will be performed.
- Whether the related activity will permanently alter or destroy the item involved.

Trap:

The propounding party should consider the cost of any related activity to be conducted. The propounding party cannot compel the responding party to share the cost [see *San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 CA4th 1400, 1405, 116 CR2d 65 (defendants could not be required to share in cost of destructive testing they did not want)].

10.09[8] Specify Form for Electronically Stored Information. A demand for the production of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced [CCP § 2031.030(a)(2)].

Cross Reference:

Discussion of demanding production of electronically stored information, see *Ch. 5, Discovery of Electronic Information*, 5.03 -5.12.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.10 Serve Demand on Target Party and All Other Parties That Have Appeared.

The party making a demand for inspection, copying, testing, or sampling must serve a copy of the demand on the party to whom it is directed and on all other parties who have appeared in the action [*CCP* § 2031.040].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.11 Do Not File Demand.

Neither a demand for inspection, copying, testing, or sampling nor the response to the demand is filed with the court [CCP § 2031.290(a); Cal Rules Ct, Rule 3.250(a)(22)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.12 Propounding Party Retains Original Papers.

10.12[1] Requesting Party Retains Responses for Statutory Retention Period. The party making a demand for inspection, copying, testing, or sampling must retain both the original of the demand, with the original proof of service affixed, and the original of the sworn response until six months after final disposition of the action [*CCP* § 2031.290(b); *Cal Rules Ct, Rule 3.250(a)(9), (b)*].

10.12[2] Originals May Be Destroyed After Retention Period. Six months after final disposition of the action, the original demand and the original response may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period [*CCP* § 2031.290(b); *Cal Rules Ct, Rule 3.250(b)*].

10.12[3] Related Papers Must Be Similarly Retained. A six-month retention period and comparable provisions for destruction also apply to agreements to extend time to respond, notices of the agreements, and declarations for additional discovery [*Cal Rules Ct, Rule 3.250(a)(7), (17), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.13 Propounding Supplemental Demands.

10.13[1] Discovery Tool Available for Inspection of Later Acquired or Discovered Evidence. A party may propound a supplemental demand to inspect, copy, test, or sample any later acquired or discovered documents, tangible things, land or other property, or electronically stored information that are in the possession, custody, or control of the party on whom the demand is made [CCP § 2031.050(a)].

10.13[2] Statutory Limit on Number of Supplemental Demands. A party may propound a supplemental demand [CCP § 2031.050(b)]:

- Twice prior to the initial setting of a trial date.
- Once after the initial setting of a trial date subject to the general time limits on discovery proceedings and motions [CCP §§ 2024.010-2024.060, 2031.050(b)].

➤ **Cross Reference:**

Discussion of general time limits on discovery, see *Ch. 1, Strategy and Planning, 1.17*.

10.13[3] Court May Allow Additional Supplemental Demands. A party may move for leave to propound additional supplemental demands for inspection, copying, testing, or sampling [CCP § 2031.050(c)]. The party requesting leave to propound additional demands must demonstrate good cause [CCP § 2031.050(c)].

➤ **Cross Reference:**

Form, see 10.35.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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10.14 Other Discovery Methods Available to Obtain Inspection of Tangible Evidence.

10.14[1] Production of Documents or Things at Depositions.

10.14[1][a] May Be Demanded in Notice of Deposition to Party. A party may be required to produce documents or other things at his or her deposition, if the notice of deposition specifies such production [*CCP* §§ 2025.220(a)(4), 2025.280(a)].

Cross Reference:

Discussion/form, see *Ch. 6, Oral Depositions in California*, 6.05 et seq.

10.14[1][b] May Be Demanded in Deposition Subpoena to Nonparty. A nonparty may be required, by service of a deposition subpoena, to produce documents or other things [*CCP* § 2020.020].

Cross Reference:

Discussion/form, see *Ch. 6, Oral Depositions in California*, 6.14 et seq.

10.14[2] Production of Documents in Response to Interrogatories. A party may respond to interrogatories by producing documents if [*CCP* § 2030.230]:

- The answer to an interrogatory would require the responding party to prepare or make a compilation, abstract, audit, or summary from that party's documents;
- The answer to an interrogatory specifies the writing from which the answer may be derived or ascertained in sufficient detail to permit the propounding party to readily locate and identify the documents; and
- The burden or expense of preparing or making it would be substantially the same for either party.

10.14[3] Informal Investigation of Public Places. A party may conduct an informal inspection of a public place without making a demand under the provisions of the Discovery Act, if the inspection is lawful [*Pullin v. Superior*

Court (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447].

Example:

Plaintiff's expert could inspect floor of defendant's store in slip-and-fall case, without a formal demand for inspection, when the inspection was carried out during a time that the store premises were open to the public [*Pullin v. Superior Court (2000) 81 CA4th 1161, 1164-1165, 97 CR2d 447].*



Cross Reference:

Discussion of informal discovery, see *Ch. 1, Strategy and Planning, 1.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas



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10.15 CHECKLIST: Responding to Demands for Inspection, Copying, Testing, and Sampling.

☐ Calendar time for serving response.



Timing:

Thirty days after service of demand unless shortened or extended.

Exception:

Five days if unlawful detainer, forcible entry, or forcible detainer action.

Authority:

CCP § 2031.260

Exception--Extension for Manner of Service:

For service by mail, add: five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; 20 calendar days if either the place of mailing or the place of address is outside the U.S. For service by Express Mail, add two court days; for service by fax, add two court days. If service is by electronic transmission pursuant to a local court rule permitting electronic service, add two court days.

Authority:

CCP §§ 1013(a), (c), (e), 1010.6(a)(6), 2016.050

Discussion:

See 10.17

☐ Determine need for extension of time to inspect, copy, test, sample, or respond.

- ☐ Seek stipulation for extension from demanding party.

Content Note:

A stipulation for an extension of time must be confirmed in writing.

- ☐ Seek protective order if attempt to obtain stipulation is unsuccessful.

☐ Generally, an attempted stipulation should precede a request for a protective order to extend the time to inspect or respond, because the motion for a protective order must be accompanied by a declaration showing an informal attempt at resolution.

Authority:

CCP §§ 2031.060, 2031.270

Discussion:

See 10.18, 10.24

Form:

See 10.37 (stipulation to extend time to respond)

- ☐ Determine need for a protective order, including an extension of time to respond.

☐ Grounds are:

- ☐ Unwarranted annoyance,
- ☐ Embarrassment,
- ☐ Oppression; or
- ☐ Undue burden and expense.

☐ Relief available includes orders that:

- ☐ All or some of the items or categories of items in the demand need not be produced;
- ☐ Time to respond be extended;
- ☐ Place of production be other than specified in the demand;
- ☐ Inspection, copying, testing, or sampling be made only on specified terms and conditions;

☐ Trade secrets or other confidential information not be disclosed, or be disclosed in specific way;

☐ Items produced be sealed.

Authority:

CCP § 2031.060

Discussion:

See 10.24

☐ If seeking protective order:

☐ Make reasonable, good faith effort to resolve issue.

☐ Draft:

☐ Motion and notice of motion for protective order.

☐ Supporting declaration.

☐ Supporting memorandum.

☐ Separate statement, if appropriate.

Content Note:

Declaration must show attempt at informal resolution of issue. A separate statement to accompany the motion is not specifically required by *Cal Rules Ct, Rule 3.1345(a)*, but may be included so the court need not review any other document to determine the protective order issue, particularly if the motion relates to multiple, but not all, items in a demand [see *Cal Rules Ct, Rule 3.1345(d)*].

☐ Draft proposed protective order.

☐ Serve and file motion, following standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP §§ 2031.060, 2031.260

Discussion:

See 10.24

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Forms:

See *10.38* (notice of motion and motion for protective order), *10.39* (proposed protective order)

- ☐ Determine responses, which may be:
 - ☐ Statements of compliance with demand;
 - ☐ Representations of inability to comply;
 - ☐ Objections.
 - ☐ Relevance.
 - ☐ Burden or oppression.
 - ☐ Attorney-client privilege.
 - ☐ Attorney work product.
 - ☐ Privacy.
 - ☐ Other statutory privileges.
 - ☐ Failure to file timely motion to compel in connection with earlier discovery.
 - ☐ Expiration of discovery period.
 - ☐ Failure to specify documents with reasonable particularity.
 - ☐ Time or place specified for inspection, copying, testing, or sampling is unreasonable.
 - ☐ Demand seeks electronically stored information from a source that is not reasonably accessible because of undue burden or expense.

Authority:

CCP § 2031.210

Discussion:

See 10.20

- ☐ Prepare response to demand.
 - ☐ Identify responding party, set number, and demanding party in first paragraph.
 - ☐ Numbering and sequence of responses must correspond to numbering and sequence of demand.
 - ☐ Respond to each item or category of item separately.

Authority:

CCP § 2031.210

Discussion:

See 10.20-10.21

Form:

See 10.36 (response to demand for inspection)

- ☐ Sign and have client verify response.

Exception:

Verification not required if response contains only objections [*CCP § 2031.250*].

Authority:

CCP § 2031.250

Discussion:

See 10.22

- ☐ Serve:
 - ☐ Original response on propounding party.
 - ☐ Copies of response on all other parties who have appeared in case.

Authority:

CCP § 2031.260

Discussion:

See 10.17

- ☐ If responses are being served late and include objections:
 - ☐ Determine whether relief from waiver of objections is available.

☐ Grounds are:

☐ Mistake.

☐ Inadvertence.

☐ Excusable neglect.

☐ Serve response that is in substantial compliance with requirements for responses.

Authority:

CCP § 2031.300

Discussion:

See 10.19[2]

☐ Draft motion and notice of motion for relief from waiver of objections, with supporting declaration and memorandum.

☐ Draft proposed order.

☐ Serve and file motion, following standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2031.300

Discussion:

See 10.19[2]

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Form:

See 10.40 (notice of motion and motion to relieve party from waiver of objections)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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1-10 MB Practice Guide: CA Civil Discovery 10.16

10.16 Options and Strategy.

When a party receives a demand for inspection, copying, testing, or sampling, the party's options are:

- To respond within 30 days [CCP § 2031.260(a)].



Cross Reference:

Discussion, see 10.17 -10.22.

- To seek a protective order to [CCP § 2031.060]:
 - ☐ Relieve the party from having to produce some or all of the items.
 - ☐ Extend the time to respond.
 - ☐ Protect confidential information.
 - ☐ Otherwise ease undue burden and expense of responding.

Prerequisite:

A reasonable, good faith attempt to informally resolve.



Cross Reference:

Discussion, see 10.24.



Trap:

Failure to file a timely response waives objections [CCP § 2031.300]. Filing a motion for a protective order does not, in itself, extend the time for response. To preserve any objections to the demand, respond within the required time, even if seeking a protective order. Failure to respond and reliance on an

ultimately unsuccessful motion for a protective order may not be considered grounds for relief from a waiver of objections [*see Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 274-276, 69 CR2d 112 (attorney-client privilege waived when not raised in original response)].

If serving objections, simultaneously serve a motion for a protective order and to extend time to respond.

 Cross Reference:

Discussion of obtaining relief from waiver, see 10.19[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.17 Time for Response.

10.17[1] General Rule Is to Serve Response Within 30 Days. Within 30 days after service of a demand for inspection, copying, testing, or sampling, the party to whom the demand is directed must serve the original of the response on the party making the demand [CCP § 2031.260(a)]. The party to whom the demand is directed must also serve a copy of the response on all other parties who have appeared in the action [CCP § 2031.260(a)].

10.17[2] Exceptions.

10.17[2][a] Five Days in Unlawful Detainer. In unlawful detainer, forcible entry, and forcible detainer cases, the response must be served within five days [CCP § 2031.260(b)].

➤ **Cross Reference:**

Timing of demands in unlawful detainer cases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][c].

10.17[2][b] Time Shortened or Extended by Court. The court may shorten the time for response, on motion of the party making the demand, or extend the time for response, on motion of the party to whom the demand is directed [CCP § 2031.260(a),(b)].

➤ **Cross References:**

Discussion, see 10.04[2].

Form, see 10.34.

10.17[3] Extensions Based on Method of Service.

10.17[3][a] Service by Regular Mail. For service of demands by mail, the time period for response is extended by five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; and 20 calendar days if either the place of mailing or the place of address is outside the U.S. [CCP §§ 1013(a), 2016.050].

10.17[3][b] Service by Express Mail. For service of demands by express mail, the time period for response is extended by two calendar days [*CCP* §§ 1013(c), 2016.050].

10.17[3][c] Service by Fax. For service of demands by fax, the time period for response is extended by two calendar days [*CCP* §§ 1013(e), 2016.050].

10.17[3][d] Service by Electronic Transmission Pursuant to Local Court Rule. For service of demands by electronic transmission pursuant to a local court rule permitting such electronic service, the period for response is extended by two court days [*CCP* § 1010.6(a)(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.18 Time to Inspect or Respond May Be Extended by Stipulation or Motion.

10.18[1] Parties May Stipulate.

10.18[1][a] Must Be in Writing. The party demanding inspection, copying, testing, or sampling and the responding party may agree to extend the date for inspection, copying, testing, or sampling or the time for service of a response to a set of inspection demands, or to particular items or categories of items in a set [CCP § 2031.270(a)].

The agreement may be informal, but it must be confirmed in a writing that specifies the extended date for inspection, copying, testing, or sampling or service of a response [CCP § 2031.270(b)].



Strategic Point:

Extensions are commonly done by letter. If there is substantial distrust between counsel, a stipulation may be used.

10.18[1][b] All Types of Response Allowed When Time Is Extended Unless Otherwise Agreed. Unless an agreement to extend the time for response expressly states otherwise, the responding party retains the right to respond to any item or category of item by stating an intention to comply with the demand, by representing an inability to comply with the demand, or by objecting to the demand [CCP § 2031.270(c)].

10.18[2] Responding Party May Move for Extension. The party to whom a demand for inspection, copying, testing, or sampling is directed may seek an extension of time to respond to the demand by filing a motion for a protective order [CCP § 2031.060(b)(2)].



Cross References:

Discussion of protective orders, see 10.24.

Form, see 10.38.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.19 Effect of Failure to Respond Timely.

10.19[1] Objections Waived. The failure to serve a timely response by the party to whom a demand for inspection, copying, testing, or sampling is directed causes a waiver of any objection to the demand, including objections based on privilege or work product [CCP § 2031.300; see *Stadish v. Superior Court* (1999) 71 CA4th 1130, 1140-1141, 84 CR2d 350 (timely response preserved attorney-client and work product privileges, but trade-secret privilege that was not asserted in response was waived)]. Assertion of a privilege after opposing counsel has reviewed documents but before the documents have been copied is not timely [*Stadish v. Superior Court* (1999) 71 CA4th 1130, 1140-1141, 84 CR2d 350 (overturning denial of motion to compel production)].

Although a failure to respond waives objections to the demand for inspection, copying, testing, or sampling, the failure to respond does not waive the responding party's ability to appeal the subsequent imposition of sanctions for the failure to respond [*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 CA3d 1579, 1580-1581, 272 CR 541].



Warning:

The responding party must comply with the procedure set forth in CCP § 2031.010 *et seq.*, to avoid a waiver of objections, even if he or she previously objected informally to a request for documents. For example, an informal letter stating that documents sought were privileged, which was mailed before the formal request for documents was made, was not a proper response to the request or a basis for relief from default [see *Schaff v. Superior Court* (1983) 146 CA3d 921, 923-924, 194 CR 546].

Distinguish--Response Timely But Inadequate:

A waiver does not occur when the response is timely but inadequate. For example, use of boilerplate objections based on privilege or work-product protection which were not adequately specific might have been sanctionable, but did not result in a waiver of the objections [*People ex rel. Lockyer v. Superior Court* (2004) 122 CA4th 1060, 1075 ; *Best Prods., Inc. v. Superior Court* (2004) 119 CA4th 1181, 1187-1188, 15 CR3d 154 ; *Korea Data Sys. Co. v. Superior Court* (1997) 51 CA4th 1513, 1517, 59 CR2d 925].



Strategic Point--Responding Party:

A party who has waived the trade secret privilege and has produced the documents for inspection may still seek a *CCP* § 2031.060(b)(5) protective order that the information may be disclosed only to specified persons or in a specified way [see *Stadish v. Superior Court* (1999) 71 CA4th 1130, 1143-1144, 84 CR2d 350 (overturning denial of motion for protective order and remanding for court to employ proper case management procedure for protective order)].



Cross Reference:

Discussion of protective orders, see 10.24.

10.19[2] Responding Party May Move for Relief From Waiver. The court, on motion, may grant relief from waiver if it determines that [*CCP* § 2031.300]:

- The party to whom the demand is directed subsequently served a response that is in substantial compliance with *CCP* § 2031.210 *et seq.*; and
- The failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

In determining whether the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect, the court may rely on decisions applying the same standard under *CCP* § 473(b) [see *Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 275, 69 CR2d 112 ; *City of Fresno v. Superior Court* (1988) 205 CA3d 1459, 1467, 253 CR 296].

Examples--Inadequate Grounds for Relief on the Basis of Mistake, Inadvertence, or Excusable Neglect:

- Counsel's mistake of law on a relatively simple and undebatable matter [*City of Fresno v. Superior Court* (1988) 205 CA3d 1459, 1467, 253 CR 296].
- The press of an attorney's practice [*City of Fresno v. Superior Court* (1988) 205 CA3d 1459, 1467, 253 CR 296].
- Tactical choice by counsel to pursue one course of action without complying with other requirements [*Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 274-276, 69 CR2d 112 (relying on ultimately unsuccessful motion for protective order, without timely asserting privilege, not excusable neglect)].



Cross References:

Form for motion for relief from waiver, see 10.40.
Requirements of *CCP* § 2031.210 *et seq.*, see 10.20 -10.21.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10.20 Response to Demand for Inspection.

10.20[1] Response.

10.20[1][a] Must Respond Separately to Each Item or Category. The party to whom a demand for inspection, copying, testing, or sampling is directed must respond separately to each item or category of item [CCP § 2031.210(a)].

10.20[1][b] Must State Intention to Comply, Representation of Inability to Comply, or Objection. The party to whom a demand for inspection, copying, testing, or sampling is directed must respond to each item or category of item with one of the following responses [CCP § 2031.210(a)]:

- A statement that he or she will comply with the particular demand by the date specified in the demand, and any related activities;
- A representation that he or she lacks the ability to comply with the demand for inspection, copying, testing, or sampling of a particular item or category of item;
- An objection to the particular demand.

10.20[2] Stating Intention to Comply. If the responding party will comply with a particular demand, the response to that demand must state that [CCP § 2031.220]:

- The production, inspections, copying, testing, or sampling, and related activity demanded will be allowed either in whole or in part.
- All documents or things in the demanded category that are in the possession, custody, or control of the responding party, and to which no objection is being made, will be included in the production.

Strategic Point--Responding Party:



A statement of intent to comply coupled with an objection that the demand is overbroad may help to narrow the demand. If, along with the objection, the responding party states what will be provided, the issue may be resolved at that point. Of course, the opposing attorney might call to request more, but at the least, that will yield a clearer idea of exactly what is sought. Among other things, this process can address the uncertainty inherent in responding to a demand for all documents "pertaining to" an event.



Strategic Point--Responding Party: Inability to Respond Within Time Specified In Demand.

In practice, the deadline imposed by the propounding party often cannot be complied with due to the time required to identify and locate the requested documents (or electronic data), and to prepare the documents (or electronic data) for production. There is also the problem of unscrupulous counsel requesting the production of documents on an intentionally inconvenient date for the purpose of harassment (*i.e.*, on a date the opposing attorney is in trial, on vacation, on a religious holiday, etc.). To avoid unnecessary discovery disputes in such instances, it is common for attorneys to respond to an inspection demand by stating that the requested documents cannot be produced on the requested date, but will be produced on a specific future date, or on a date mutually convenient to the parties. The form in 10.36 contains alternative language addressing this situation by stating, in effect, that the documents will be produced, but not at the time and date specified in the demand.

10.20[3] Stating Inability to Comply.

10.20[3][a] Diligent Search and Reasonable Inquiry Are Prerequisite. If the responding party states an inability to comply with a demand for inspection, copying, testing, or sampling, he or she must affirm that a diligent search and a reasonable inquiry have been made to comply with the demand [CCP § 2031.230].

10.20[3][b] Specify Reason for Inability to Comply. If the responding party states an inability to comply with a demand for inspection, copying, testing, or sampling, he or she must specify whether the inability to comply is because the particular item or category [CCP § 2031.230]:

- Has never existed;
- Has been destroyed, lost, misplaced, or stolen; or
- Has never been, or is no longer, in the possession, custody, or control of the responding party.

10.20[3][c] Identify Person or Organization Known or Believed to Have the Item Demanded. If the responding party states that a particular item or category of item has never been, or is no longer in his or her possession, custody, or control, the responding party must also set forth the name and address of any natural person or organization known or believed by the responding party to have possession, custody, or control of that item or category of item [CCP § 2031.230].

10.20[4] Asserting Objections.

10.20[4][a] Identify Item or Category of Item Objected to and State Ground. If the responding party objects to a demand for inspection, copying, testing, or sampling of an item or category of item, the response must [CCP § 2031.240(b)]:

- Identify with particularity any document, tangible thing, land, or electronically stored information included in any category of item in the demand to which an objection is being made.

- Set forth clearly the extent of, and specific ground for, the objection.

10.20[4][b] Expressly State Objections Based on Privilege or Work Product. If an objection is based on a claim of privilege, the particular privilege invoked must be stated [CCP § 2031.240(b)(2)]. If the objection is based on CCP § 2018.010 *et seq.* work-product protection, the claim must be expressly asserted [CCP § 2031.240(b)(2)].

Objections based on privilege are usually asserted in a privilege log. The log sets out for each document the privilege asserted and the document's sequential number (or other identifier), general nature or subject matter, date, author and recipients [see *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 C4th 201, 205, 91 CR2d 716, 990 P2d 591 (attorney-client privilege applicable)].



Trap:

Take care in preparing identifying descriptions of documents. In the case of attorney-client privilege, even providing dates and names may invade the privilege. Yet the description must be clear enough for the judge to rule on the privilege. Providing an inadequate description may result in the judge returning the log repeatedly until the description is adequate. In the case of work product, giving a name may reveal an undisclosed consultant or expert, which may in turn reveal a strategic line of thought.



Strategic Point:

Consider seeking a stipulation that a privilege log need not list any communications solely between the client and counsel and prepared after the date of the complaint. This might be done in the case management order or addressed in the privilege log.

Judge's Perspective:

While the format of a privilege log may vary, it is important to be very specific as to the privileges asserted. For example, documents which are withheld solely on the basis of attorney-client privilege are not subject to an in camera inspection absent a stipulation by the party asserting the privilege. On the other hand, documents that have been withheld on the basis of work product can be inspected in camera if the court is otherwise unable to rule on the privilege issues [see *Evid Code* § 915; *Fellows v. Superior Court* (1980) 108 CA3d 55, 69-70, 166 CR 274 ; see also *Dowden v. Superior Court* (1999) 73 CA4th 126, 136, 86 CR2d 180 (in propria persona party can assert work-product privilege; remanding for court to follow *Fellows* procedure); but see *OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 895, 9 CR3d 621 (rule against in camera review of materials protected under attorney-client privilege is not absolute and such a review may be conducted if necessary to determine *whether an exception to the privilege applies*)].



Timing:

There is no obligation under CCP § 2031.010 *et seq.* to produce a privilege log at the time a party responds to a demand. In fact, there is no statutory requirement that a responding party produce a privilege log at all, unless ordered to do so by a court evaluating a claim of privilege in connection with a motion to compel further responses [*People ex rel. Lockyer v. Superior Court* (2004) 122 CA4th 1060, 1075 ; *Best Prods., Inc. v. Superior Court* (2004) 119 CA4th 1181, 1189].

Judge's Perspective:

The best practice, of course, is to serve a privilege log with the responses. It clearly demonstrates to the trial court that time and effort has gone into the responses and likewise demonstrates a clear import to preserve the privileges specified.

10.20[4][c] Respond to Unobjectionable Parts. If only part of an item or category of item in a demand for inspection, copying, testing, or sampling is objectionable, the response must contain a statement of compliance, or a representation of an inability to comply, with respect to the remainder of that item or category [CCP § 2031.240(a)].

10.20[5] Grounds for Objection.

10.20[5][a] Potential Grounds for Objection. The grounds for objection to a demand to inspect an item include:

- Relevance [see 10.20[5][b], 2.03 -2.08].
- Burden or oppression [see 10.20[5][c]].
- Attorney-client privilege [see 10.20[4][b], 2.16].
- Attorney work product [see 2.25 -2.32].
- Privacy [see 10.20[5][d], 2.33 -2.38].
- Trade secret [Evid. Code § 1060; see 2.24].
- Official information privilege [Evid. Code § 1040; *Suarez v. Office of Administrative Hearings* (2004) 123 CA4th 1191, 20 CR3d 618 ; see 2.23].
- Legislative privilege [*City of Santa Cruz v. Superior Court* (1975) 40 CA4th 1146, 48 CR2d 216 .
- Other statutory privileges [see 10.20[5][e]].
- Failure to make a timely motion to compel during earlier discovery [CCP § 2031.310(c); see 10.20[f]].
- Expiration of the time for completion of discovery [CCP § 2024.020; see 10.20[g]].
- The request does not identify the requested documents with reasonable particularity [CCP § 2031.030(c)(1); see 10.09[4]].
- The time or place specified for inspection is unreasonable [CCP § 2031.030[c][2], [3]; see 10.09[5] (time requirement), 10.09[6] (place must be reasonable)].
- The request seeks discovery of electronically stored information from a source that is not reasonably accessible because of undue burden or expense [CCP § 2031.210(d); see 5.19].

10.20[5][b] Relevance Is Ground for Objection. A demand for inspection, copying, testing, or sampling may be objectionable if it requests documents or things that are beyond the scope of discovery; i.e., not relevant to the subject matter of the action or to the determination of any motion made in the action [see CCP § 2017.010].

Distinguish--Admissibility:

A demand is not objectionable simply because the evidence to be discovered would not be admissible at trial, as long as it appears reasonably calculated to lead to the discovery of admissible evidence [CCP § 2017.010; see *Greyhound Corp. v. Superior Court of Merced County* (1961) 56 C2d 355, 391, 15 CR 90, 364 P2d 266] .

Cross References:

Relevance standard, see 2.03 -2.08.

10.20[5][c] Burden or Oppression Are Grounds for Objection. To support an objection of burden or oppression, there must be some showing that the ultimate effect of the burden is incommensurate with the result sought [*Mead Reinsurance Co. v. Superior Court* (1986) 188 CA3d 313, 321, 232 CR 752] .

Example:

In an action brought by the state of California against a corporation alleging violations of statutes governing the practice of optometry, it was unduly burdensome to require the state to search for documents from nonparty state agencies, whereas there was no burden in requiring the defendant to serve subpoenas on the state agencies from which it wished to obtain records [*People ex rel. Lockyer v. Superior Court* (2004) 122 CA4th 1060, 1079-1080, 19 CR3d 324] .

10.20[5][d] Violation of Privacy Rights Is Ground for Objection. A demand may be objectionable if it requests documents that are protected by the privacy privilege implied from the right to privacy guaranteed by *Cal Const art I, § 1*. In determining whether a matter falling within an individual's zone of privacy should be disclosed, the court generally will balance the state's interest in facilitating ascertainment of the truth against the person's privacy interest [*John B. v. Superior Court* (2006) 38 C4th 1177, 1199, 45 CR3d 316, 137 P3d 153] .

Example:

In an action against their former employer, plaintiffs sought production of the personnel file of a current employee. The employer refused to produce the file on the ground that it would violate the employee's right of privacy. The trial court ordered production of the personnel file, but the Court of Appeal issued a writ of mandate directing the trial court to consider whether less intrusive means would yield the information sought [*El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 CA3d 342, 346, 235 CR 303] .

Distinguish:

The right to privacy only applies to individuals. The constitutional right of privacy "protects the rights of people [i]t is significant that the [right of privacy] is couched in terms of protecting real live people--not fictional persons such as corporations" [*Roberts v. Gulf Oil Corp.* (1983) 147 CA3d 770, 791-793, 195 CR 393] . But note that the federal privacy right might be broader [see *Zurich-American Ins. Co. v. Superior Court* (2007) 155 CA4th 1485, 1504-1505, 66 CR3d 833] .

Cross Reference:

Privacy protection, see 2.33 -2.38.

10.20[5][e] Other Statutory Privileges May Apply In Appropriate Situations. In addition to the attorney-client privilege, a demand for inspection, copying, testing, or sampling may be objectionable if it requests the production of documents or tangible things protected by other statutory privileges [CCP §§ 2010.010, 2031.240(b)(2)]. Following is a partial listing of other statutory privileges that may be asserted as objections to the production of documents:

- Physician-Patient Privilege [*Evid Code* § 994; see 2.17].
- Psychotherapist-Patient Privilege [*Evid Code* § 1014; see 2.18].
- Mediation Privilege [*Evid Code* § 1119].
- Clergy-Penitent Privilege [*Evid Code* §§ 1033, 1034; see 2.20].

- Domestic Violence Victim/Counselor Privilege [*Evid Code* § 1037.4; *see* 2.22].
- Sexual Assault Victim/Counselor Privilege [*Evid Code* § 1035.8; *see* 2.21].
- Spousal Privilege [*Evid Code* § 980; *see* 2.19].

10.20[5][f] Request May Be Barred by Failure To Make Earlier Motion To Compel. If the party seeking inspection, copying, testing, or sampling previously failed to move for a motion to compel within 45 days following an earlier response to a demand, the demanding party waives any right to compel a further response [*CCP* § 2031.310(c)]. If the 45 day period has run, the propounding party is barred from requesting essentially the same information through other subsequent discovery [*Prof. Career Colleges, Magna Institute v. Superior Court* (1989) 207 CA3d 490, 494, 255 CR 5 ; *see also* *Sexton v. Superior Court* (1997) 58 CA4th 1403, 68 CR2d 708 (time within which to make a motion to compel production of documents is mandatory and jurisdictional)].



Strategic Point:

A party who has missed the deadline for compelling inspection of documents still may be able to request that the same documents be brought to a deposition [*Carter v. Superior Court* (1990) 218 CA3d 994, 997-998, 267 CR 290 (failure of one procedure does not bar use of the other); *see also* *Unzipped Apparel, LLC v. Bader* (2007) 156 CA4th 123, 127, 67 CR3d 111 (60-day limit under *CCP* § 2025.480 applies to subpoena for business records as well as subpoena for an oral deposition, and period runs from date of response to subpoena)].



Cross Reference:

Motion to compel response, 10.25, 10.26.

Motion to compel further response, 10.27, 10.28.

Subpoenas to command production of business records, 6.17, 6.18.

10.20[5][g] Time for Completion of Discovery May Have Expired. Discovery ordinarily must be completed on or before the 30th day before the initial trial date, and motions concerning discovery must be heard on or before the 15th day before the initial trial date [*CCP* § 2024.020(a); *see* *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 CA4th 1568, 1571, 82 CR3d 64 (trial court abused its discretion in granting motion to compel after the discovery motion cutoff date when moving party had not moved to reopen discovery under *CCP* § 2024.050)]. A continuance or postponement of the trial date does not operate to reopen discovery proceedings, except as otherwise provided [*CCP* § 2024.030(b); *see* *CCP* § 2024.050 (reopening discovery)].



Cross Reference:

Discovery cutoff dates, *see* 1.17.



Strategic Point:

Counsel sometimes forget about these limitations when the initial trial date has been postponed.



Warning:

A responding party who provides false assurances that he or she will produce the requested discovery,

inducing the requesting party to delay filing a motion to compel, is estopped from relying on the discovery motion cut-off date [*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 CA4th 1342, 1351, 32 CR3d 717] .

Distinguish--New Trial Restarts Discovery Period.

A new trial after a mistrial restarts discovery limitations, rendering a demand for another expert witness list timely [*Beverly Hospital v. Superior Court* (1993) 19 CA4th 1289, 1296, 24 CR2d 238] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged
MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview



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1-10 MB Practice Guide: CA Civil Discovery 10.21

10.21 Format of Response.

The first paragraph of the response, immediately below the title of the case, must identify [CCP § 2031.210(b)]:

- The responding party;
- The set number; and
- The demanding party.

Each statement of compliance, each representation, and each objection in the response must bear the same number, and be in the same sequence as the corresponding item or category in the demand [CCP § 2031.210(c)]. However, the text of each item or category need not be repeated [CCP § 2031.210(c)].

The same format must be used for further responses to demands [see *Cal Rules Ct, Rule 3.1000*].

Cross Reference:

Form for response to demand for inspection, see 10.36.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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10.22 Signature.

10.22[1] Party Must Verify Unless Response Contains Only Objections. The responding party must sign the response under oath unless the response contains only objections [*CCP* § 2031.250(a)].

If a timely filed unverified response contains both objections and other statements, the objections are timely and not waived, because they need not be verified to be effective [*Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 CA4th 651, 656-658, 46 CR2d 925].

10.22[2] Officer or Agent Signs on Behalf of Entity. If the responding party is a public or private corporation, or a partnership or association, or governmental agency, one of its officers or agents must sign the response under oath on the party's behalf [*CCP* § 2031.250(b)].



Trap:

If the officer or agent signing the response on behalf of a party is an attorney acting in that capacity for the party, the party waives any lawyer-client privilege and any *CCP* § 2018.010 *et seq.* work product protection during subsequent discovery from that attorney concerning the identity of the sources of the information in the response [*CCP* § 2031.250(b)].

10.22[3] Attorney Signs Objections. The responding party's attorney must sign any response that contains an objection [*CCP* § 2031.250(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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10.23 Production of Documents.

10.23[1] Time for Production. The responding party must produce all documents demanded on the date specified in the inspection demand, unless the responding party has objected to that date. If the date for inspection has been extended pursuant to section *CCP* § 2031.270, the responding party must produce the documents on the agreed-upon date [*CCP* § 2031.280(b)].

10.23[2] Manner in Which Documents Must Be Produced. Any documents demanded must be produced in either of the following ways [*CCP* § 2031.280(a)]:

- As they are kept in the usual course of business; or
- Organized and labeled to correspond with the categories in the demand.

If necessary, the responding party, at the reasonable expense of the demanding party, must employ detection devices to translate any data compilations included in the demand into reasonably usable form [*CCP* § 2031.280(e)].

Commonly, documents are stamped or labeled with unique sequential alpha-numeric designations ("Bates-stamped") to provide a means to determine exactly what has and has not been produced and to identify documents withheld on privilege grounds and listed on a privilege log. It is customary to have the first part of the identifying designation be an acronym or abbreviation that allows easy identification of the producing party (e.g. "DOE-00001"). In some instances the designation may identify a specific office or facility from which the document has been produced.

Cross References:

Discussion of privilege logs, see 10.20[4][b].

Discussion of manner of production of electronically stored information, see *Ch. 5, Discovery of Electronic Information*, 5.16.



Strategic Points:

When the responsive documents are voluminous, work with opposing counsel to seek agreement on the most convenient and efficient way to produce both parties' documents. The method of production can raise concerns for both sides:

- The responding party may provide the propounding party with access to all potentially responsive documents and have the propounding party decide which of the documents to copy or scan. If fewer than all documents are copied or marked with sequential identifying numbers, however, disputes may arise later if the responding party attempts to use documents that it claims were made available but not selected for copying by the propounding party [see, e.g., *Pate v. Channel Lumber Co. (1997) 51 CA4th 1447, 1452-1453, 59 CR2d 919* (court resolved dispute in favor of propounding party, concluding that responding party had not made available all relevant documents)]. To avoid such disputes, it may be in the interest of the responding party either to share the cost of copying or scanning all potentially responsive documents, or to create a record of all the documents it made available to the propounding party.

- If the propounding party selects only some of the documents made available by the responding party, the responding party may request copies of all documents selected for copying. Depending on the circumstances, the propounding party may argue that its selection of documents is protected work product. It may be in the interest of the propounding party to waive the work product claim, however, in exchange for an agreement with the responding party to share the cost of copying or scanning the selected documents.

- Usually the responding party reviews the documents for responsiveness/relevance and privilege before making the documents available to the propounding party for review. In some circumstances, if the potentially responsive documents are particularly voluminous, the responding party may propose to "open the warehouse doors" and make all potentially responsive documents available for review if the propounding party agrees to a non-waiver agreement (i.e., that the production of the documents will not on that ground alone constitute a waiver of any applicable privileges). This scenario assumes that the responding party will know which documents have been selected for copying and that it will have the opportunity to litigate privilege issues at a later time.

- If the propounding party receives access to a massive collection of documents to select for copying, and does not want to disclose which have been copied, it should carefully determine the time, place, and manner of copying. If done in the responding party's facility by its employee, the responding party will know what has been copied. Scanning can be expensive, and it is not clear that the court can order costs be shared [see *CCP § 2017.710 et seq.* (use of technology in discovery)]. The parties often stipulate with respect to copying costs.

- Often a responding party will request a stipulation or make a motion that the documents be made available for review only on condition that there is a confidentiality order prohibiting disclosure to third parties of the documents and the information contained in the documents. Sometimes the responding party will make a similar request or move that documents containing trade secrets be made available only on an "attorneys' eyes only" basis so that the lawyers--but not the party--are the only persons with access to competitively sensitive documents and information.



Warning:

The non-waiver agreement precludes the other party to the agreement from arguing that there was a waiver, but third parties may not be precluded from arguing that there was a waiver by production to the adverse party even though it was done pursuant to a non-waiver agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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10.24 Obtain Protective Order.

10.24[1] Objective and Grounds. A protective order protects any party or other person from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [CCP § 2031.060]. The moving party must demonstrate good cause for the order [CCP § 2031.060(b)].

A request for the production of documents is oppressive if the ultimate burden is incommensurate with the result sought [*Mead Reinsurance Co. v. Superior Court* (1986) 188 CA3d 313, 320-321, 232 CR 752 ; see *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 223 (decided under CCP §§ 2020.410-2020.440; judge to carefully weigh cost and inconvenience against probative value of material that may be disclosed)].

A request that does not describe the documents or category of documents to be produced with reasonable particularity is burdensome and overbroad [*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216, 223 (decided under CCP §§ 2020.410-2020.440; request that was in effect overly broad blanket request for all documents on a topic, despite grossly excessive use of definitions and instructions that appeared to give request particularity, and which in themselves were unduly burdensome)].

Example:

It was oppressive to require an insurer to produce files of all claims made over a five-year period that were similar in nature to the claim at issue, when to do so would have required individual evaluation of over 13,000 claims [*Mead Reinsurance Co. v. Superior Court* (1986) 188 CA3d 313, 320-321, 232 CR 752 (prior law)].

10.24[2] Relief Available in Protective Order. A protective order may encompass any order justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [CCP § 2031.060(b)]. A protective order may include, but is not limited to, one or more of the following directions:

- That all or some of the items or categories of items in the demand need not be produced or made available [CCP § 2031.060(b)(1)];

- That the time to respond to the set of demands, or to a particular item or category in the set, be extended [CCP § 2031.060(b)(2)];
- That the place of production be other than that specified in the demand [CCP § 2031.060(b)(3)];
- That the inspection, copying, testing, or sampling be made only on specified terms and conditions [CCP § 2031.060(b)(4)];
- That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way [CCP § 2031.060(b)(5)]; or
- That the items produced be sealed and thereafter opened only on order of the court [CCP § 2031.060(b)(6)].

Example:

The employer in a wrongful termination suit was entitled to compel production of a computer that it had provided to an employee to work at home. However, the employee could seek protective orders to define the scope of the inspection to prohibit the unnecessary copying and dissemination of his financial and other information stored on the computer that had no bearing on the case [*TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 CA4th 443, 454, 117 CR2d 155].

10.24[3] Procedure.

10.24[3][a] Make Motion Promptly. After receiving a demand for inspection, copying, testing, or sampling, the responding party must promptly move for any desired protective order [CCP § 2031.060(a)].

**Cross Reference:**

Forms of motion and proposed order, see 10.38, 10.39.

10.24[3][b] Declaration Showing Attempt at Informal Resolution Is Required. A motion for a protective order must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [CCP § 2031.060(a)].

10.24[3][c] Moving Papers. The moving papers for a motion for a protective order must include:

- A motion and notice of motion [Cal Rules Ct, Rule 3.1112(a)];
- A supporting declaration establishing facts outside the record in the case, including an informal attempt at resolution [CCP §§ 2002, 2003, 2015.5]; and
- A memorandum in support of the motion [Cal Rules Ct, Rule 3.1112(a)].

**Strategic Point:**

Cal Rules Ct, Rule 3.1345(a) does not explicitly require a motion for a protective order to be supported by a separate statement. However, (particularly if the motion for a protective order relates to multiple, but not all, items in a demand) and because it is a motion involving the content of a discovery request, a separate statement may be included with the motion so that the court is not required to review any other document to determine the issues.

Judge's Perspective:

Practically speaking, if a separate statement would help the court sort out the impasse or enhance the chances of success in obtaining the relief sought, then the separate statement should be done, even if not technically required.

10.24[4] Court May Qualify Denial of Motion. If the motion for a protective order is denied in whole or in part, the court may order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just [*CCP* § 2031.060(c)].

10.24[5] Sanctions Against Losing Party Are Generally Mandatory. The court is to impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2031.060(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders



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10.25 CHECKLIST: Compelling Response to Demand for Inspection, Copying, Testing, and Sampling.

10.25[1] Moving Party's Checklist.

☐ Verify that party to whom demand for inspection, copying, testing, or sampling has been directed has failed to respond or to file a motion for a protective order within the required time for response.

☐ Draft:

☐ Notice of motion and motion to compel response and to impose a monetary sanction.

☐ Supporting declaration.

☐ Supporting memorandum.

Content Notes:

If no response has been made:

- The supporting declaration need not show an informal attempt at resolution.
- Separate statement is not required.

Authority:

Cal Rules Ct, Rule 3.1345(b)

- ☐ Draft proposed order.
- ☐ Serve and file motion, following standard noticed motion procedure.
- ☐ Calendar response and hearing date.
- ☐ If opposing party fails to comply with order compelling response, file motion for sanctions.

Authority:

CCP § 2031.300

Discussion:

See 10.26

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

Form:

See 10.41 (notice of motion and motion to compel response to demand for inspection)

10.25[2] Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.
- ☐ Draft response to demand for inspection that substantially complies with requirements for responses.
- ☐ Serve response to demand for inspection before hearing date for motion to compel response.

**Warning:**

If the time to respond to a demand for inspection, copying, testing, or sampling has expired, and a motion to compel has been filed, a late filing of a response is still an untimely response. An untimely response constitutes a waiver of any objection to the demand for inspection, copying, testing, or sampling. If the response contains objections, the responding party should move for relief from the waiver.

Authority:

CCP § 2031.300

Discussion:

See 10.19

Form:

See 10.40 (notice of motion and motion to relieve party from waiver)

- ☐ Determine whether moving party will drop motion, if not:

☐ Draft:

☐ Opposition to motion to compel, with request for a monetary sanction, if appropriate.

☐ Supporting declaration.

☐ Opposing memorandum.

Content Notes:

To avoid monetary sanctions if the motion to compel is granted, the opposition to the motion should state that:

- The responding party acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Counter-Attack:

Because sanctions are available against the losing party, the party opposing the motion should consider requesting imposition of a sanction against the moving party, particularly if extenuating circumstances prevented a timely response and a late response was subsequently served.

☐ Draft proposed order.

☐ Serve and file motion, following standard noticed motion procedure.

Authority:

CCP § 2031.300

Discussion:

See 10.26

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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1-10 MB Practice Guide: CA Civil Discovery 10.26

10.26 Motion to Compel Response.

10.26[1] Available When No Response Has Been Made. If no response has been made to a demand for inspection, copying, testing, or sampling, the party making the demand may move for an order compelling a response [CCP § 2031.300(b)].

Distinguish--No Informal Resolution Required:

Unlike other motions, a motion based on a failure to respond need not be preceded by an attempt at informal resolution because the motion is based on a failure to respond, not an inadequate response. Nonetheless, the propounding party would be well advised to send a letter alerting the responding party to the failure to respond. If the letter does not help resolve the issue, it nevertheless may enhance the possibility the court will impose sanctions on the responding party if the propounding party prevails on the motion.

Prerequisite:

A proper demand for inspection is a prerequisite to a motion to compel production and inspection [see *Schaefer v. Manufacturers Bank* (1980) 104 CA3d 70, 74, 163 CR 402 (court properly denied motion when no prior demand had been made; prior law); *People ex rel. Department of Transp. v. Superior Court* (1976) 60 CA3d 352, 358, 131 CR 476 (court improperly granted motion when no prior demand; prior law), *disapproved on other grounds*, *Davies v. Superior Court* (1984) 36 C3d 291, 301, 204 CR 154, 682 P2d 349].

10.26[2] Motion Papers. The moving papers for a motion to compel a response must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case [CCP §§ 2002, 2003, 2015.5]; and
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].

Distinguish--No Separate Statement:

Because the motion is based on a failure to respond, the moving party is not required to provide a *Cal Rules Ct, Rule 3.1345* separate statement [*Cal Rules Ct, Rule 3.1345(b)*].

**Cross References:**

Form for motion, see *10.41*.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.10 (Matthew Bender)*.

10.26[3] Sanctions Against Losing Party Are Generally Mandatory. With two exceptions, the court must impose a monetary sanction under *CCP § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to a demand for inspection, copying, testing, or sampling [*CCP § 2031.300(c)*].

Exceptions:

Sanctions are not mandatory if the court finds that [*CCP § 2031.300(c)*]:

- The party subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

As a matter of law, a party who reveals the existence of documents, seeks a confidentiality agreement, announces the intention to move for a protective order, and prevails on that motion has substantial justification for withholding documents until the motion for a protective order is determined and for opposing a motion to compel [*Foothill Props. v. Lyon/Copley Corona Assocs. (1996) 46 CA4th 1542, 1557-1558* (reversing sanctions order when "eyes only" protective order and motion to compel were granted at same time)].

10.26[4] Sanctions Are Available for Failure to Comply With Order. If a party fails to obey an order compelling a response to a demand for inspection, copying, testing, or sampling, the court may make those orders that are just, including [*CCP § 2031.300(c)*]:

- Issue sanctions [*CCP § 2023.030(b)*], evidence sanctions [*CCP § 2023.030(c)*], or terminating sanctions [*CCP § 2023.030(d)*].
- Monetary sanctions [*CCP § 2023.030(a)*] in lieu of or in addition to any other sanctions.

If a party repeatedly fails to respond to discovery despite court orders and monetary sanctions, the trial court may properly impose terminating sanctions even in the absence of a formal court order compelling responses; the parties' stipulation setting a deadline for overdue discovery responses was tantamount to the court order required by *CCP § 2031.300(c)* [*Mileikowsky v. Tenet Healthsystem (2005) 128 CA4th 262*].

10.26[5] Sanctions Are Available Even If No Opposition to Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

However, the failure to file a written opposition or to appear at a hearing or the voluntary provision of discovery cannot be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil
ProcedureDiscoveryMotions to Compel



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10.27 CHECKLIST: Compelling Further Response to Demand for Inspection, Copying, Testing, and Sampling.

10.27[1] Moving Party's Checklist.

☐ Review response to demand for inspection, copying, testing, or sampling for adequacy.

A motion to compel further response must be served within 45 days after service of the response, unless parties have agreed in writing to a specific later date.

☐ If response is inadequate, make reasonable, good faith effort to resolve issue.

☐ If matter is not resolved, draft:

☐ Notice of motion and motion to compel further response and to impose a monetary sanction.

☐ Supporting declaration.

☐ Separate statement.

☐ Supporting memorandum.

☐ Proposed order.

☐ Grounds are:

- ☐ Incomplete statement of compliance,
- ☐ Inadequate, incomplete, or evasive representation of an inability to comply, or
- ☐ Objection without merit or too general.

Content Notes:

- Motion must show good cause justifying discovery sought.
- Declaration must show attempt at informal resolution.
- Motion must be accompanied by a *Cal Rules Ct, Rule 3.1345* separate statement.

- ☐ Serve and file motion, following standard noticed motion procedure.
- ☐ Calendar response and hearing dates.
- ☐ If opposing party fails to comply with order compelling further response, file motion for sanctions.

Authority:*CCP § 2031.310***Discussion:***See 10.28***Standard Procedure Checklist:***See Ch. 4, Law and Motion Procedure, 4.03***Form:***See 10.42 (notice of motion and motion to compel further response to demand for inspection)***10.27[2] Opposing Party's Checklist.**

- ☐ Calendar response and hearing dates.
- ☐ Prepare opposition:
 - ☐ Draft declaration(s) in support of opposition to motion.
 - ☐ Draft opposing memorandum.

Content Notes:

To avoid monetary sanctions if the motion to compel is granted, the opposition to the motion should state that:

- The party responding to the motion to compel acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Counter-Attack:

Because sanctions are available against the losing party, the party opposing the motion should consider requesting sanctions against the moving party, particularly if there is questionable good cause for the discovery sought or the propounding party did not make a good faith attempt to resolve informally.

- ☐ Draft proposed order.
- ☐ Serve and file motion, following standard noticed motion procedure.

Authority:

CCP § 2031.310

Discussion:

See 10.28

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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10.28 Motion to Compel Further Response.

10.28[1] Grounds. After receiving a response to a demand for inspection, copying, testing, or sampling, the party demanding the inspection can move for an order compelling further response if he or she deems that [CCP § 2031.310(a)]:

- A statement of compliance with the demand is incomplete,
- A representation of an inability to comply with the demand is inadequate, incomplete, or evasive, or
- An objection in the response is without merit or too general.

Distinguish--Motion to Compel Compliance With Response:

The purpose of a motion to compel further response is to have the court order a further response that completely identifies and requires the production of the available, nonprivileged documents. The court resolves the validity of claimed privileges. Once an adequate response has been obtained, there is no longer any dispute over the right to inspect the items, and a subsequent refusal to produce the items as promised may lead to a motion to compel compliance [*Standon Co., Inc. v. Superior Court* (1990) 225 CA3d 898, 903, 275 CR 833].

10.28[2] Motion Must Show Good Cause for Demand. A motion for an order compelling further response to a demand for inspection, copying, testing, or sampling must set forth specific facts showing good cause justifying the discovery sought by the demand [CCP § 2031.310(b)(1)].

10.28[3] Attempt At Informal Resolution Is Required. A motion for an order compelling further response to a demand for inspection, copying, testing, or sampling must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by it [CCP § 2031.310(b)(2)].

10.28[4] Motion Must Be Made Within 45 Days of Response. To avoid waiving the right to compel a further response, notice of a motion to compel further response must be given either [CCP § 2031.310(c)]:

- Within 45 days of service of the response, or any supplemental response; or
- On or before any specific later date to which the demanding party and the responding party have agreed in writing.

Unless the parties have agreed otherwise, the 45-day time limit is mandatory, and any untimely motion to compel further response must be denied [*Sexton v. Superior Court* (1997) 58 CA4th 1403, 1409-1410, 68 CR2d 708].



Strategic Points:

- If the propounding party misses the 45-day deadline, it may still be possible to obtain documents by requesting that the documents be brought to a deposition [*Carter v. Superior Court* (1990) 218 CA3d 994, 995-996, 267 CR 290].
- If the responding party agrees during the meet and confer to supplement some responses, that agreement does not automatically extend the 45-day period as to other responses. If it is necessary to extend the time for all responses, an agreement to that effect should be obtained.

10.28[5] Motion Papers. The moving papers for a motion to compel further response must include:

- A motion and notice of motion [*Cal Rules Ct, Rule 3.1112(a)*].
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution and good cause justifying the discovery sought by the demand [*CCP §§ 2002, 2003, 2015.5, 2031.310*].
- A memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*].
- A separate statement with all information necessary to understand each discovery request and all responses to it which are at issue [*Cal Rules Ct, Rule 3.1345(a), (c)*].



Cross References:

Forms, see 10.42 and separate statement in *Ch. 4, Law and Motion Procedure*, 4.56.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 85, Discovery: Production or Inspection of Tangible Evidence*, § 85.11 (Matthew Bender).

10.28[6] Sanctions Against Losing Party Are Generally Mandatory. With two exceptions, the court must impose a monetary sanction under *CCP § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a demand for inspection, copying, testing, or sampling [*CCP § 2031.310(h)*].

Exceptions:

Sanctions are not mandatory if the court finds that [*CCP § 2031.310(h)*]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

A party who reveals the existence of documents, seeks a confidentiality agreement, announces the intention to move for a protective order, and prevails on the motion for a protective order has substantial justification as matter of law for having withheld documents until the motion for a protective order was determined and for opposing motion to compel [*Foothill Props. v. Lyon/Copley Corona Assocs.* (1996) 46 CA4th 1542, 1557-1558 (reversing sanctions order when "eyes only" protective order and motion to compel were granted at same time)].

10.28[7] Sanctions Are Available for Failure to Comply With Order. If a party fails to obey an order compelling further response to a demand for inspection, copying, testing, or sampling, the court may make those orders that are just, including [CCP § 2031.310(i)]:

- An issue sanction [CCP § 2023.030(b)], an evidence sanction [CCP § 2023.030(c)], or a terminating sanction [CCP § 2023.030(d)].
- A monetary sanction [CCP § 2023.030(a)] in lieu of or in addition to any other sanction.

Distinguish:

A court may not order a party's privileges waived for failure to comply with an order compelling further responses. Such an order exceeds the court's authority under CCP § 2031.310 [*People ex rel. Lockyer v. Superior Court* (2004) 122 CA4th 1060, 1074-1075 ; *Best Prods., Inc. v. Superior Court* (2004) 119 CA4th 1181, 1189].

10.28[8] Sanctions Are Available Even If No Opposition to Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

However, the failure to file a written opposition or to appear at a hearing or to voluntarily provide of discovery cannot be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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Chapter 10 Inspection of Documents, Tangible Things, and Land
VI. COMPELLING COMPLIANCE WITH RESPONSE TO DEMAND FOR INSPECTION, COPYING, TESTING,
AND SAMPLING

1-10 MB Practice Guide: CA Civil Discovery 10.29

10.29 CHECKLIST: Compelling Compliance With Response to Demand for Inspection, Copying, Testing, and Sampling.

10.29[1] Moving Party's Checklist.

☐ Confirm that party to whom a demand for inspection, copying, testing, or sampling was directed failed to comply with a response stating that the inspection, copying, testing, or sampling would be allowed at the time specified in the demand or agreed upon by the parties.

☐ Draft:

☐ Notice of motion and motion to compel response and to impose a monetary sanction.

☐ Supporting declaration.

☐ Separate statement.

☐ Supporting memorandum.

Content Notes:

The motion must identify by set and number the demands at issue. A separate statement to accompany the motion is not specifically required by *Cal Rules Ct, Rule 3.1345(a)*, but may be included for the court's convenience [*see Cal Rules Ct, Rule 3.1345(d)*], particularly if motion concerns multiple items in a demand.

☐ Draft proposed order.

☐ Serve and file motion, following standard noticed motion procedure.

☐ Calendar response and hearing dates.

☐ If opposing party fails to comply with order compelling response, file motion for sanctions.

Authority:

CCP § 2031.320

Discussion:

See 10.30

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Form:

See 10.43 (notice of motion and motion to compel compliance with response to demand for inspection)

10.29[2] Opposing Party's Checklist.

☐ Calendar response and hearing dates.

☐ Comply with response to demand before hearing date on motion to compel compliance.

☐ Determine whether moving party will drop motion, if not draft:

☐ Supporting declaration.

☐ Opposing memorandum.

Content Notes:

To avoid monetary sanctions if the motion to compel is granted, the opposition to the motion should state that:

- The responding party acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

Counter-Attack:

Because sanctions are available against the losing party, the party opposing the motion should consider requesting sanctions against the moving party, particularly if circumstances prevented compliance in accordance with the response and the responding party has subsequently complied with the inspection demand.

- ☐ Draft proposed order.
- ☐ Serve and file motion, following standard noticed motion procedure.

Authority:

CCP § 2031.320

Discussion:

See 10.30

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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AND SAMPLING

1-10 MB Practice Guide: CA Civil Discovery 10.30

10.30 Motion to Compel Compliance With Response.

10.30[1] Grounds. If a party who has filed a response to a demand for inspection afterwards fails to permit the inspection, copying, testing, or sampling in accordance with a statement of compliance in the response, the demanding party may move for an order compelling compliance [CCP § 2031.320(a)].

Distinguish--Motion to Compel Further Response:

The purpose of a motion to compel *further response* is to obtain a court order requiring a further response that completely identifies the available, nonprivileged documents and agrees to produce them. The court resolves the validity of claimed privileges. Once an adequate response has been obtained, there is no longer any dispute over the right to inspect the items; a subsequent refusal to produce the items as promised may prompt a motion to *compel compliance* [*Standon Co., Inc. v. Superior Court* (1990) 225 CA3d 898, 902-903, 275 CR 833].

10.30[2] Motion Papers. The moving papers for a motion to compel compliance with a response must include:

- A motion and notice of motion [Cal Rules Ct, Rule 3.1112(a)];
- A supporting declaration establishing facts outside the record in the case [CCP §§ 2002, 2003, 2015.5]; and
- A memorandum in support of the motion [Cal Rules Ct, Rule 3.1112(a)].

Distinguish--Separate Statement Requirement:

A motion to compel compliance with a response to a demand for inspection, copying, testing, or sampling is not one of the motions specified as requiring a separate statement under *Cal Rules Ct, Rule 3.1345(a)*. However, because it is a motion involving the response to a discovery request, a separate statement may be included with the motion so that the court is not required to review any other document to determine the full demand and the full response [see *Cal Rules Ct, Rule 3.1345(a), (c)*], particularly if compliance is at issue concerning multiple items in a demand.

Judge's Perspective:

Be mindful that separate statements, while exceptionally tedious and time consuming, are very helpful to the judge in preparing for the discovery hearing. Separate statements are the first papers that the court reviews with respect to the discovery motion. All other aspects of the moving and opposing papers, in many instances, are simply argument based on a series of self-serving vituperative correspondence.

► Cross References:

Form, see 10.43.

Form for memorandum supporting motion, see *California Points and Authorities*, Ch. 85, *Discovery: Production or Inspection of Tangible Evidence*, § 85.20 (Matthew Bender).

10.30[3] Sanctions Against Losing Party Are Generally Mandatory. With two exceptions, the court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a response to a demand [*CCP* § 2031.320(b)].

Exceptions:

Sanctions are not mandatory if the court finds that [*CCP* § 2031.320(b)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of a sanction unjust.

10.30[4] Sanctions Are Available for Failure to Comply With Order. If a party fails to obey an order compelling inspection, copying, testing, or sampling, the court may make those orders that are just, including [*CCP* § 2031.320(c)]:

- Issue sanctions [*CCP* § 2023.030(b)], evidence sanctions [*CCP* § 2023.030(c)], or terminating sanctions [*CCP* § 2023.030(d)].
- Monetary sanctions [*CCP* § 2023.030(a)] in lieu of or in addition to any other sanctions.

Examples:

- Issue sanction imposed for willful failure to obey an order compelling production of financial records [*Sauer v. Superior Court* (1987) 195 CA3d 213, 228-229, 240 CR 489].
- Terminating sanction dismissing complaint imposed after plaintiff's failure to comply with an order for production [*Hartbrodt v. Burke* (1996) 42 CA4th 168, 174, 49 CR2d 562].
- Terminating sanction striking answer imposed after defendants erased e-mails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 CA4th 1161].

10.30[5] Sanctions Are Available Even in Absence of Opposition to Motion. The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving

party after the motion was filed [*Cal Rules Ct, Rule 3.1348(a)*].

However, the failure to file a written opposition or to appear at a hearing or to voluntarily provide discovery cannot be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal Rules Ct, Rule 3.1348(b)*].

10.30[6] Monetary Sanctions May Be Available Post Trial. A monetary sanction may be available after trial, when issue, evidence, and terminating sanctions can no longer be imposed.

Examples:

- Monetary sanctions imposed post trial against defendants who withheld evidence and lied about its existence [*Sherman v. Kinetic Concepts, Inc. (1998) 67 CA4th 1152, 1162-1163, 79 CR2d 641*].
- Monetary sanctions imposed by the reviewing court after responding party filed two unmeritorious mandate petitions objecting to a legitimate demand for inspection with which trial court had ordered compliance [*Manzetti v. Superior Court (1993) 21 CA4th 373, 378-381, 25 CR2d 857*].
- Monetary sanctions imposed following trial against plaintiff who failed to provide two documents before trial; the trial court found that the delay in production seriously hindered the defendant in the preparation of his defense and made the defense much more difficult, expensive and complex than it should have been [*City and County of San Francisco v. Ballard (2006) 136 CA4th 381*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 10 Inspection of Documents, Tangible Things, and Land
VII. FORMS

A. Making Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.31

10.31 Demand for Production of Documents or Tangible Things for Inspection.

Demand for Production of Documents or Tangible Things for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND FOR PRODUCTION OF
_____ [name],	)	_____ [DOCUMENTS and/or
Defendant.	)	TANGIBLE THINGS] FOR INSPECTION
	)	Demanding Party: _____ [identify,
	)	<i>e.g.</i> , Plaintiff John Smith].
	)	Responding Party: _____ [identify,
	)	<i>e.g.</i> , Defendant Mary Jones].
	)	Set No. _____ [specify]

To _____ [party, *e.g.*, Defendant Mary Jones] and to his/her attorney of record:

_____ [Demanding party, *e.g.*, Plaintiff John Smith] demands that you produce the
_____ [documents or items] listed below on _____ [date], at
_____ [time], at _____ [place, *e.g.*, The Law Offices of Tom Doe], located at
_____ [street address], _____ [city], California, for the purpose of inspection and
_____ [specify related activity, *e.g.*, copying and/or photographing]. [If the related activity is
something other than copying, such as sampling or testing, specify the manner in which the activity will be performed,

and whether it will permanently alter or destroy the items or items].

_____ [Demanding party, e.g., Plaintiff John Smith] demands that you produce and permit the inspection and _____ [specify related activity, e.g, copying and/or photographing] by or on behalf of himself/herself of the following _____ [documents and/or tangible things]:

1. [Set forth separately the things to be produced by specifically describing each individual item, or specify each category with reasonable particularity, e.g., All claims procedure manuals used by Defendant during the period of 1998-2002].

2. [Continue setting forth, in separately numbered paragraphs, as many items or categories as desired].

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2031.010



Timing:

See 10.08

Drafting Demand:

See 10.09

Number of Demands Allowed:

See 10.07

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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A. Making Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.32

10.32 Demand for Permission to Enter Onto Land or Other Property for Inspection.

Demand for Permission to Enter Onto Land or Other Property for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND FOR PERMISSION TO ENTER ONTO
_____ [name],	)	PROPERTY FOR INSPECTION
Defendant.	)	Demanding Party: _____ [identify,
	)	e.g., Plaintiff John Smith].
	)	Responding Party: _____ [identify,
	)	e.g., Defendant Mary Jones].
		Set No. _____ [specify]

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

_____ [Demanding party, e.g., Plaintiff John Smith] demands permission to enter
_____ [describe property, e.g., the residential lot located at 125 Main St., Farallon City, California] for
the purpose of inspecting and _____ [specify related activity, e.g., surveying the lot] on
_____ [date] at _____ [time].

[Specify the manner in which the related activity will be performed, and whether it will permanently alter or destroy the property or anything on the property, e.g., The survey will be performed by Green & Co., Inc., Professional Surveyors,

in accordance with standard surveying practice, and will not result in any permanent alteration or damage to the property].

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2031.010

**Timing:**

See 10.08

Drafting Demand:

See 10.09

Number of Demands Allowed:

See 10.07

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

A. Making Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.33

10.33 Notice of Motion and Motion for Leave to Make Early Demand for Inspection.

Notice of Motion and Motion for Leave to Make Early Demand for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR
) LEAVE TO MAKE EARLY DEMAND FOR
) _____ [specify inspection sought
) and related activities, e.g., PERMISSION TO
) ENTER, INSPECT, AND PHOTOGRAPH PROP-
) ERTY], SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for leave to make an early demand _____ [specify inspection sought and related activities, e.g., for permission to enter onto the property located at 125 Main St., Farallon City, California, for the purposes of inspecting and photographing the premises].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking leave to make an early demand _____ [specify inspection sought and related activities, e.g., for permission to enter onto the property located at 125 Main St., Farallon City, California, for the purposes of inspecting and photographing the premises].

3. Good cause exists for the early demand in that _____ [set forth facts showing good cause, e.g., construction is ongoing on the premises and surrounding area and will alter the area where the accident at issue occurred].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.020

Requesting Early Demand for Inspection:

See 10.08[1][c]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

A. Making Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.34

10.34 Notice of Motion and Motion to Shorten Time for Response to Demand for Inspection with Supporting Declaration.

Notice of Motion and Motion to Shorten Time for Response to Demand for Inspection with Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION TO
) SHORTEN TIME FOR RESPONSE TO DEMAND
) FOR _____ [specify nature of de-
) mand, e.g., PRODUCTION AND INSPECTION OF
) DOCUMENTS], SUPPORTING DECLARATION
) OF _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [responding party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [demanding party, e.g., Plaintiff John Smith] will, and hereby does, move for an order shortening time for the response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1], served on _____ [date], so that the response must be served by _____ [date]. The motion will be made on the grounds that _____ [specify, e.g., Plaintiff John Smith only recently became aware of the existence of the documents that are the subject of the demand, and the discovery cut-off date in this action is August 25, 2005].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith in the action described above].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order shortening the time for response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1], served on _____ [date].

3. The time for response should be shortened to _____ [date] because _____ [set forth facts showing reason time should be shortened, such as recent discovery of the existence of documents and the reasons why they were not discovered earlier].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.260

Shortened Time for Response:

See 10.17[2][b]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

A. Making Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.35

10.35 Notice of Motion and Motion for Leave to Propound Supplemental Demand for Inspection.

Notice of Motion and Motion for Leave to Propound Supplemental Demand for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR
) LEAVE TO PROPOUND SUPPLEMENTAL DE-
) MAND FOR _____ [specify nature
) of demand, e.g., PRODUCTION AND INSPECTION
) OF DOCUMENTS], SUPPORTING DECLARA-
) TION OF _____ [name], AND
) MEMORANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [responding party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order granting leave to propound a supplemental demand for _____ [specify nature of demand, e.g., production and inspection of documents]. The motion will be made on the grounds that _____ [specify, e.g., Plaintiff John Smith only recently became aware of the existence of the documents that are the subject of the demand, which are relevant to the issue of Defendant's prior knowledge of the product defects alleged in this action].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. _____ [Moving party, e.g., Plaintiff John Smith] is seeking an order granting leave to propound a supplemental demand for _____ [specify nature of demand, e.g., production and inspection of documents].

3. Leave is required because _____ [specify, e.g., Plaintiff John Smith previously propounded a supplemental demand for production and inspection of documents after the initial setting of a trial date in this matter].

4. Good cause exists for the supplemental demand in that _____ [set forth facts showing good cause, e.g., Plaintiff John Smith became aware of the existence of the documents that are the subject of the demand, which are relevant to the issue of Defendant's prior knowledge of the product defects alleged in this action, after making his previous supplemental demand for production and inspection].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.050

Propounding Supplemental Demands for Inspection:

See 10.13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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B. Responding to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.36

10.36 Response to Demand for Inspection.

Response to Demand for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	RESPONSE TO DEMAND FOR
_____ [name],	)	_____ [specify nature of demand,
Defendant.	)	e.g., PRODUCTION AND INSPECTION OF DOC-
	)	UMENTS]
	)	Demanding Party: _____ [identify,
	)	e.g., Plaintiff John Smith].
		Responding Party: _____ [identify,
		e.g., Defendant Mary Jones].
		Set No. _____ [specify]

To _____ [demanding party, e.g., Plaintiff John Smith] and to his/her attorney of record:

_____ [Responding party, e.g., Defendant Mary Jones] responds as follows to the above-referenced demand for _____ [specify nature of demand, e.g., production and inspection of documents] served on _____ [date of service]:

[EITHER, (for those items or categories of items being produced, respond separately to each item or category

requested)]

1. _____ [Responding party, e.g., Defendant Mary Jones] will produce _____ [all responsive documents or the documents responsive to Request(s) No(s). _____ (specify the request numbers responded to)] at the time and place specified in the demand for _____ [specify nature of demand, e.g., production and inspection of documents] served on _____ [date of service.]

[AND/OR, if items will be produced, but cannot be produced by the date specified in the demand]

1. _____ [Responding party, e.g., Defendant Mary Jones] cannot produce _____ [the responsive document(s) or the document(s) responsive to Request(s) No(s). _____ (specify the request or request number(s) responded to)] at the time and place specified in the demand for _____ [specify nature of demand, e.g., production and inspection of documents] served on _____ [date of service].
 _____ [Responding party, e.g. Defendant Mary Jones] will produce the requested document(s) on _____ [specify date and time] at _____ [specify location], or some other time and date mutually agreed to be the parties.

[AND/OR, if unable to comply with the demand for inspection of a particular item or category of item]

1. _____ [Responding party, e.g. Defendant Mary Jones] cannot produce the document(s) responsive to Request No(s). _____ [specify request number(s)] specified in the demand for _____ [specify nature of demand, e.g., production and inspection of documents] served on _____ [date of service], because _____ [state reason for not producing the document(s), e.g., the documents have been lost or destroyed, cannot be located, or no longer exist]. A diligent search and a reasonable inquiry have been made in an effort to comply with the demand.

[AND/OR, if objecting to an entire item or category of item, state for each item or category]

1. _____ [Responding party, e.g. Defendant Mary Jones] objects to the production of the document(s) responsive to Request No. _____ [specify request number(s) objected] specified in the demand for _____ [specify nature of demand, e.g., production and inspection of documents] served on _____ [date of service] in its/their entirety because the document(s) requested _____ [state grounds for objection, e.g., are protected by the _____ (e.g., attorney-client privilege or attorney work product privilege or patient-physician privilege or constitutional right to privacy)].

[AND/OR, if objecting to part of an item or category of item demanded, state for each part objected to]

1. _____ [Responding party, e.g., Defendant Mary Jones] objects to Item No. 1 as to _____ [specify, e.g., telephone logs after January 1, 2005] on the ground that _____ [state ground, e.g., they are not relevant to this case because the communication between Plaintiff and Defendant ceased when this action was filed in 2004]. As to the remainder of Item No. 1, _____ [Responding party, e.g., Defendant Mary Jones] _____ [state compliance or inability to comply, e.g., is unable to comply because the telephone logs were discarded at the end of each calendar year. A diligent search and reasonable inquiry have been made in an effort to comply with this demand].

[CONTINUE]

2. [Set forth, in successive paragraphs, responses bearing the same number, and in the same sequence, as each corresponding item or category in the demand].

Date: _____

[EITHER, attorney signs if response contains one or more objections]

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[AND/OR party, its agent, or officer signs and verifies, unless response contains only objections]

VERIFICATION

[EITHER, if declarant is an individual]

I, _____ [name], _____ [certify or declare] under penalty of perjury under the laws of the State of California that the foregoing responses are true and correct.

[OR, if declarant is answering on behalf of corporation or other entity]

I, _____ [name], _____ [certify or declare] under penalty of perjury under the laws of the State of California that I am informed and believe that the foregoing responses are true and correct based on such information as is available to _____ [name of party], a _____ [specify type of entity, e.g., corporation], which designated me as its agent to respond to the foregoing request.

Date: _____

_____ [signature]

NOTES.

Authority:

CCP § 2031.210 et seq.

Drafting Response:

See 10.20



Timing:

See 10.17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

Matthew Bender (R) Practice Guide: California Civil Discovery
Kiesel, Matthai, Seabolt, Grillo

Chapter 10 Inspection of Documents, Tangible Things, and Land
VII. FORMS

1-10 MB Practice Guide: CA Civil Discovery 10.37

Stipulation to Extend Time to Inspect or Respond.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Plaintiff,
vs.

Defendant.

) NO. _____
)
) STIPULATION TO EXTEND
) _____ [DATE FOR INSPECTION
) or TIME TO RESPOND TO DEMAND FOR
) _____ (*specify nature of demand,*
) *e.g.*, PRODUCTION AND INSPECTION OF DOC-
) UMENTS)]
)
) Re: Demand for _____ [*specify*
) *nature of demand, e.g.*, production and inspection of
) documents]
)
) Demanding Party: _____ [*identify,*
) *e.g.*, Plaintiff John Smith].
)
) Responding Party: _____ [*identify,*
) *e.g.*, Defendant Mary Jones].
)
) Set No. _____ [*specify*]

[Demanding party, [EITHER, if stipulating to extension of time for service of response] e.g.,
Plaintiff John Smith] and _____ [responding party, e.g., Defendant Mary Jones], by and through their

undersigned attorneys, hereby stipulate that the time to respond to the above-referenced demand for _____ [specify nature of demand, e.g., production and inspection of documents] is extended to _____ [date].

[OR, if stipulating to extension of date for inspection]

_____ [Demanding party, e.g., Plaintiff John Smith] and _____ [responding party, e.g., Defendant Mary Jones], by and through their undersigned attorneys, hereby stipulate that the date to _____ [specify nature of demand, e.g., produce documents for inspection] as requested in the above-referenced demand is extended to _____ [date].

[CONTINUE]

[Set forth any further stipulation regarding response, e.g., Plaintiff and Defendant further stipulate that, in the response, Defendant will not object to any item in the above-referenced demand on the basis of attorney-client privilege.]

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

_____ [Firm Name]

By: _____ [Signature]

_____ [Typed Name]

Attorney for _____

[Name of responding party]

NOTES.

Authority:

CCP § 2031.270

Stipulation to Extend Time to Inspect or Respond:

See 10.18[1]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

B. Responding to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.38

10.38 Notice of Motion and Motion for Protective Order Concerning Demand for Inspection With Supporting Declaration.

Notice of Motion and Motion for Protective Order Concerning Demand for Inspection With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR PRO-
_____ [name],	)	TECTIVE ORDER RESTRICTING DISCOVERY
Defendant.	)	AND IMPOSING MONETARY SANCTION, SUP-
	)	PORTING DECLARATION OF
	)	_____ [name], AND MEMOR-
	)	ANDUM IN SUPPORT OF MOTION
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order _____ [specify order sought, e.g., directing that Item No. 5 in the Demand for Production and Inspection of Documents, Set 1, propounded by Plaintiff John Smith and served on Defendant Mary Jones on August 18, 2005, need not be produced], and for an order imposing a monetary sanction against _____ [name(s) of propounding party and/or his/her attorney] in the amount of \$ _____. The motion will be made on the grounds that _____ [specify grounds, e.g., producing the records requested in Item No. 5 will result in undue burden and expense for Defendant Mary Jones].

The motion will be based on this notice of motion, on the declaration of _____ [name], [on the separate statement served and filed herewith,] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones].

2. On _____ [date], _____ [demanding party, e.g., Plaintiff John Smith] served _____ [moving party, e.g., Defendant Mary Jones] with _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1].

3. Item No. _____ of that demand requests that _____ [specify demand, e.g., Defendant Mary Jones produce all customer contracts she procured during her 20 years in business].

4. _____ [Set forth facts showing grounds for protective order, e.g., Complying with this demand would require searching through thousands of individual customer files, many of which are in storage facilities in other states, resulting in undue burden and expense for Defendant].

5. _____ [Moving party, e.g., Defendant Mary Jones] is seeking a protective order from this court directing that _____ [specify order sought, e.g., that the records requested in Item No. 5 in the Demand for Production and Inspection of Documents, Set 1, propounded by Plaintiff John Smith and served on Defendant Mary Jones on August 18, 2005, need not be produced because production will result in undue burden and expense for Defendant Mary Jones].

6. On _____ [date], _____ [specify actions taken to confer with opposing party in a

reasonable and good faith attempt to resolve informally the issues presented by the motion, e.g., I sent a letter to Plaintiff's attorney requesting that she narrow the scope of the demand. A copy of the letter is attached. To date, I have not received an answer to the letter. Although I have telephoned Plaintiff's attorney four times, I have not been able to get through to her, and she has not returned my calls].

7. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.060

Grounds for Protective Order:

See 10.24[1]

Relief Available:

See 10.24[2]



Timing:

See 10.24[3][a]

Prerequisite:

See 10.24[3][b]

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Related Form of Order:

See 10.39

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

B. Responding to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.39

10.39 Order on Motion for Protective Order Concerning Demand for Inspection.

Order on Motion for Protective Order Concerning Demand for Inspection.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	[PROPOSED] ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for a protective order directing that _____ [specify order sought, e.g., that the documents requested in Item No. 5 in the Demand for Production and Inspection of Documents, Set 1, propounded by Plaintiff John Smith and served on Defendant Mary Jones on August 18, 2005, need not be produced] and for monetary sanctions came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]. Defendant appeared by counsel _____ [name].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [state order, e.g., the documents requested in Item No. 5 in the Demand for Production and Inspection of Documents, Set 1, propounded by Plaintiff John Smith and served on Defendant Mary Jones on February 18, 2005, need not be produced].

[AND EITHER, if imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] _____ [acted without substantial justification or specify other circumstances making imposition of a sanction just],

IT IS FURTHER ORDERED that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] pay forthwith to _____ [successful party, e.g., Defendant Mary Jones] the sum of \$_____ as reasonable expenses and attorneys' fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] _____ [acted with substantial justification or specify other circumstances making imposition of a sanction unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2031.060

Related Form of Motion:

See 10.38

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders



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Chapter 10 Inspection of Documents, Tangible Things, and Land

VII. FORMS

B. Responding to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.40

10.40 Notice of Motion and Motion to Relieve Party From Waiver of Objections to Demand for Inspection With Supporting Declaration.

Notice of Motion and Motion to Relieve Party From Waiver of Objections to Demand for Inspection With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION TO RE-
) LIEVE _____ [responding party,
) e.g., DEFENDANT MARY JONES] FROM
) WAIVER OF OBJECTIONS TO DEMAND FOR
) _____ [specify nature of demand,
) e.g., PRODUCTION AND INSPECTION OF DOC-
) UMENTS], SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order relieving _____ [moving party, e.g., Defendant Mary Jones] from a waiver of objections to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1]. The motion will be made on the grounds that the failure to serve a timely response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] was the result of _____ [mistake or inadvertence or excusable neglect].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones].

2. On _____ [date], _____ [demanding party, e.g., Plaintiff John Smith] served _____ [moving party, e.g., Defendant Mary Jones] with _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1].

3. The failure of _____ [moving party, e.g., Defendant Mary Jones] to serve a timely response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] was the result of _____ [mistake or inadvertence or excusable neglect] in that _____ [specify, e.g., the demand for production was delivered by the postal service to the wrong office and was not received by Defendant Mary Jones's counsel until August 23, 2005, two days before a response was due].

4. _____ [Moving party, e.g., Defendant Mary Jones] subsequently served a response that was in substantial compliance with *Code of Civil Procedure* sections 2031.210-2031.240 and 2031.280 on September 17, 2005.

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.300

Waiver of Objections:

See 10.19[1]

Grounds for Relief from Waiver:

See 10.19[2]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection



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Chapter 10 Inspection of Documents, Tangible Things, and Land
VII. FORMS

C. Compelling Response, Further Response, or Compliance With Response to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.41

10.41 Notice of Motion and Motion to Compel Response to Demand for Inspection With Supporting Declaration.

Notice of Motion and Motion to Compel Response to Demand for Inspection With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER COMPELLING RESPONSE TO DEMAND
) FOR _____ [specify nature of de-
) mand, e.g., PRODUCTION AND INSPECTION OF
) DOCUMENTS], SUPPORTING DECLARATION
) OF _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order compelling _____ [responding party, e.g., Defendant Mary Jones] to respond to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1]. _____ [Moving party, e.g., Plaintiff John Smith will also move this court for an order requiring _____ [name(s) of responding party and/or his/her attorney] to pay a monetary sanction in the amount of \$ _____ to _____ [moving party, e.g., Plaintiff]. The motion will be made on the grounds that _____ [responding party, e.g., Defendant Mary Jones] has failed to timely respond to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1].

The motion will be based on this notice of motion, on the declaration of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. The subject matter of this action is _____ [state nature of action].

3. On _____ [date], _____ [demanding party, e.g., Plaintiff John Smith] served _____ [responding party, e.g., Defendant Mary Jones] with _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] for the purpose of _____ [specify, e.g., inspecting and copying the records of all communications between Plaintiff and Defendant regarding the agreement at issue]. A true and correct copy of this demand is attached hereto as Exhibit A and made a part hereof.

4. A response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] was due on _____ [date].

5. To date, _____ [responding party, e.g., Defendant Mary Jones] has failed to serve a response.

6. _____ [Moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.300

Grounds:

See 10.26[1]

Drafting Motion:

See 10.26[2]

Related Form of Memorandum:

See California Points and Authorities, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.10 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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Chapter 10 Inspection of Documents, Tangible Things, and Land
VII. FORMS

C. Compelling Response, Further Response, or Compliance With Response to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.42

10.42 Notice of Motion and Motion to Compel Further Response to Demand for Inspection With Supporting Declaration.

Notice of Motion and Motion to Compel Further Response to Demand for Inspection With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION TO COM-
) PEL FURTHER RESPONSE TO DEMAND FOR
) _____ [specify nature of demand,
) e.g., PRODUCTION AND INSPECTION OF DOC-
) UMENTS], SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order compelling _____ [responding party, e.g., Defendant Mary Jones] to serve an adequate response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1]. _____ [Moving party, e.g., Plaintiff John Smith] will also move this court for an order requiring _____ [name(s) of responding party and/or his/her attorney] to pay a monetary sanction in the amount of \$ _____ to _____ [moving party, e.g., Plaintiff]. The motion will be made on the grounds that _____ [responding party, e.g., Defendant Mary Jones] has _____ [describe inadequacy of response, e.g., made evasive representations of an inability to comply with Plaintiff's Demand for Production and Inspection of Documents, Set No. 1]. There is good cause for the discovery sought by the demand in that _____ [state good cause justifying the discovery sought by the inspection demand].

The motion will be based on this notice of motion, _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1], the declaration of _____ [name], the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345(a)*, and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. The subject matter of this action is _____ [state nature of action to show why items demanded are relevant].

3. On _____ [date], _____ [demanding party, e.g., Plaintiff John Smith] served _____ [responding party, e.g., Defendant Mary Jones] with _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] for the purpose of _____ [specify, e.g., inspecting and copying the records of Plaintiff's account with Defendant]. A true and correct copy of this demand is attached as Exhibit A and incorporated by reference.

4. Good cause exists justifying the discovery sought by _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1] in that _____ [specify, e.g., the account records are relevant to the issue of payments made on Plaintiff's account].

5. On _____ [date], _____ [responding party, e.g., Defendant Mary Jones] served a response to _____ [identify demand, e.g., Plaintiff's Demand for Production and Inspection of Documents, Set No. 1].

6. The response of _____ [responding party, e.g., Defendant Mary Jones] was inadequate in that _____ [describe inadequacy of response, e.g., Defendant made evasive representations of an inability to comply with Plaintiff's Demand for Production and Inspection of Documents, Set No. 1 because Defendant did not specify why the account records could not be produced].

7. On _____ [date], _____ [specify actions taken to confer with responding party in a reasonable and good faith attempt to resolve informally the issues covered by the motion] .

8. _____ [Moving party, e.g., Plaintiff John Smith] bases his/her request for the imposition of a sanction in the amount of \$ _____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2031.310

Grounds:

See 10.28[1]

Prerequisite:

See 10.28[3]



Timing:

See 10.28[4]

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.03

Drafting Motion:

See 10.26[2], 10.26[5]

Related Form of Memorandum:

See California Points and Authorities, Ch. 85, Discovery: Production or Inspection of Tangible

Evidence, § 85.11 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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Chapter 10 Inspection of Documents, Tangible Things, and Land
VII. FORMS

C. Compelling Response, Further Response, or Compliance With Response to Demands for Inspection

1-10 MB Practice Guide: CA Civil Discovery 10.43

10.43 Notice of Motion and Motion to Compel Compliance With Response to Demand for Inspection With Supporting Declaration.

Notice of Motion and Motion to Compel Compliance With Response to Demand for Inspection With Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER COMPELLING COMPLIANCE WITH RE-
) SPONSE TO DEMAND FOR
) _____ [specify nature of demand,
) e.g., PERMISSION TO ENTER ONTO PROP-
) ERTY], SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move for an order compelling _____ [responding party, e.g., Defendant Mary Jones] to comply with his/her response to _____ [identify demand, e.g., Plaintiff's Demand for Permission to Enter Onto Property, Set No. 1]. _____ [Moving party, e.g., Plaintiff John Smith] will also move this court for an order requiring _____ [name(s) of responding party and/or his/her attorney] to pay a monetary sanction in the amount of \$ _____ to _____ [moving party, e.g., Plaintiff]. The motion will be made on the grounds that _____ [responding party, e.g., Defendant Mary Jones] has _____ [describe failure to comply, e.g., refused to allow Plaintiff to enter onto the property where the accident occurred to inspect and photograph the premises after agreeing to do so in her written response].

The motion will be based on this notice of motion, _____ [identify demand, e.g., Plaintiff's Demand for Permission to Enter Onto Property, Set No. 1], the declaration of _____ [name], [the separate statement served and filed herewith,] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____, declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff John Smith].

2. The subject matter of this action is _____ [state nature of action to show why items demanded are relevant].

3. On _____ [date], _____ [demanding party, e.g., Plaintiff] served _____ [responding party, e.g., Defendant Mary Jones] with _____ [identify demand, e.g., Plaintiff's Demand for Permission to Enter Onto Property, Set No. 1] for the purpose of _____ [specify, e.g., inspecting and photographing Defendant's business premises where the accident at issue occurred]. A true and correct copy of this demand is attached hereto as Exhibit A and made a part hereof.

4. On _____ [date], _____ [responding party, e.g., Defendant Mary Jones] served a response to _____ [identify demand, e.g., Plaintiff's Demand for Permission to Enter Onto Property, Set No. 1].

5. In that response, _____ [*responding party, e.g., Defendant Mary Jones*] stated that _____ [*specify compliance, e.g., Plaintiff would be allowed to enter, inspect, and photograph the premises on March 7, 2005*].

6. To date, _____ [*responding party, e.g., Defendant Mary Jones*] has repeatedly refused to comply with that response.

7. _____ [*Moving party, e.g., Plaintiff John Smith*] bases his/her request for the imposition of a sanction in the amount of \$_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

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

Date: _____

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Set out memorandum here*]

NOTES.

Authority:

CCP § 2031.320

Grounds:

See 10.30[1]

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Drafting Motion:

See 10.30[2]

Related Form of Memorandum:

See California Points and Authorities, Ch. 85, Discovery: Production or Inspection of Tangible Evidence, § 85.20 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel



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Chapter 11 Physical and Mental Examinations

1-11 MB Practice Guide: CA Civil Discovery 11.syn

§ 11.syn Synopsis to Chapter 11: Physical and Mental Examinations

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Chapter 11 Physical and Mental Examinations
I. STRATEGY

1-11 MB Practice Guide: CA Civil Discovery 11.01

11.01 Scope.

This Chapter covers:

- Objectives and strategy for obtaining discovery by physical and mental examinations [see 11.02].
- Obtaining physical and mental examinations [see 11.03 -11.09].
- When physical and mental examinations are available [see 11.05 -11.07].
- How to stipulate to physical and mental examinations [see 11.10 -11.13; Form: see 11.66] and sanctions for failure to comply [see 11.14, 11.15].
- How to demand a physical examination of a personal injury plaintiff [see 11.16 -11.22; Form: see 11.56] and compelling compliance [see 11.30 -11.33; Forms: see 11.58 -11.60].
- How to obtain a court order for a medical examination [see 11.34 -11.40; Forms: see 11.61, 11.62] and compelling compliance [see 11.41 -11.45].
- How to respond to demands for physical examinations [see 11.23 -11.29; Form: see 11.57].
- Who can observe medical examinations [see 11.46 -11.48].
- How can medical examinations be recorded [see 11.47[3], [7]; 11.48[3], [4]].
- How to obtain and use reports by medical examiners [see 11.49 -11.55; Forms: see 11.63 -11.65].

Core Statutes:

CCP § 2032.010 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
I. STRATEGY

1-11 MB Practice Guide: CA Civil Discovery 11.02

11.02 Objective and Strategy.

Obtaining a medical examination of an opposing party is a powerful discovery tool. It is an opportunity for the party calling for the examination to obtain an unbiased view of the opposing party's alleged physical and/or mental injuries. *CCP § 2032.010 et seq.* provides the procedure for these examinations.

Counsel should plan carefully before using this discovery method, considering the cost of examinations as well as potential objections based on invasion of privacy. Issues to be considered in determining whether to seek this type of evidence include:

- The need for the particular evidence that is likely to be produced.
- The scope of the examination and the procedures to be performed.
- The timing of the examination.
- What type of medical professional can best perform the examination.
- What other means are available to obtain the information.
- Objections that opposing counsel will raise.

Key criteria for selecting the examiner include not only the examiner's quality and reputation, but also the future availability of the examiner for trial.

Judge's Perspective:

When the demand for the physical and/or mental exam has been made, counsel need to first try and circumscribe the parameters of the exam itself. Most impasses arise over the scope of not only the actual physical part of the exam but also over the nature of the background and historical data that the examining physician can obtain. Counsel should always attempt to work these issues out before the exam itself. Far too often, disputes arise during the course of the exam, which not only necessitate the preparation of a discovery motion, but more often than not also result in added expense for the exam to

be retaken.



Warning:

When a medical examination serves as a discovery tool, it is a strictly adversarial context [*Urbaniak v. Newton* (1991) 226 CA3d 1128, 1135, 277 CR 354]. There will be no work product protection for the report; everyone can obtain a copy [see CCP §§ 2032.610, 2032.630].

Moreover, the examining physician owes the claimant no duty of care [see *Urbaniak v. Newton* (1991) 226 CA3d 1128, 1135, 277 CR 354].



Strategic Points--Plaintiff:

To avoid plaintiff being subjected to a mental examination in a personal injury case, strongly consider stipulating that your claim for mental and emotional distress is limited to that usually associated with the physical injuries being claimed [see CCP § 2032.320(b), (c)(1)].

If after an examination you cannot get a copy of the report because none was prepared, you can demand that a report be written up and provided [see CCP § 2032.610].



Strategic Point--Defense:

You may want to review plaintiff's examination reports with your own expert before deciding whether to demand a report. If you can work with that report, you may avoid the risk of demanding a report that turns out to be worse for your case.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 197, Discovery: Physical and Mental Examinations (Matthew Bender).

California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 62, Physical and Mental Examinations (Matthew Bender).



Cross References:

Discussion on physical and mental examinations in federal cases, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.

Discussion of physical and mental examinations in federal cases, see Moore's Federal Practice, Ch. 35, Physical and Mental Examinations of Persons (Matthew Bender 3d ed.); or 13 Bender's Forms of Discovery Treatise, Ch. 7, Physical and Mental Examination of Persons (Matthew Bender).

For tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

1-11 MB Practice Guide: CA Civil Discovery 11.03

11.03 CHECKLIST: Obtaining Physical and Mental Examinations.

☐ Determine availability of discovery by physical or mental examination:

☐ Party's physical or mental condition must be in controversy.

Authority:

CCP § 2032.020(a)

Discussion:

See 11.05[1]

☐ Consider who may be examined:

☐ A party to the action.

☐ An agent of any party.

☐ A natural person in the custody or under the legal control of a party.

Authority:

CCP § 2032.020(a)

Discussion:

See 11.06

☐ Determine best method for obtaining physical or mental examination:

- ☐ Request that party stipulate to mental or physical examination.
- ☐ Demand one physical examination of personal injury plaintiff.
- ☐ Move for court ordered mental or physical examination.

Authority:

CCP §§ 2032.220(a), 2032.310

Discussion:

See 11.04

☐ Consider who can be the examiner:

- ☐ Physical examination must be conducted by physician or other licensed practitioner.
- ☐ Mental examination must be conducted by physician or by qualified clinical psychologist.

Authority:

CCP § 2032.020(b), (c)

Discussion:

See 11.08

Legal Topics:

For related research and practice materials, see the following legal topics:

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II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

1-11 MB Practice Guide: CA Civil Discovery 11.04

11.04 Options and Strategies for Physical and Mental Examinations.

Discovery may be obtained by the following:

- Requesting that a party stipulate to mental or physical examination;
- Demanding one physical examination of personal injury plaintiff; and/or
- Moving for a court-ordered mental or physical examination.

Strategic Points:



At the outset, a threshold issue to be determined is how many physical examinations will be required. In a significant injury case, it is quite common to have at least two and potentially more physical examinations.

Stipulations are commonly made between counsel to provide for more than one examination. Typically, it depends on the severity of the injuries and the nature of the examination that is contemplated. The more closely related the examination is to the claimed injuries of plaintiff, the greater likelihood a stipulation will avoid the probability of a court ordering the examination to proceed forward.

If there are multiple defendants in a personal injury case, typically the defendants need to agree on a single examiner in order to avoid multiple examinations.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 11 Physical and Mental Examinations
II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

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11.05 Party's Mental or Physical Condition Must Be in Controversy.

11.05[1] "In Controversy" Requirement. A party can obtain discovery by means of a physical or mental examination only when the physical or mental condition of the party to be examined is in controversy in the action [CCP § 2032.020(a)].

11.05[2] Pleadings May Place Mental or Physical Condition in Controversy.

11.05[2][a] Plaintiff's Complaint May Raise Controversy. Allegations of physical or mental injury in the complaint and denial of the injury or denial of the extent of injury places the condition in controversy [*Schlagenhauf v. Holder* (1964) 379 US 104, 119, 85 S Ct 234, 13 L Ed2d 152 (discussing Fed R Civ P Rule 35)].

11.05[2][b] Defendant's Answer May Raise Controversy. A defendant's condition is in controversy if a defendant asserts his or her mental or physical conditions as a defense [*Schlagenhauf v. Holder* (1964) 379 US 104, 119, 85 S Ct 234, 13 L Ed2d 152 (discussing Fed R Civ P Rule 35); *Reuter v. Superior Court* (1979) 93 CA3d 332, 341, 155 CR 525].

11.05[2][c] Condition Need Not Be First Raised in Pleadings. The mental or physical condition does not have to be first raised in the pleadings in order for the condition to be in controversy [*Reuter v. Superior Court* (1979) 93 CA3d 332, 341, 155 CR 525 (condition discovered at deposition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.06 Any Party May Obtain Discovery.

Any party may obtain discovery, subject to the restrictions found in *CCP* § 2019.030, by means of a physical or mental examination in any action in which the mental or physical condition of the other party or of certain other persons is in controversy [*CCP* § 2032.020(a)].



Cross Reference:

Discussion of *CCP* § 2019.030, see *Ch. 1, Strategy and Planning*, 1.13[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
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II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

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11.07 Party, Agent, or Person in Custody or Control of Party May Be Examined.

11.07[1] Examination Permitted If Mental or Physical Condition Is in Controversy. A party to the action, an agent of any party, or a natural person in the custody or under the legal control of a party can be examined if that person's mental or physical condition (including blood group) is in controversy in the action [CCP § 2032.020(a)].

11.07[2] Minor's Guardian May Not Be Examined. The legal incapacity of a minor which requires that the minor have an adult representative to pursue the minor's interests does not justify ordering the guardian to submit to the invasion of his or her body or intimate mental processes where the guardian's condition is not in controversy [*Reuter v. Superior Court* (1979) 93 CA3d 332, 344, 155 CR 525 (overturning order for psychological examination of guardian)].

Distinguish:

In some cases where the guardian's physical condition *is* in controversy, the guardian may be considered the child's *agent* and thus have his or her examination ordered [*Cruz v. Superior Court* (2004) 121 CA4th 646, 650-652, 17 CR3d 368] (upholding order compelling drawing of blood for genetic testing from minor plaintiff and his mother, where plaintiff and his mother were simultaneously under the care of defendant obstetrician, and plaintiff claimed that his injury resulted in part from obstetrician's care of his mother during pregnancy and delivery).

11.07[3] CCP § 2032.010 et seq. May Not Be Used for Exhumation of Corpse. CCP § 2032.010 et seq. cannot be used to obtain the exhumation and autopsy of the body of a decedent [*Holm v. Superior Court* (1986) 187 CA3d 1241, 1248, 232 CR 432 (decided under former CCP § 2032)].

11.07[4] Genetic Paternity Tests Not Affected by CCP § 2032.010 et seq. CCP § 2032.010 et seq. does not affect genetic paternity tests under the Uniform Act on Blood Tests to Determine Paternity [CCP § 2032.010(a); see *Fam Code* §§ 7550-7558].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

1-11 MB Practice Guide: CA Civil Discovery 11.08

11.08 Examination Must Be Conducted by Licensed Professional.

11.08[1] Physical Examination Must Be Conducted by Physician or Other Licensed Practitioner. A physical examination under *CCP § 2032.010 et seq.* must be conducted by a physician or other appropriate licensed health care practitioner [*CCP § 2032.020(b)*]. "Other appropriate licensed health care practitioner" is not defined. Professions that may be included in this term include chiropractors, physical therapists, speech pathologists, audiologists, optometrists, respiratory therapists, etc.

11.08[2] Mental Examination Must Be Conducted by Physician or Qualified Clinical Psychologist. Mental examinations can be performed by either a licensed physician or a licensed clinical psychologist who holds a doctoral degree in psychology and who has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders [*CCP § 2032.020(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 11 Physical and Mental Examinations
II. OBTAINING PHYSICAL AND MENTAL EXAMINATIONS

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11.09 Particular Rules for Multiple X-Rays.

If an examinee agrees to or authorizes access to x-ray any area of his or her body, no additional x-rays may be taken by the examiner except on further consent of the examinee or on an order of the court for good cause shown [*CCP* § 2032.520].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
III. STIPULATING TO PHYSICAL OR MENTAL EXAMINATION

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11.10 CHECKLIST: Stipulating to Physical or Mental Examination.

☐ Consider what type of examination will achieve your goals and what type of examiner you need.

☐ Draft stipulation, including:

- ☐ Time and place of examination,
- ☐ Identity and speciality of the examiner,
- ☐ What procedures will be used,
- ☐ Who will observe the examination,
- ☐ How will the examination be recorded,
- ☐ Scope of the examination,
- ☐ Length of time of the examination.

Authority:
CCP § 2016.030

Discussion:
See 11.13

Form:

See 11.66

☐ Be aware of sanctions:

- ☐ For failure to comply with stipulation.
- ☐ For failure to produce another person for examination.

Authority:

CCP §§ 2032.410, 2032.420

Discussion:

See 11.14, 11.15

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations



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11.11 Parties May Agree to Mental or Physical Examination Pursuant to Stipulation.

The parties to an action may agree to discovery by means of a physical or mental examination [CCP § 2016.030]. This agreement must be in writing [CCP § 2016.030].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations



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11.12 Examination Pursuant to Agreement Is Not Subject to Statutory Restrictions.

Parties may make their own agreement regarding medical examinations in lieu of the procedures and restrictions imposed on examinations made by demand and court-ordered examinations [*CCP* § 2016.030].



Strategic Point:

The party who wants to obtain discovery by medical examination should strive to obtain a stipulation to any examination that would otherwise require court authorization under *CCP* § 2032.310 since a motion seeking court authorization [*see* 11.36[4]] must be accompanied by a declaration showing a reasonable and good-faith attempt to conduct the examination pursuant to the parties' agreement. Even if the parties cannot agree on all aspects of the examination, fulfillment of the reasonable and good faith attempt requires that the parties attempt to arrive at as complete an agreement as is possible.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations



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11.13 Contents of Stipulation.

To minimize conflict and misunderstanding, the written agreement or stipulation should, at a minimum, cover the same terms and conditions that would be required in a demand for an examination [see CCP § 2032.220(c)]:

- Time;
- Place;
- Manner;
- Conditions;
- Scope;
- Nature of the examination;
- Identity and specialty of the examiner.



Strategic Point:

It is also good practice to include an agreement to turn over the written report as soon as it is available.

Judge's Perspective:

It is wise to make sure that the stipulation agreed on is enforceable by court order.

Legal Topics:

For related research and practice materials, see the following legal topics:

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11.14 Sanctions for Failure to Comply With Stipulation.

If a party fails to submit to an agreed on physical or mental examination, the court, on motion of the party entitled to the examination, may make any orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023.030. In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under Section 2023.030 [*CCP* § 2032.410].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMisconduct



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11.15 Sanctions for Failure to Produce Another for Examination.

If a party is required to produce another person for a physical or mental examination pursuant to an agreement, and fails to do so, the court, on motion of the party entitled to the examination, may make orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030, unless the party failing to comply demonstrates an inability to produce that person for examination [*CCP* § 2032.420]. In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.420].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconduct



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IV. DEMANDING ONE PHYSICAL EXAMINATION OF PERSONAL INJURY PLAINTIFF

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11.16 CHECKLIST: Demanding One Physical Examination of Personal Injury Plaintiff.

- ☐ Review statutory requirements:
 - ☐ Demand is available only for one examination of personal injury plaintiff.
 - ☐ Physical examination only:
 - ☐ Examination must not include any diagnostic test or procedure that is painful, protracted, or intrusive.
 - ☐ Examination must be conducted at a location within 75 miles of the residence of the person to be examined.

Authority:

CCP §§ 2032.210, 2032.220(a)

Discussion:

See 11.17 -11.19



Consider timing:

- ☐ Defendant may make demand after it has been served or has appeared in the action.

Authority:

CCP § 2032.220(b)

Discussion:*See 11.20*☐ Draft demand, including:

- ☐ Time;
- ☐ Place;
- ☐ Manner;
- ☐ Conditions;
- ☐ Scope;
- ☐ Nature of the examination;
- ☐ Identity and specialty of the examiner.

Authority:*CCP § 2032.220(c)***Discussion:***See 11.21***Form:***See 11.56*☐ Serve demand:

- ☐ Copies must be served on the plaintiff and all other parties who have appeared in the action.

Authority:*CCP § 2032.220(e)***Discussion:***See 11.22[1]*☐ Schedule examination:

- ☐ The physical examination must be scheduled for a date that is at least 30 days after the service of the demand, and
- ☐ Place of examination must be within 75 miles of examinee's residence.

Authority:

CCP § 2032.220(a)(2), (d)

Discussion:

See 11.22[2]

- ☐ Keep original of demand, together with proof of service and response.

Authority:

CCP § 2032.260

Discussion:

See 11.22[3]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.17 Demands Can Be Made Only in Personal Injury Actions.

If the plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff [CCP § 2032.220]. "Plaintiff" includes a cross-complainant, and "defendant" includes a cross-defendant [CCP § 2032.210].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.18 Examination Cannot Be Painful, Protracted, or Intrusive.

The examination must not include any diagnostic test or procedure that is painful, protracted, or intrusive [CCP § 2032.220(a)(1)]. This examination has been referred to as a "routine physical examination" [Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L Rev 1051, 1095 (2001)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.19 Examination Site Must Be Within 75 Miles of Examinee's Residence.

The examination must be conducted at a location within 75 miles of the residence of the person to be examined [CCP § 2032.220(a)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.20 Defendant Must Be Served Before Demand Is Made.

A defendant may demand an examination after that defendant has been served with the summons and complaint or has appeared in the action, whichever occurs first [*CCP* § 2032.220(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.21 Contents of Demand.

The demand must contain the following [CCP § 2032.220(c)]:

- Time of the examination;
- Place of the examination;
- Manner of the examination;
- Any conditions of the examination;
- Scope of the examination;
- Nature of the examination; and
- Identity and the specialty, if any, of the licensed professional who will perform the examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.22 Service of Demand.

11.22[1] Copies Must Be Served on Plaintiff and All Parties. A copy of the demand for a physical examination must be served on the plaintiff and all other parties who have appeared in the action [CCP § 2032.220(e)].

11.22[2] Physical Examination Cannot Be Scheduled Until 30 Days After Service. The physical examination must be scheduled for a date that is at least 30 days after the service of the demand [CCP § 2032.220(d)]. If service is made by mail, this 30-day period is extended five calendar days if the place of address is within California [CCP §§ 1013(a), 2016.050]. The 30-day period is extended by two court days if the service is made by Express Mail or an overnight delivery service [CCP § 1013(c)]. However, the party making the demand can move for a court order shortening this time [CCP § 2032.220(d)].

11.22[3] Defendant Should Not File Original Demand. The demand should not be filed with the court. The defendant must retain and preserve the original of the demand together with the proof of service and the original response, until six months after final disposition of the action [CCP § 2032.260]. After this time the originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period [CCP § 2032.260(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.23 CHECKLIST: Responding to Demand for One Physical Examination of Personal Injury Plaintiff.

☐ Consider options for response:

- ☐ Comply with demand.
- ☐ Comply with demand, but modify terms.
- ☐ Refuse to comply for specified reasons.

Authority:

CCP § 2032.230(a)

Discussion:

See 11.25

☐ Draft response.

Form:

See 11.57

☐ Serve response on demanding defendant within 20 days:

- ☐ Unless court has shortened or extended period to respond.
- ☐ Serve copies on all other parties appearing in action.

- ☐ Failure to timely respond waives objections.

Authority:

CCP §§ 2032.230(b), 2032.240(a)

Discussion:

See 11.27 -11.29

- ☐ If responding late, move for relief from waiver, based on:

- ☐ Service of response that is in substantial compliance with *CCP* § 2032.230, and
- ☐ Mistake, inadvertence, or excusable neglect.

Authority:

CCP § 2032.240(a)

Discussion:

See 11.29

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.24 Options and Strategy.

11.24[1] Reasons to Refuse an Examination. There are numerous valid reasons for refusing to submit to a demand for a medical examination including the following:

- The condition for which the examination is sought is a condition that is not in controversy in the action.
- The person to be examined is not a party, an agent of a party, or under the legal custody or control of a party.
- The proposed examiner fails to meet the statutory requirements to conduct the examination (e.g., the examiner is not a licensed physician).
- The demand is seeking tests and procedures that are painful, intrusive, or protracted.
- The place of the examination is more than 75 miles from the examinee's residence.

11.24[2] Consider Modifications. Plaintiff's response can include specific modifications to the demand [CCP § 2032.230(a)]. Common modifications are changes in times and dates. Plaintiff should also consider modifying the scope and manner of the examination.

Judge's Perspective:

The right to modify as provided by the statute is a useful tool and should be used to define the parameters of the exam before the exam takes place. Counsel should always try and resolve any impasse before appearing for the exam; otherwise the disagreements will inevitably lead to a discovery motion in which the risk of monetary sanctions would be enhanced.

11.24[3] Preparing Client for Examination. Remember that the plaintiff/client is there for a physical or mental examination, not a deposition. The plaintiff should be told to say nothing about the underlying facts of the incident itself, except, perhaps, the dynamics of the collision itself to this extent this has relevance. Plaintiff's counsel may

provide the physician with a copy of the plaintiff's deposition if the doctor wants more information, but it is important that clients know to keep what they say, aside from physical complaints, to a minimum.

Legal Topics:

For related research and practice materials, see the following legal topics:

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11.25 Format and Contents of Response to Demand for Physical Examination.

11.25[1] Plaintiff Must Give Written Response. The plaintiff must respond to the demand for a physical examination by a written statement [CCP § 2032.230(a)].

11.25[2] Three Options for Plaintiff's Response. The plaintiff must respond to the demand for a physical examination by a written statement that [CCP § 2032.230(a)]:

- The examinee will comply with the demand as stated;
- The examinee will comply with the demand as specifically modified by the plaintiff; or
- The examinee will refuse, for reasons specified in the response, to submit to the demanded physical examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.26 Substantial Justification for Refusal to Submit to Demanded Physical Examination Is Required.

A plaintiff must provide substantial justification for refusing to submit to particular medical procedures [*CCP* § 2032.240(c); *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 261, 24 CR2d 501 (decided under former CCP § 2032)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.27 Time for Response.

11.27[1] Plaintiff Must Respond Within 20 Days. The plaintiff must serve the original of the response on the defendant making the demand within 20 days after service of the demand [CCP § 2032.230(b)]. If service is made by mail, this 20-day period is extended 5 calendar days if the place of address is within California [CCP §§ 1013(a), 2016.050]. The 30-day period is extended by 2 court days if the service is made by an overnight delivery service or facsimile transmission [CCP § 1013(c)].

11.27[2] Court May Alter Response Time. On motion of the defendant making the demand the court may shorten the time for response. On motion of the plaintiff to whom the demand has been directed, the court may also extend the time for response [CCP § 2032.230(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.28 Other Parties Must Be Served With Response.

A copy of the response must also be served on all other parties who have appeared in the action within the 20-day period for serving the response on the plaintiff [*CCP* § 2032.220(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.29 Late Response May Waive Objections.

11.29[1] Failure to Serve Timely Response Waives Objections to Demand. If the plaintiff fails to serve a timely response to a demand for a physical examination, the plaintiff waives any objection to the demand [*CCP* § 2032.240(a)].

11.29[2] Plaintiff May Move for Relief From Waiver. The court, on motion, may relieve a plaintiff from waiver on the court's determination that (1) the plaintiff has subsequently served a response that is in substantial compliance with *CCP* § 2032.230, and (2) the plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*CCP* § 2032.240(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. COMPELLING RESPONSE TO OR COMPLIANCE WITH DEMAND FOR ONE PHYSICAL EXAMINATION
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**11.30 CHECKLIST: Compelling Response to or Compliance With Demand for One Physical Examination of
Personal Injury Plaintiff.**

☐ Grounds for motion:

- ☐ Failure to timely respond.
- ☐ Unwarranted modification.
- ☐ Unwarranted refusal to comply.

Authority:

CCP §§ 2032.240(b), 2032.250(a)

Discussion:

See 11.31

☐ Be aware that unsuccessful motion may be sanctioned by court.

Authority:

CCP § 2032.250(b)

Discussion:

See 11.33

☐ Draft motion:

- ☐ Include declaration of good faith attempt to resolve issues.
- ☐ Include separate statement required by Cal Rule Ct, Rule 3.1345(a).
- ☐ Separate statement not required if no response was made.

Authority:

CCP § 2032.250(a); Cal Rules Ct, Rule 3.1345(b)

Discussion:

See 11.32

Forms:

See 11.58, 11.59

- ☐ Draft proposed order.

Form:

See 11.60

- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.

- ☐ Calendar response and hearing dates.

Authority:

CCP § 2032.250

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

- ☐ Consider availability of sanctions:
 - ☐ Failure to submit to examination.
 - ☐ Failure to produce another person for examination.
 - ☐ Failure to obey order.

Authority:

CCP §§ 2032.240(c), 2032.410, 2032.420

Discussion:

See 11.33

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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Chapter 11 Physical and Mental Examinations

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1-11 MB Practice Guide: CA Civil Discovery 11.31

11.31 Grounds for Motion to Compel Response to or Compliance With Demand for One Physical Examination of Personal Injury Plaintiff.

11.31[1] Failure to Serve Timely Response. If the plaintiff fails to timely respond to a demand, the defendant may move for an order compelling a response to and compliance with the demand [CCP § 2032.240(b)].

11.31[2] Response Contains Unwarranted Refusal or Modification. If a defendant who has demanded a physical examination of a personal injury plaintiff, on receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand [CCP § 2032.250(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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VI. COMPELLING RESPONSE TO OR COMPLIANCE WITH DEMAND FOR ONE PHYSICAL EXAMINATION OF PERSONAL INJURY PLAINTIFF

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11.32 Required Motion Papers.

11.32[1] Declaration of Attempt to Resolve Issues Informally Is Required. The motion to compel must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [CCP §§ 2016.040, 2032.250(a)].



Cross References:

Form, see 11.58.

Form for memorandum supporting motion, see *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.10 (Matthew Bender)*.

11.32[2] Separate Statement of Information Is Required. A motion to compel a medical examination over objection must be accompanied by a separate statement [Cal Rules Ct, Rule 3.1345(a)], filed and served with the discovery motion, that sets forth all the information necessary to understand the particular request and all the responses to it that are at issue. The separate statement must be sufficiently complete so that no other documents are necessary to determine the full request and the full response. Material must not be incorporated into the separate statement by reference. The separate statement must include [Cal Rules Ct, Rule 3.1345(c)]:

- Text of the demand;
- Text of each response, or objection, and any further responses;
- Statement of the factual and legal reasons for compelling further responses, or production as to each matter in dispute;
- If necessary, the text of all definitions, instructions, and other matters required to understand the discovery request and the responses to it;

- 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 must be set forth; and
- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document.

**Cross Reference:**

Form, see 11.59.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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Chapter 11 Physical and Mental Examinations

VI. COMPELLING RESPONSE TO OR COMPLIANCE WITH DEMAND FOR ONE PHYSICAL EXAMINATION OF PERSONAL INJURY PLAINTIFF

1-11 MB Practice Guide: CA Civil Discovery 11.33

11.33 Sanctions Are Available.

11.33[1] Sanctions for Failure to Submit to Examination. If a party required to submit to a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030. In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.410].

11.33[2] Sanctions for Failure to Produce Another for Examination. If a party required to produce another person for a physical fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030, unless the party failing to comply demonstrates an inability to produce that person for examination. In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.420].

11.33[3] Sanctions for Unsuccessfully Making or Opposing Motion. The court will impose a monetary sanction under *CCP* § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel response and compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2032.240(c)].

11.33[4] Sanctions for Failure to Obey Order Compelling Response and Compliance. If a plaintiff fails to obey a order compelling response and compliance, the court may make just orders, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.010 *et seq.* In lieu of or in addition to that sanction the court may impose a monetary sanction under *CCP* § 2023.010 *et seq.* [*CCP* § 2032.240(d)]. However, the court may not levy a fine in addition to reasonable expenses as a sanction [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 262, 24 CR2d 501].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconduct



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VII. OBTAINING COURT ORDER FOR PHYSICAL OR MENTAL EXAMINATION

1-11 MB Practice Guide: CA Civil Discovery 11.34

11.34 CHECKLIST: Obtaining Court Order for Physical or Mental Examination.

11.34[1] Moving Party's Checklist.

☐ Determine that court order is required:

- ☐ Parties are not able to agree to examination.
- ☐ Good cause exists for examination.
- ☐ Mental examination is sought.
- ☐ Subsequent physical examination is sought.
- ☐ Physical examination involving diagnostic tests or procedures that are painful, protracted, or intrusive is sought.

Authority:

CCP §§ 2032.310(a), 2032.320(a)

Discussion:

See 11.36

☐ Draft motion:

☐ Specify:

- ☐ Time of the examination.
- ☐ Place of the examination.
- ☐ Manner of the examination.
- ☐ Conditions of the examination.
- ☐ Scope of the examination.
- ☐ Nature of the examination.
- ☐ Identity and the specialty, if any, of the person(s) who will perform the examination.

☐ Include with motion papers:

- ☐ Declaration(s), including declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by agreement under *CCP § 2016.030*.
- ☐ Supporting memorandum.

Authority:

CCP § 2032.310(b); Cal Rules Ct, Rule 3.1113

Discussion:

See 11.36[3]

Form:

See 11.61

- ☐ Draft proposed order, specifying:
 - ☐ Person(s) who may perform the examination,
 - ☐ Time of the examination,
 - ☐ Place of the examination,
 - ☐ Manner of the examination,
 - ☐ Diagnostic tests and procedures to be conducted during the examination,

- ☐ Conditions of the examination,
- ☐ Scope of the examination, and
- ☐ Nature of the examination.

☐ If place of examination is more than 75 miles from examinee's residence:

- ☐ Order must specify good cause, and
- ☐ Amount of reasonable travel expenses has been advanced to examinee.

Authority:

CCP §§ 2032.310(b), 2032.320(e)

Discussion:

See 11.38

Form:

See 11.62

☐ Serve motion on party to be examined, and on other parties who have appeared in the action:

- ☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2032.310

Discussion:

See 11.37

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

11.34[2] Opposing Party's Checklist.

☐ Prepare opposing declaration(s):

- ☐ Include any facts showing that condition is not in controversy.
- ☐ If applicable, show how good cause for the examination has not been shown.

- ☐ Include any facts showing that the person to be examined is not a party, an agent of a party, or in the legal custody or control of a party.
- ☐ Include facts showing that the examination should not be taken in the matter requested, such as that the examiner is unqualified or that the procedures are extraordinary, unnecessary, and/or unduly painful.
- ☐ Include requests for, and facts supporting, a limitation of the scope of the examination or the imposition of certain conditions at the examination, such as the presence of examinee's attorney or a court reporter at a physical examination, a tape recording of an examination, etc.

Authority:

CCP § 2032.020(a), (b), (c); see CCP §§ 2002(1), 2003, 2009, 2015.5, 2032.010 et seq.

Discussion:

See 11.05 -11.09, 11.35 -11.40

- ☐ Prepare memorandum opposing motion.

File and serve papers at least nine court days prior to hearing.

Authority:

CCP §§ 1005(b), 1010.6(a)(6), 1013

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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VII. OBTAINING COURT ORDER FOR PHYSICAL OR MENTAL EXAMINATION

1-11 MB Practice Guide: CA Civil Discovery 11.35

11.35 Objectives and Strategy.

11.35[1] Consider that Mental and Physical Examinations Are Subject to CCP § 2019.010 et seq. Restrictions. Mental and physical examinations are subject to the restrictions found in *CCP § 2019.030* [*CCP § 2032.020(a)*]. The court will restrict the frequency or extent of use of examinations if it determines that [*CCP § 2019.030(a)*]:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.
- The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Cross Reference:

Discussion, see *Ch. 1, Strategy and Planning, 1.16*.

11.35[2] Number of Examinations Is Not Limited. *CCP § 2032.010 et seq.* does not limit the number of mental or physical examinations that may be ordered by a trial court on a showing of good cause. Multiple physical examinations may be appropriate if the plaintiff has alleged multiple injuries affecting various parts of his or her body. In this situation, the defendant would be justified in seeking physical examinations by different medical specialists [*Shapira v. Superior Court* (1990) 224 CA3d 1249, 1254-1255, 274 CR 516 (decided under former CCP § 2032)].



Strategic Point:

Prior to setting more than one examination or bringing a motion, attempt to obtain a stipulation from opposing counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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VII. OBTAINING COURT ORDER FOR PHYSICAL OR MENTAL EXAMINATION

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11.36 Motion for Court Ordered Examination.

11.36[1] When Court Order Is Required for Examination. All examinations, other than the initial physical examination in a personal injury case provided for by *CCP* § 2032.220 and examinations conducted pursuant to the parties' agreement, require a court order [*CCP* §§ 2032.310, 2032.320].



Cross Reference:

Form, see 11.62.

11.36[2] Movant Must Show Good Cause. The party moving for a physical or mental examination of another party must show good cause for the examination [*CCP* § 2032.320(a)].

11.36[3] Required Contents of Motion. The motion for a court ordered examination must specify [*CCP* § 2032.310(b)]:

- Time of the examination;
- Place of the examination;
- Manner of the examination;
- Conditions of the examination;
- Scope of the examination;
- Nature of the examination; and
- Identity and the specialty, if any, of the person or persons who will perform the examination.

The motion must be accompanied by a supporting memorandum [*Cal Rules Ct, Rule 3.1113(a)*].

 Cross References:

Form, see 11.61.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations*, § 87.11 (Matthew Bender).

11.36[4] Good Faith Attempt at Agreement Declaration Required. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by an agreement under *CCP* § 2016.030 [*CCP* § 2032.310(b)].

11.36[5] Exceptional Circumstances Required for Mental Examination, If Party Stipulates to Certain Facts. Absent a showing of exceptional circumstances, the court will not order a mental examination of a person for whose personal injuries a recovery is being sought, if a party stipulates that [*CCP* § 2032.320(b), (c)]:

- No claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed; and
- No expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.37 All Parties Must Be Served With Notice of Motion.

Notice of the motion for a court ordered examination must be served on the person to be examined and on all parties who have appeared in the action [CCP § 2032.310(c)].

➡ **Cross Reference:**

Form, see 11.61.

Legal Topics:

For related research and practice materials, see the following legal topics:
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VII. OBTAINING COURT ORDER FOR PHYSICAL OR MENTAL EXAMINATION

1-11 MB Practice Guide: CA Civil Discovery 11.38

11.38 Court Order Approving Examination.

11.38[1] Required Contents. The order granting a physical or mental examination must specify [*CCP* § 2032.320(d)]:

- Person(s) who may perform the examination;
- Time of the examination;
- Place of the examination;
- Manner of the examination;
- Diagnostic tests and procedures to be conducted during the examination;
- Conditions of the examination;
- Scope of the examination; and
- Nature of the examination.

To satisfy the requirements *CCP* § 2032.320(d), the court order must name the tests and procedures to be performed [*Carpenter v. Superior Court* (2006) 141 CA4th 249, 261-262, 45 CR3d 821] .

11.38[2] If Examination Is More than 75 Miles From Examinee's Residence. If the examination will occur more than 75 miles from the examinee's residence, the order must be [*CCP* § 2032.320(e)]:

- Made only on the court's determination that there is good cause for the travel involved; and
- Conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.39 Court Generally Accepts Defendant's Physician.

Although the court may appoint any physician it chooses to conduct the examination, as a practical matter the court will almost always appoint the physician requested by the moving party [*Mercury Cas. Co. v. Superior Court* (1986) 179 CA3d 1027, 1033, 225 CR 100 ; *Edwards v. Superior Court* (1976) 16 C3d 905, 912, 130 CR 14, 549 P2d 846].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.40 Movant Can Challenge Court's Limitations by Writ of Mandate.

Although the court has broad discretion in fashioning its order, the movant can challenge any restrictions on the examination by a writ of mandate [*see, e.g., Golfland Entertainment Centers, Inc. v. Superior Court (2003) 108 CA4th 739, 742-743, 133 CR2d 828*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
VIII. COMPELLING COMPLIANCE WITH COURT ORDER FOR EXAMINATION

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11.41 CHECKLIST: Compelling Compliance With Court Order for Examination.

☐ Draft motion to compel compliance with court order:

- ☐ Follow standard noticed motion procedure;
- ☐ Include request for sanctions;
- ☐ Include separate statement required by Cal Rules Ct, Rule 3.1345(a):
- ☐ Not required if no response was made.

☐ Calendar response and hearing dates.

Authority:

CCP § 2032.410

Discussion:

See 11.42, 11.43

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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VIII. COMPELLING COMPLIANCE WITH COURT ORDER FOR EXAMINATION

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11.42 Party That Obtained Court Order Can Move for Compliance.

If a party required to submit to a physical or mental examination fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just [*CCP* § 2032.410].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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11.43 Motion to Compel Must Include Separate Statement of Information.

A motion to compel a medical examination over objection must be accompanied by a separate statement [Cal Rules Ct, Rule 3.1345(a)], filed and served with the discovery motion, that sets forth all the information necessary to understand the particular request and all the responses to it that are at issue. The separate statement must be sufficiently complete so that no other documents are necessary to determine the full request and the full response. Material must not be incorporated into the separate statement by reference. The separate statement must include [Cal Rules Ct, Rule 3.1345(c)]:

- Text of the demand;
- Text of each response, or objection, and any further responses;
- Statement of the factual and legal reasons for compelling further responses, or production as to each matter in dispute;
- If necessary, the text of all definitions, instructions, and other matters required to understand the discovery request and the responses to it;
- 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 must be set forth; and
- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them shall summarize each relevant document.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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11.44 Objecting Party Carries Burden of Proof.

The party who objects to a condition of an examination carries the burden of proving that the particular condition imposed on the examination is not necessary [*Edwards v. Superior Court* (1976) 16 C3d 905, 913, 130 CR 14, 549 P2d 846].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel



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VIII. COMPELLING COMPLIANCE WITH COURT ORDER FOR EXAMINATION

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11.45 Sanctions Are Available for Noncompliance.

11.45[1] Issue, Evidence, or Terminating Sanctions for Failing to Submit to Examination. If a party is required to submit to a physical or mental examination pursuant to a court order and the party fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030 [*CCP* § 2032.410].

11.45[2] Monetary Sanctions for Failing to Submit to Examination. In lieu of or in addition to the imposition of issuance sanction, evidence sanction, or terminating sanction, the court may, on motion of the party, impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.410].

11.45[3] Sanctions for Failing to Produce Another for Examination. If a party is required to produce another for a physical or mental examination pursuant to a court order and fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030, unless the party failing to comply demonstrates an inability to produce that person for examination [*CCP* § 2032.420]. In lieu of or in addition to that sanction, the court may impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.420].



Cross Reference:

See Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconduct



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Chapter 11 Physical and Mental Examinations
IX. OBSERVING AND RECORDING PHYSICAL OR MENTAL EXAMINATION

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11.46 CHECKLIST: Observing and Recording Physical or Mental Examination.

- ☐ Plan to attend physical examination of client, or appoint a representative to do so:
 - ☐ Provide written authorization for representative.
- ☐ Arrange to have physical examination of client audiotaped or recorded stenographically.
- ☐ Arrange to have mental examination audiotaped.

Authority:

CCP §§ 2032.510(a), (c), 2032.530

Discussion:

See 11.47, 11.48

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
IX. OBSERVING AND RECORDING PHYSICAL OR MENTAL EXAMINATION

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11.47 Physical Examination.

11.47[1] Counsel Can Attend Physical Examination. The attorney for the examinee or for a party producing the examinee, is permitted to attend and observe any physical examination conducted for discovery purposes [*CCP* § 2032.510(a)].

11.47[2] Counsel's Representative Can Attend Physical Examination. A representative of the attorney for the examinee or the a party producing the examinee, is permitted to attend and observe any physical examination conducted for discovery purposes [*CCP* § 2032.510(a)]. The attorney must authorize the observer's presence in a signed writing that identifies the representative [*CCP* § 2032.510(c)].



Strategic Point:

In almost every case (aside from a mental examination), a representative from the plaintiff's law firm should be present at the examination. Counsel should seriously consider designating a medical professional as the observer [see Martin Blake, *Medical Exams of Plaintiffs Require Lawyers' Wariness*, Daily Journal Extra, June 23, 2003 at 7]. There are firms that specialize in providing medical personnel to act as observers at defense medical examinations. Typically, the personnel these firms provide will observe and audio-record the medical examination. The expertise such an observer has may strengthen allegations of impropriety if the examination is done improperly and unfairly. These firms typically will review the report produced from the examination and will compare it to the observer's account to find any inconsistencies, misstatements, or unsupported conclusions. In determining whether to designate a medical professional as observer, consider factors such as the size of the case, the nature of the injury, and the extent to which the examination is subjective.

11.47[3] Recording by Audiotape or Stenography Allowed. A physical examination can be recorded stenographically or by audio tape [*CCP* § 2032.510(a)].

11.47[4] Video Recording of Examination Is Not Allowed. The physical examination cannot be recorded by video [*Ramirez v. MacAdam* (1993) 13 CA4th 1638, 1641, 16 CR2d 911].

11.47[5] Attorney or Representative Must Only Observe. The observer can monitor the examination but must not participate in the examination or disrupt it [*CCP* § 2032.510(b)].

11.47[6] Examiner Can Object to Conduct of Observer. If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order [*CCP* § 2032.510(e)].

11.47[7] Attorney or Representative Can Object to Procedures and Move for Protective Order. If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend the examination, and the examinee's counsel can move for a protective order [*CCP* § 2032.510(d)].

11.47[8] Sanctions Are Available for Unsuccessfully Making or Opposing Protective Order. The court will impose a monetary sanction under § 2032.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2032.510(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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IX. OBSERVING AND RECORDING PHYSICAL OR MENTAL EXAMINATION

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11.48 Mental Examination.

11.48[1] Counsel Generally May Not Attend Mental Exam. In most cases, counsel is not permitted to attend a mental examination [*Edwards v. Superior Court* (1976) 16 C3d 905, 907, 130 CR 14, 549 P2d 846 ; *Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 CA4th 739, 747, 133 CR2d 828].

11.48[2] Trial Courts Can Permit Presence of Counsel. Trial courts retain the power to permit the presence of counsel or to take other prophylactic measures when needed to protect the person to be examined [*Vinson v. Superior Court* (1987) 43 C3d 833, 846, 239 CR 292, 740 P2d 404 ; *Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 CA4th 739, 747, 133 CR2d 828].

Example:

In *Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 CA4th 739, 133 CR2d 828 , a case that involved a discovery order for a neuropsychologist's examination of a 10-year-old boy, the court stated that the record lacked evidence demonstrating that the presence of counsel was necessary to protect the boy and therefore failed to justify an exception to the standard rule barring counsel. Note however, the boy's mother, who was also a plaintiff (and therefore not a third party observer) was allowed to attend the examination.

11.48[3] Mental Examination Can Be Audiotaped. During a mental examination, both the examiner and examinee have the right to record the examination on audio tape [CCP § 2032.530].

11.48[4] No Right to Videotape Examination. There is no right to videotape a mental examination [*Baqleh v. Superior Court* (2002) 100 CA4th 478, 492, 122 CR2d 673].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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Chapter 11 Physical and Mental Examinations
X. OBTAINING AND USING EXAMINATION REPORTS

1-11 MB Practice Guide: CA Civil Discovery 11.49

11.49 CHECKLIST: Obtaining Examination Reports.

11.49[1] Examinee's Checklist.

☐ Draft demand for examination reports, specifying:

☐ A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner, and

☐ A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

Authority:

CCP § 2032.610(a)

Discussion:

See 11.50

Form:

See 11.63

☐ If reports are not received, move to compel:

☐ Accompany motion with declaration stating failure of attempts at informal resolution.

☐ Include request for sanctions.

- ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2016.040, 2032.620

Discussion:

See 11.52

Form:

See 11.64

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

- ☐ If reports are received, send opposing party copies of existing written reports of examinations of client by other health care practitioners:

- ☐ Calendar sending subsequent reports to opposing counsel.

Authority:

CCP § 2032.640

Discussion:

See 11.53

- ☐ Schedule deposition of practitioner who conducted examination.

Authority:

Kennedy v. Superior Court (1998) 64 CA4th 674, 679, 75 CR2d 373 ; CCP § 2032.610

Discussion:

See 11.54

- ☐ Be aware of sanctions against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless:

- ☐ the court finds that the one subject to the sanction acted with substantial justification,
- ☐ or that other circumstances make the imposition of the sanction unjust.

- ☐ Consider that the court will exclude at trial the testimony of any examiner whose report has not been provided by a party.

Authority:

CCP §§ 2032.620(b), 2032.650(c)

Discussion:

See 11.53[2][a] -[d]

11.49[2] Examining Party's Checklist.

☐ Order reports, if none are available.

Deliver demanded reports within 30 days after service of the demand, or within 15 days of trial, whichever is earlier.

☐ Be aware of sanctions against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless:

☐ the court finds that the one subject to the sanction acted with substantial justification,

☐ or that other circumstances make the imposition of the sanction unjust.

☐ Consider that the court will exclude at trial the testimony of any examiner whose report has not been provided by a party.

Authority:

CCP §§ 2032.620(b), 2032.650(c)

Discussion:

See 11.52

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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X. OBTAINING AND USING EXAMINATION REPORTS

1-11 MB Practice Guide: CA Civil Discovery 11.50

11.50 Examinee Can Demand Written Report.

An examinee can demand examination reports from the person who required the examination [CCP § 2032.610(a)]. This demand must be in writing specifying delivery of [CCP § 2032.610(a)]:

- A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; and
- A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.51 Responding to Examinee's Demand for Examination Report.

11.51[1] Reports Must Be Delivered Within 30 Days or Within 15 Days of Trial. Copies of the examination reports must be delivered to the examinee within 30 days after service of the demand, or within 15 days of trial, whichever is earlier [*CCP § 2032.610(b)*].

11.51[2] Where No Report Exists: Examiner May Be Required to Create It. Although courts are reluctant to order parties to produce nonexistent reports, *CCP § 2032.610* provides that a party who submits to a physical examination is entitled to a report of that examination, which must contain certain specified information. If one party to personal injury litigation is required to submit to a medical examination, that party is entitled to a report of the information obtained by his or her adversary [*Kennedy v. Superior Court (1998) 64 CA4th 674, 678, 75 CR2d 373*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.52 Compelling Production of Reports.

11.52[1] Moving for Order Compelling Delivery. If the party at whose instance the examination was made fails to make a timely delivery of the reports demanded, the demanding party may move for an order compelling their delivery [CCP § 2032.620(a)].

Prerequisite:

A declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion must accompany the motion [CCP §§ 2016.040, 2032.620(a)].



Cross References:

Form, see 11.64.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.50 (Matthew Bender)*.

11.52[2] Sanctions for Unsuccessfully Making or Opposing Motion to Compel Delivery of Medical Reports. The court will impose a monetary sanction under Section 2032.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [CCP § 2032.620(b)].

11.52[3] Sanctions for Failure to Obey Court Order. If a party fails to obey an order compelling delivery of demanded medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2032.030. In lieu of or in addition to those sanctions, the court may impose a monetary sanction under Section 2032.030 [CCP § 2032.620(c)].

11.52[4] Failure to Provide Report Results in Exclusion of Testimony. The court will exclude at trial the testimony of any examiner whose report has not been provided by a party [CCP § 2032.620(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconductCivil
ProcedureDiscoveryMotions to Compel



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11.53 Examinee Has Duty of Reciprocity.

11.53[1] Access to Examinee's Reports and Experts That Relate to Same Condition in Controversy. A party receiving a demand for a report under *CCP* § 2032.610 is entitled at the time of compliance to receive in exchange a copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner. In addition, that party is entitled to receive promptly any later report of any previous or subsequent examination of the same condition, by any physician, psychologist, or licensed health care practitioner [*CCP* § 2032.640].

11.53[2] Motion to Compel Production of Report.

11.53[2][a] Party Who Has Complied May Compel Other Party. If a party who has demanded and received delivery of medical reports fails to deliver existing or later reports of previous or subsequent examinations, a party who has complied with *CCP* § 2032.610 may move for an order compelling delivery of medical reports [*CCP* § 2032.650(a)].

Prerequisite:

A declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion must accompany the motion [*CCP* §§ 2016.040, 2032.650(a)].



Cross References:

Form, see 11.65.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.52 (Matthew Bender)*.

11.53[2][b] Sanctions for Unsuccessfully Making or Opposing Motion to Compel Delivery of Medical Reports. The court will impose a monetary sanction under *CCP* § 2032.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2032.650(b)].

11.53[2][c] Sanctions for Failure to Obey Order. If a party fails to obey an order compelling delivery of medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *CCP* § 2023.030. In lieu of or in addition to the sanction, the court may impose a monetary sanction under *CCP* § 2023.030 [*CCP* § 2032.650(c)].

11.53[2][d] Failure to Provide Report Results in Exclusion of Testimony. The court will exclude at trial the testimony of any health care practitioner whose report has not been provided by a party ordered to do so by the court [*CCP* § 2032.650(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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11.54 Waiver of Privileges and Protection for Work Product.

11.54[1] Waiver Applies to Report and Testimony. The protection for work product under *CCP* § 2018.010 *et seq.* is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony [*CCP* §§ 2032.610(c), 2032.630].

11.54[2] Deposition of Examiner. The examinee may depose the examining physician regarding the examination, whether or not the party requesting the examination has withdrawn the physician as an expert witness [*Kennedy v. Superior Court* (1998) 64 CA4th 674, 679, 75 CR2d 373].

11.54[3] Hiding Expert Witnesses Not Permitted. Ordinarily a party may "hide" an expert from deposition by withdrawing the expert and reclassifying the individual as a "consultant," thereby reinstating work product protection. However, this strategy does not work when the expert is also an examining physician under *CCP* § 2032.010 *et seq.* Despite the withdrawal of an examining physician as an expert, the examinee is still entitled to depose the examining physician with regard to the physical examination [*Kennedy v. Superior Court* (1998) 64 CA4th 674, 679, 75 CR2d 373].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers



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11.55 Probing for Bias of Examiner.

11.55[1] Parties Are Entitled to Evidence of Potential Bias of Expert. The Law Revision Commission comment to *Evid Code* § 722, which permits discovery of how much compensation an expert receives in a particular case, notes "the tendency of some experts to become advocates for the party employing them." Parties are entitled to evidence about the nature of the examiner's practice to show potential bias [*Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 CA4th 691, 698, 101 CR2d 67 ; *Allen v. Superior Court* (1984) 151 CA3d 447, 451, 198 CR 737].

11.55[2] Examiner May Be Questioned Regarding Predominate Work for One Side. A physician should be required to provide a description of his or her practice sufficient to permit a factfinder to determine whether the physician's opinions have been influenced by any bias in favor of lawyers or parties who have retained the physician's services [*Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 CA4th 691, 700, 101 CR2d 67].

Evidence that the particular expert usually or always testifies for one side of a particular class of lawsuit would be evidence of advocacy [*Allen v. Superior Court* (1984) 151 CA3d 447, 451, 198 CR 737]. At deposition, a medical expert may be asked to provide a numerical estimate of defense and plaintiff-related medical-legal work including examinations, reports, and deposition and trial testimony and a numerical estimate of the amount of income generated from that defense and plaintiff-oriented work [see *Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 CA4th 691, 700, 101 CR2d 67 (limiting to past three years); see *Allen v. Superior Court* (1984) 151 CA3d 447, 453, 198 CR 737].

11.55[3] Right to Evidence of Potential Bias Is Balanced Against Disclosure of Private Information. Although an expert should be required to describe his or her practice sufficiently to allow the finder of fact to determine whether the expert's opinions have been influenced by his or her bias in favor of the lawyers or parties who retained his or her services, the expert should be protected against excessive intrusion into his or her privacy interests [*Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 CA4th 691, 699, 101 CR2d 67 ; *Allen v. Superior Court* (1984) 151 CA3d 447, 453, 198 CR 737].

Example:

The details of a physician's billing and accounting or the specifics of the physician's prior testimony and depositions is not necessary to show bias or prejudice. Rather than determining the exact number of

cases in which the physician has been retained by defense and amount of compensation, the physician may be asked estimate the percentage of his or her practice that involves defense work and compensation for it. Thus, when a trial court denied a protective order against a subpoena duces tecum requiring the production of records from the previous five years showing the source of income when examinations were made at the request of insurance companies or defense counsel, records that would reveal what portion of the physician's total income came from treating patients as opposed to defense evaluations, and records relating to prior depositions, along with other categories of records, the appellate court overturned the order on the ground the trial court abused its discretion by not requiring a less intrusive manner of discovery [*Allen v. Superior Court* (1984) 151 CA3d 447, 453, 198 CR 737].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsMental & Physical Examinations



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11.56 Demand for Medical Examination of Personal Injury Plaintiff.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [name],	)	DEFENDANT'S DEMAND FOR INITIAL PHYS-
Defendant	)	ICAL EXAMINATION OF PLAINTIFF
	)	_____ [name] SEEKING DAM-
	)	AGES FOR PERSONAL INJURY [CCP § 2032.220]

To plaintiff _____ [name] and to his/her attorney of record:

Defendant demands, pursuant to *California Civil Procedure Code Section 2032.220*, that you appear for a physical examination on _____ [date], at _____ [time], to be conducted by _____ [name and, if appropriate, specialty of examiner], at [place of the examination, e.g., the office of Dr. Smith] located at _____ [street address], which is located less than 75 miles from your residence.

This examination will be conducted for the purpose of ascertaining _____ [state condition to be examined, e.g., the extent of injuries sustained by you to your right knee, ankle, and lower leg] and will consist of _____ [state nature, manner, and scope of examination, including all tests to be conducted]. None of these tests or procedures is painful, protracted or intrusive.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2032.220

General Restrictions on the Demand:

See 11.17 -11.20

Required Contents of the Demand:

See 11.21



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11.57 Response to Demand for Physical Examination of Personal Injury Plaintiff.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [name],	)	RESPONSE TO DEMAND FOR EXAMINATION
Defendant.	)	OF PLAINTIFF
	)	
	)	

To defendant _____ [name] and to his/her attorney of record:

[EITHER]

_____ [Name of examinee] will comply with your demand for physical examination, dated _____.
_____. _____ [name of examinee] will appear at the time and place stated in the demand.

[OR]

_____ [Name of plaintiff-examinee] will comply with your demand for a medical examination, dated _____.

_____, with the following modifications: _____[*state modifications, such as a different time or date*].

[OR]

_____ [*Name of plaintiff-examinee*] refuses to comply with your demand for a medical examination, dated _____, for the following reasons [*state specific reasons, e.g.: The qualifications of the health care practitioner specified in your Demand for Physical Examination fail to meet the requirements of Code of Civil Procedure Section 2032.020(b).*]

Dated: _____

_____ [*signature*]

_____ [*typed name*]

Attorney for _____

NOTES.

Authority:

CCP § 2032.230

Format and Contents of Response to Demand for Physical Examination:

See 11.25

Time for Response:

See 11.27

Consequences of a Late Response:

See 11.29



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11.58 Notice of Motion and Motion to Compel Response and Compliance With Demand for Physical Examination and Sanctions.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No. _____
) NOTICE OF MOTION AND MOTION TO COM-
) PEL RESPONSE TO AND COMPLIANCE WITH
) DEMAND FOR PHYSICAL EXAMINATION, AND
) SANCTIONS, SUPPORTING DECLARATION OF
) _____, AND MEMORANDUM IN
) SUPPORT OF MOTION [*Code Civ. Proc.* §§
) 2032.240, 2032.250]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To all parties and their attorneys of record:

NOTICE IS HEREBY GIVEN that on _____ [date] at _____, [time] or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], defendant will, and hereby does, move this court for an order compelling plaintiff to respond and comply with Defendant's Demand for Physical Examination, served on _____, and to submit to a physical examination to be conducted by _____ [name and title of the examiner], on _____ [date], at _____ [time], or at such other date and time as is ordered by this Court, at _____ [address of the place of examination]. Copies of Defendant's Demand for Physical Examination and the Proof of Service are attached to this motion and marked as Exhibits "A" and "B," respectively. Defendant will also move for an order for monetary sanctions for plaintiff's refusal to respond or comply with the demand. This motion is made pursuant to *Code of Civil Procedure Section 2032.240* and *Code of Civil Procedure Section 2032.250*, on the ground that plaintiff's physical condition is in controversy in this action, and that defendant has a right to demand one physical examination under *Code of Civil Procedure § 2032.220*.

This motion is based on this notice of motion, the pleadings, records and files in this action, the attached memorandum, the attached supporting declaration of _____ [name of declarant], and such other oral and documentary evidence as may be presented at the time of the hearing.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

DECLARATION OF _____

[Add declaration(s) supporting motion.]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2032.240, 2032.250.

Grounds for Motion to Compel:

See 11.31

Required Motion Papers:

See 11.32

Related Form of Separate Statement:

See 11.59

Related Form of Order:

See 11.60

Related Form of Memorandum:

See *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.10*
(Matthew Bender)



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1-11 MB Practice Guide: CA Civil Discovery 11.59

11.59 Separate Statement to Accompany Notice of Motion to Compel Response and Compliance With Demand for Physical Examination.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No. _____
) SEPARATE STATEMENT IN SUPPORT OF MO-
) TION TO COMPEL RESPONSE AND COMPLI-
) ANCE WITH DEMAND FOR PHYSICAL EXAM-
) INATION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
Date Action Filed: _____
Trial Date: _____

This separate statement is submitted in support of the motion by _____ [party, e.g., Defendant Mary Jones] to compel _____ [non-complying party, e.g., Plaintiff John Smith] to comply with the demand to submit to a physical examination. As required under California Rules of Court, Rule 3.1345, this separate statement provides information relating to the demand and response at issue in the motion as follows:

1. Text of Demand: _____ [specify].

2. Text of Response: _____[*specify text of response, and any further responses to the demand*].
3. Related Definitions and Instructions: _____[*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the demand and the responses to it*].
4. Related Discovery Requests and Responses: _____[*if the response to the demand is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the response to it*].
5. Related Pleadings and Other Documents: _____[*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party*].
6. Statement of Reasons for Compelling Further Response(s): _____[*state factual and legal reasons for compelling compliance with the demand*].
- Date: _____

_____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2032.250; Cal Rules Ct, Rule 3.1345

Required Motion Papers:

See 11.32

Related Form for Motion:

See 11.58

Related Form for Order:

See 11.60



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1-11 MB Practice Guide: CA Civil Discovery 11.60

11.60 Order Compelling Response and/or Compliance With Demand for Physical Examination of Personal Injury Plaintiff.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of defendant _____ [name] for an order compelling [response to and] compliance with defendant's demand of _____ [date], for plaintiff _____'s [name] initial physical examination under *Code of Civil Procedure Sections 2032.240 and 2032.250*, came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; defendant appeared by counsel _____ [name].

On proof made to the satisfaction of the court that the motion ought to be granted, IT IS ORDERED that the motion be, and it is hereby granted [in part], and that _____ [name of plaintiff] submit to a physical examination by _____ [name of examining licensed practitioner], at _____ [date and time of the examination], at _____ [location].

[EITHER]

IT IS FURTHER ORDERED that the nature, scope, conditions, and manner of the examination be those set forth in the defendant's demand.

[OR]

IT IS FURTHER ORDERED that the nature, scope, conditions, and manner of the examination be as follows: *[Specify, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded.]*

[EITHER, if imposing sanctions]

IT IS FURTHER ORDERED that _____ *[identify persons against whom sanction is to be imposed, e.g., Plaintiff John Smith and his attorney Tom Doe]* pay forthwith to defendant _____ *[name]* the sum of _____ Dollars (\$ _____) as reasonable expenses and attorney's fees.

[OR, if not ordering sanctions]

On further proof made to the satisfaction of the court that plaintiff _____ *[name]* and his/her attorney _____ *[name]* [acted with substantial justification or specify other circumstances making imposition of a sanction unjust].

IT IS FURTHER ORDERED that no monetary sanction be imposed on plaintiff _____ *[name]* and his/her attorney _____ *[name]*.
Dated: _____

_____ *[signature]*

Judge of the Superior Court

NOTES.

Authority:

CCP § 2032.250

Sanctions for Refusing to Obey an Order Compelling a Response:

See 11.33[4]

Monetary Sanctions for Unsuccessful Opposition to a Demand:

See 11.33[3]

Related Form of Motion:

See 11.58

Related Form of Separate Statement:

See 11.59



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Chapter 11 Physical and Mental Examinations
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1-11 MB Practice Guide: CA Civil Discovery 11.61

11.61 Notice of Motion and Motion for Court Ordered Physical or Mental Examination.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER REQUIRING PLAINTIFF
) _____ [NAME], TO SUBMIT TO
) MEDICAL EXAMINATION, SUPPORTING DE-
) CLARATIONS OF _____
) [NAMES], AND MEMORANDUM IN SUPPORT
) OF MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [identify party, e.g., plaintiff] _____ [name] and to his/her attorney of
record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [address], _____ [moving party, e.g., Defendant Mary Jones] will and hereby does, move under *Section 2032.310 of the Code of Civil Procedure* for an order requiring plaintiff _____ [name] to submit to a _____ [physical or mental] examination to be taken by _____ [name of licensed practitioner], _____ [give examiner's specialty, if any, e.g., an ophthalmologist,] [and his/her assistants,] or an examiner to be appointed by the court, on _____ [date], at _____ [time], at _____ [place], or at such time and place as the court may direct. This examination is to include _____ [specify nature, manner, scope, and conditions of examination, as well as any extraordinary tests or procedures which are to be employed, e.g., MRI, blood tests, or extensive x-rays] to determine _____ [designate particular physical or mental condition, e.g., the existence and extent of any permanent optical nerve damage sustained by plaintiff], as more particularly set out in the declaration(s) of _____ [name(s)] attached hereto. The motion will be made on the grounds that _____ [specify condition of party or other person to be examined, e.g., the alleged damage to plaintiff _____'s (name) eyesight] is in controversy in this action, that there is good cause for the requested examination in that defendant _____ (name) cannot adequately and safely prepare for and proceed to trial of the issues, particularly _____ (specify issues, e.g., the extent of any injuries suffered by plaintiff), in this action without medical information relating to the nature and extent of plaintiff _____'s (name) alleged injuries].

Despite defendant's reasonable and good faith attempt to arrange for this examination by agreement under *Section 2016.030 of the Code of Civil Procedure*, plaintiff refused and continues to refuse to enter into any such agreement.

The motion will be based on this notice of motion, on the declaration(s) of _____ and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF

_____ [NAME OF ATTORNEY]

I, _____ [attorney-declarant], declare that:

I am the attorney for _____ [moving party, e.g., Defendant Mary Jones] in this action. Good cause exists for the requested _____ [physical or mental] examination of _____ [examinee], in that _____ [state facts indicating that condition to be examined is in controversy and that there is a need for an independent evaluation of that condition].

_____ [Name of examiner] is duly licensed to practice _____ [state nature of examiner's license] in California, and is fully qualified to conduct this examination. _____ [If demand is for a mental examination, add: _____ (name of examiner) is a licensed clinical psychologist with a doctoral degree in psychology and more than five years of post graduate experience in the diagnosis and treatment of emotional and mental disorders].

The following procedures will be performed on _____ [examinee]: _____ [describe the nature and extent of the examination, indicating each test and procedure that may be performed]. [Where appropriate, add: No X-rays have previously been taken of this condition. If X-rays exist, they have not been made available to (examiner) or state other facts constituting good cause for taking X-rays in addition to the examination.]

[This is the first examination _____ (defendant) has requested of _____ (examinee) in this action or identify previous examinations and state facts constituting good cause justifying an additional examination].

This examination will be conducted within 75 miles from _____'s (examinee) home.

[OR]

This examination must be conducted more than 75 miles from _____'s (examinee) home because _____ [state facts showing good cause for the travel involved].

I have made reasonable and good faith attempts to arrange an examination pursuant to *Code of Civil Procedure Section 2016.030*, by [state efforts made to resolve issues without court intervention]. These attempts were unsuccessful.

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

Dated: _____

_____ [signature]

_____ [typed name]

SUPPORTING DECLARATION OF

_____ [NAME OF PHYSICIAN]

I, _____ [name of physician], declare:

I am a doctor duly licensed to practice medicine in the State of California. I conduct a practice at _____ [address]. I have the following qualifications: _____ [state qualifications pertaining to the examination requested]. I have been retained in this action by _____ [plaintiff or defendant] as an expert in the field of _____ [state specialty], and have reviewed _____ [indicate documents reviewed by examiner]. These documents indicate that the condition of _____ [examinee] regarding which this examination is sought is in controversy in this action.

In order to determine whether, or the extent to which, _____ [examinee] suffers from the conditions alleged, the examination requested in this motion is necessary. This examination should include _____ [describe in detail the nature and scope of the examination, including laboratory or other diagnostic tests to be performed, and persons other than declarant involved in the conduct of the examination]. This examination may involve diagnostic tests and procedures that are moderately painful, protracted, or intrusive, in that: _____ [describe consequences of examination]. However, the above-described procedures are necessary in that _____ [state facts justifying the examination, such as: there is no other medical procedure currently approved for the diagnosis of this condition].

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

Dated: _____

_____ [signature of physician]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2032.310

Examinations Requiring Court Authorization:

See 11.36[1]

Contents of the Motion Seeking a Court Ordered Examination:

See 11.36[3]

Related Form of Order:

See 11.62

Related Form of Memorandum:

*See California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.11
(Matthew Bender)*



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11.62 Order for Physical or Mental Examination.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for an order that
_____ [name of person to be examined, e.g., Plaintiff John Smith] submit to a _____
[physical or mental] examination came on regularly for hearing on _____ [date]. Plaintiff appeared by
counsel _____ [name]; defendant appeared by counsel _____ [name].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that the motion be, and hereby is, granted [in part], and that _____ [party, e.g.,
Plaintiff John Smith] submit for a _____ [physical or mental] examination by
_____ [name of examining licensed practitioner] on _____ [date and time of the
examination], at _____ [location].

IT IS FURTHER ORDERED that this examination shall be conducted in the following manner:

[Specify in separately numbered subparagraphs the nature, manner, scope, and conditions of the examination.]

Dated: _____

_____ *[signature]*

Judge of the Superior Court

NOTES.

Authority:

CCP § 2032.310

Required Contents:

See 11.38

Related Form of Motion:

See 11.61



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XI. FORMS

1-11 MB Practice Guide: CA Civil Discovery 11.63

11.63 Demand for Copies of Physical or Mental Examination Report.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [name],	)	DEMAND FOR COPIES OF
Defendant.	)	_____ [PHYSICAL OR MENTAL]
	)	EXAMINATION REPORTS
	)	

To _____ [name of examining party] and to his/her attorney of record:

_____ [Plaintiff or Defendant] demands pursuant to *Code of Civil Procedure Section 2032.610(a)* that you deliver to _____, [name] his/her attorney of record the following:

- (1) A copy of the detailed written report of _____ [name of examiner] setting out the history, examinations, findings, results of all tests made, diagnoses, prognoses, and conclusions relating to the examination of _____ [name] which was conducted on _____ [date of examination];
- (2) Copies of reports of all earlier examinations of _____ [name of examinee] related to _____ [state condition for which examinee was examined], whether made by _____ [name of examiner] or any other person.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2032.610(a)

Examinee's Right to Demand a Report:

See 11.50

Timely Deliverance of the Report:

See 11.51[1]

Duty of Reciprocity:

See 11.53

Failure to Prepare a Report:

See 11.51[2]



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XI. FORMS

1-11 MB Practice Guide: CA Civil Discovery 11.64

11.64 Notice of Motion and Motion to Compel Production of Examination Report.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No. _____
) NOTICE OF MOTION AND MOTION TO COM-
) PEL PRODUCTION OF MEDICAL EXAMINA-
) TION REPORTS AND SANCTIONS
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [address], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move this court for an order requiring _____ [party at whose instance examination was made, e.g., Defendant Mary Jones] to deliver to _____ [name of party who submitted to or produced another for physical or mental examination, e.g., Plaintiff John Smith] a copy of the detailed written report of

_____ [name of examiner] concerning the _____ [physical or mental] examination of _____ [name of examinee], conducted on _____ [date of the examination], and copies of reports of all earlier examinations relating to the same condition. _____ [Moving party, e.g., Plaintiff John Smith] will also move this Court for an order for monetary sanctions against _____ [name of party at whose instance examination was conducted, e.g., Defendant Mary Jones] for his/her failure to deliver copies of these reports when demanded. This motion is made under *Section 2032.620 of the Code of Civil Procedure* on the ground that a written demand for copies of these reports was served on _____ [name of party at whose instance examination was conducted, e.g., Defendant Mary Jones] on _____ [date], and _____ [name of party] has failed to comply with that demand. Copies of the Demand for _____ [physical or mental] Examination and Proof of Service are attached to this motion and marked as Exhibits "A" and "B," respectively.

This motion is based on this notice, the pleadings, records, and files in this action, the attached memorandum, the attached supporting declaration of _____ [name of declarant], the attached Demand for Reports, and such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

DECLARATION OF _____

[Add declaration(s) supporting motion.]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2032.620

Compelling Production of a Report:

See 11.52[1]

Sanctions for Not Delivering a Report:

See 11.52[2] -[4]

Duty of Reciprocity:

See 11.53

Related Form of Memorandum:

See California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.50 (Matthew Bender)



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11.65 Notice of Motion and Motion to Compel Reciprocal Delivery of Examination Reports.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) No. _____
) NOTICE OF MOTION AND MOTION TO COM-
) PEL RECIPROCAL DELIVERY OF MEDICAL EX-
) AMINATION REPORTS AND SANCTIONS
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [address of courthouse], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move this Court for an order compelling _____ [party who has demanded and received delivery of medical reports, e.g., Plaintiff John Smith] to deliver to _____ [moving party, e.g., Defendant Mary Jones], by _____ [due date of reports], copies of any existing written reports of any

examinations of _____ [name of examinee] for _____ [specify condition for which examination was conducted], in compliance with *Code of Civil Procedure* Section 2032.640.

_____ [Moving party, e.g., Defendant Mary Jones] will, and hereby does, further move for an order requiring _____ [party who failed to deliver reports, e.g., Plaintiff John Smith] to identify to _____ [moving party, e.g., Defendant Mary Jones] in writing, all examiners who examine _____ [name of examinee] for the same condition in the future, and to deliver any later report of any such examination of the same condition by any _____ [specify as appropriate: physician or psychologist or licensed health care practitioner] within _____ [number] days after it is received.

_____ [Moving party, e.g., Defendant Mary Jones] will further, and hereby does, move this Court for an order imposing sanctions for _____ 's [party who has demanded and received delivery of medical reports, e.g., Plaintiff John Smith] failure to deliver copies of reports to which _____ [moving party, e.g., Defendant Mary Jones] is entitled. This motion is made on the ground that _____ [moving party, e.g., Defendant Mary Jones] delivered to _____ [party refusing delivery, e.g., Plaintiff John Smith] on demand, on _____ [date], a copy of the detailed written report of _____ [name of examiner] regarding the examination of _____ [name of examinee] on _____ [date of the examination]. Accordingly, pursuant to *Section 2032.640 of the Code of Civil Procedure*, _____ [moving party, e.g., Defendant Mary Jones] is entitled to an exchange of reports.

This motion is based on this notice, the pleadings, records, and files in this action, the attached memorandum, the attached supporting declaration of _____ [name of declarant], and such other oral or documentary evidence as may be presented at the time of the hearing.

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for _____

DECLARATION OF _____

[Add declaration(s) supporting motion.]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2032.610, 2032.640

Exclusion of Examiner's Testimony for Failing to Provide a Report:

See 11.52[4], 11.53[2][d]

Waiver of the Work Product Rule Applies to the Waiver Applies to the Report and the Physician's Testimony:

See 11.54

Reciprocal Obligation to Disclose Reports:

See 11.53

Disclosure Obligations Extends to Subsequent Reports:

See 11.26[5]

Related Form of Memorandum:

See *California Points and Authorities, Ch. 87, Discovery: Physical and Mental Examinations, § 87.52*
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Chapter 11 Physical and Mental Examinations
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11.66 Stipulation for Mental or Physical Examination.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	No. _____
vs.	)	STIPULATION FOR MEDICAL EXAMINATION
_____ [name],	)	OF
Defendant.	)	_____ [NAME OF EXAMINEE]
	)	
	)	

The parties hereby stipulate through their respective counsel that _____ [name of person to be examined], _____ [status of examinee, e.g., Plaintiff or Defendant], will submit to a _____ [physical or mental] examination to be conducted by _____ [name of examiner] on _____ [date of the examination], at _____ [time of the examination] at _____ [location] to determine _____ [specify the condition in question, e.g., the extent and nature of any skeletal, muscular, soft tissue, or neurological damage or injury or abnormality of, plaintiff's neck, shoulders, and back, including, in particular, any evidence of loss of normal range of motion].

It is further stipulated that the nature, scope, conditions, and manner of the examination and the delivery of the examination report produced as a result of this examination are to be as follows:

1. The examination will consist of the following procedures: _____ [specify agreed on procedures, e.g.

, a general physical examination, blood tests, x-rays of plaintiff's neck, shoulders, and back].

2. The examination will last no longer than _____ hours.
3. The examinee's attorney will be present at the examination.
4. The examination will be videotaped.
5. Costs of this examination will be paid by _____[party].
6. Examiner will deliver the report of the examination to _____ by _____[date].

[Specify in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination as agreed to by the parties.]

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for Plaintiff _____

Dated: _____

_____ [signature]

_____ [typed name]

Attorney for Defendant _____

NOTES.

Authority:

CCP § 2016.030

Parties May Agree to an Examination:

See 11.11

Examination Pursuant to Agreement Not Subject to Statutory Restrictions:

See 11.12

Contents of the Stipulation:

See 11.13

Failure to Comply with a Stipulation:

See 11.14



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Chapter 12 Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.syn

§ 12.syn Synopsis to Chapter 12: Requests for Admissions

12.01 Scope.

12.02 Objective and Strategy.

12.03 CHECKLIST: Making Requests for Admissions.

12.04 Options and Strategies for Propounding Party.

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12.07[1] Number Is Different for Unlimited and Limited Civil Cases.

12.07[2] Unlimited Civil Cases.

12.07[2][a] Thirty-Five Requests Not Related to Genuineness of Documents Are Allowed As Matter of Right.

12.07[2][b] Declaration for Additional Discovery Allows More Than 35 Requests.

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12.07[3] Limited Civil Cases.

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12.07[3][b] Party May Move to Withdraw Case From Restrictions for Impracticality.

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12.08 Timing of Requests.

12.08[1] Plaintiff May Request Without Leave of Court After Service of Summons or Appearance.

12.08[1][a] General Rule Is 10 Days After.

12.08[1][b] Exception Is Five Days in Unlawful Detainer.

12.08[1][c] May Make Earlier Request With Leave of Court.

12.08[2] Defendant May Request at Any Time.

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12.10 Format of Request.

12.10[1] Judicial Council Form Is Not Mandatory.

12.10[2] Number Sets of Requests Consecutively.

12.10[3] Identify Parties and Set Numbers in Caption.

12.10[4] Frame Requests As Statements, Not Questions.

12.10[5] State Each Request Separately.

12.10[6] Do Not Use Subparts, Compound, Conjunctive or Disjunctive Requests.

12.10[7] Do Not Include Any Preface.

12.10[8] Capitalize Specially Defined Terms.

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12.11 Serve Requests on All Appearing Parties.

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12.13 Requesting Party Retains Original Papers.

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12.14 CHECKLIST: Responding to Request.

12.15 Options and Strategy.

12.16 Time for Response.

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12.16[2] Exceptions.

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12.16[2][b] As Shortened or Extended by Court.

12.16[3] Extensions Based on Method of Service.

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12.17 Time to Respond May Be Extended by Stipulation or Motion.

12.17[1] Parties May Stipulate.

12.17[1][a] Must Be in Writing.

12.17[1][b] All Types of Responses Allowed When Time Is Extended Unless Otherwise Agreed.

12.17[1][c] Responding Party Gives Notice of Extension.

12.17[2] Responding Party May Move for Extension.

12.18 Effect of Failure to Answer Timely.

12.18[1] Objections Waived.

12.18[2] Responding Party May Move for Relief From Waiver.

12.19 Response to Requests.

12.19[1] Determine Number of Requests Requiring Response in Unlimited Civil Case.

12.19[1][a] Number of Requests Re Genuineness of Documents Is Generally Unrestricted.

12.19[1][b] Other Than Genuineness of Documents Only 35 Requests Allowed Absent Declaration for Additional Discovery.

12.19[2] Determine Number of Requests Requiring Response in Limited Civil Case.

12.19[3] Responses.

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12.19[3][b] Must Be Straightforward and Complete.

12.19[3][c] May Admit, Deny, or Assert Lack of Information.

12.19[4] Stating a Denial.

12.19[5] Asserting Lack of Information.

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12.19[6] Asserting Objections.

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12.19[6][b] Grounds for Objections.

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12.20 Effect of Admission.

12.20[1] Matter Is Conclusively Established.

12.20[2] Later Acquired Evidence May Not Be Admissible.

12.20[3] Binds Party for Pending Action Only.

12.20[4] Court Determines Scope and Effect.

12.21 Party Has No Ongoing Duty to Update Response.

12.22 Format of Response.

12.23 Signature.

12.23[1] Failure to Sign Under Oath Treated As Failure to Respond.

12.23[2] Attorney Signs Objections.

12.23[3] Officer or Agent Signs on Behalf of Entity.

12.24 Responses Must Be Verified.

12.25 Co-Parties Joining in Response Must Make Separate Verifications.

12.26 Obtain Protective Order.

12.26[1] Objective and Grounds.

12.26[2] Relief Available in Protective Order.

12.26[3] Procedure.

12.26[3][a] Make Motion Promptly.

12.26[3][b] Attempt at Informal Resolution Is Required.

12.26[3][c] Motion Papers.

12.26[4] Burden of Proof Is on Moving Party Unless Issue Is Number of Requests.

12.26[5] Court May Qualify Denial of Motion.

12.26[6] Court Is Generally Required to Sanction Losing Party.

12.27 CHECKLIST: Deeming Matters Admitted.

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12.28 Motion to Deem Matters Admitted or Documents Genuine.

12.28[1] Available When No Response Was Made.

12.28[1][a] Motion.

12.28[1][b] Required Motion Papers.

12.28[2] Sanctions Are Mandatory.

12.28[3] Motion to Be Granted If No Response Before Hearing.

12.28[4] Order Is Equivalent to Party Having Admitted All Requests.

12.29 CHECKLIST: Compelling Further Response.

12.29[1] Moving Party's Checklist.

12.29[2] Opposing Party's Checklist.

12.30 Motion to Compel Further Responses.

12.30[1] Grounds.

12.30[2] Attempt at Informal Resolution Is Required.

12.30[3] Motion Generally Must Be Within 45 Days of Response Unless Extended.

12.30[4] Motion Papers.

12.30[5] Sanctions Against Losing Party Are Generally Mandatory.

12.30[6] Sanctions Are Available for Failure to Comply With Order.

12.31 CHECKLIST: Withdrawing or Amending Responses.

12.31[1] Moving Party's Checklist.

12.31[2] Opposing Party's Checklist.

12.32 Withdrawal or Amendment of Admissions.

12.32[1] Noticed Motion Is Required.

12.32[2] Grounds.

12.32[3] Relief Is Available From Actual and Deemed Admissions.

12.32[4] Motion Papers.

12.32[5] Court May Impose Conditions When Granting Motion.

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12.33 CHECKLIST: Recovering Expenses of Proving Unadmitted Matters.

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12.34 Recovery of Expenses.

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12.34[1][a] Failure to Admit Matter Plus Later Proof of That Matter.

12.34[1][b] Example of Failure to Admit.

12.34[1][c] Proof Requires Establishment by Evidence.

12.34[1][d] Requirement of Proof Is Not Satisfied When Later Admission Obviates Need for Proof of Matter Not Admitted in Discovery.

12.34[1][e] Requirement of Proof May Be Satisfied on Grant of Summary Judgment or Nonsuit.

12.34[2] Award Is Generally Mandatory

12.34[2][a] Exceptions to Mandatory Award Listed.

12.34[2][b] What Constitutes Waiver of Response.

12.34[2][c] "Not Substantially Important" Exception Does Not Apply If Matter Relates to Central Issue.

12.34[2][d] What Constitutes Good Reason.

12.34[3] Not Intended to Be Penalty.

12.34[4] Recoverable Expenses Are Limited to Those Incurred in Proving Matter Denied.

12.34[5] Party May Recover Expenses Even If Not Prevailing Party in Lawsuit.

12.34[6] Motion Is Made After Trial.

12.34[7] Order Granting or Denying Attorney's Fees Is Appealable.

12.35 Judicial Council Form DISC-020 Requests for Admission.

12.36 Sample Request for Admissions.

12.37 Declaration for Additional Discovery.

12.38 Sample Response to Requests for Admissions.

12.39 Stipulation to Extend Time to Respond.

12.40 Notice of Stipulation to Extend Time to Respond.

12.41 Notice of Motion and Motion for Protective Order Concerning Request for Admissions With Supporting Declaration.

12.42 Order on Motion for Protective Order Concerning Request for Admissions.

12.43 Notice of Motion and Motion to Relieve Party From Waiver of Objections for Requests for Admissions With Supporting Declaration.

12.44 Notice of Motion and Motion that Requests for Admissions Be Deemed Admitted With Supporting Declaration.

12.45 Notice of Motion and Motion to Compel Further Responses to Requests for Admission With Supporting Declaration.

12.46 Notice of Motion and Motion to Amend and/or Withdraw Responses to Requests for Admissions With Supporting Declaration.

12.47 Notice of Motion and Motion to Recover Expenses Incurred in Proof With Supporting Declaration.



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Chapter 12 Requests for Admissions
I. STRATEGY

1-12 MB Practice Guide: CA Civil Discovery 12.01

12.01 Scope.

This chapter covers:

- Objectives and strategies for admissions [*see 12.02*].
- Subject matter and number of admissions that may be requested [*see 12.03 -12.07*].
- Making [*see 12.08 -12.13*; Forms: *see 12.35 -12.37*] and responding to [*see 12.14 -12.26*; Forms: *see 12.38 -12.43*] requests for admissions, including seeking protective orders [*see 12.26*; Forms: *see 12.41, 12.42*].
- Effect of admissions [*see 12.20*].
- Deeming admissions made after failure to respond [*see 12.27, 12.28*; Form: *see 12.44*].
- Motions to compel further responses [*see 12.29, 12.30*; Form: *see 12.45*].
- Withdrawal or amendment of admissions [*see 12.31, 12.32*; Form: *see 12.46*].
- Reimbursement for the expense of proof after a failure to admit [*see 12.33, 12.34*; Form: *see 12.47*].

Core Statutes:

CCP §§ 2033.010-2033.420

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral Overview



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Chapter 12 Requests for Admissions
I. STRATEGY

1-12 MB Practice Guide: CA Civil Discovery 12.02

12.02 Objective and Strategy.

Requests for admissions are the tools used to remove facts and issues from the case by having the opposing party admit that the documents are genuine or the facts are true. By limiting the issues for trial, admissions eliminate the burden and expense of proving undisputed facts [see *Cembrook v. Superior Court* (1961) 56 C2d 423, 429, 15 CR 127, 364 P2d 303 ; *Stull v. Sparrow* (2001) 92 CA4th 860, 864-865, 112 CR2d 239]. Requests for admissions are governed by CCP §§ 2033.010-2033.420.

Judge's Perspective:

Requests for admissions, when used properly, are the single most effective discovery device for focusing the case. Admissions that are obtained on either side can effectively prevent the granting of a summary judgment or alternatively enable the court to grant summary adjudications without running afoul of the prohibition regarding the weighing of evidence. Moreover, admissions are extremely helpful in narrowing the record for either pre-trial motions or trial itself.

When admissions have been obtained, parties are generally precluded from later offering contradictory evidence [see CCP § 2033.410]. Moreover, if an admission is susceptible to more than one meaning, the court has discretion to construe its scope and effect [see *Burch v. Gombos* (2000) 82 CA4th 352, 356, 98 CR2d 119]. However, if parties are arguing the meaning of an admission in front of the court, the usefulness of the admission has been lost. Thus, counsel must exercise great care in crafting both requests and responses.



Strategic Points--Propounding Party:

Parties commonly request admissions after other discovery is completed to determine which facts remain in dispute. However, admissions are useful at the beginning of a case to establish early whether a party intends to dispute a fact.

Admissions are also an effective means of creating a basis for impeachment in a later deposition or trial.

Responses to admissions can be used to lay a foundation for a summary judgment motion [see DeMeo, *California Deposition and Discovery Practice*, § 63.51 (Matthew Bender)].

Admissions are useful for laying the foundation for documents to be admitted at trial by precluding disputes over authenticity (or quickly ending any such dispute).



Warning --Responding Party:

Respond within the required time period. Failure to respond can result in a court order deeming documents to be genuine or the facts true [see 12.28].

Take great care when drafting responses. Responses may be amended or withdrawn only with leave of court and only under specific conditions [see 12.32].



Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 196, Discovery: Requests for Admissions (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 63, Requests for Admission (Matthew Bender).

Requests for admission in federal cases, see Matthew Bender [(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, Methods of Discovery.



Cross References:

For requests for admissions in federal cases, see Moore's Federal Practice, Ch. 36, Requests for Admission (Matthew Bender 3d ed.); or 13 Bender's Forms of Discovery Treatise, Ch. 7, Physical and Mental Examination of Persons (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral Overview



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Chapter 12 Requests for Admissions
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12.03 CHECKLIST: Making Requests for Admissions.

☐ Determine timing:

Plaintiff may serve requests beginning later of more than 10 days after:

☐ Responding party has answered or

☐ Responding party was served.

Exceptions:

- Five days if unlawful detainer, forcible entry, or forcible detainer; or
- In any case, if requesting party obtains order authorizing early service.

Defendant may begin to serve requests at any time.

Authority:

CCP § 2033.020

Discussion:

See 12.08

☐ Decide whether to file motion to shorten time to respond.

Authority:

CCP § 2033.250

Discussion:

See 12.04[3]

☐ Determine how many requests you may make:

☐ In unlimited civil case:

☐ Make as many requests relating to genuineness of documents as needed.

Restriction:

As justice requires to protect responding party from annoyance, embarrassment, oppression, or undue burden and expense.

☐ Make up to 35 requests that do not relate to genuineness of documents.

☐ If more than 35 are needed, evaluate:

☐ How many are needed, and

☐ Why complexity or quantity of issues require the additional requests.

☐ Prepare *CCP § 2033.050* Declaration for Additional Discovery to serve with the requests.

Authority:

CCP § 2033.030-2033.050

Discussion:

See 12.07[2]

Form:

See 12.37 (declaration for additional discovery)

☐ In limited civil case:

☐ Evaluate desired requests for admissions in light of restriction to total of 35 of all of the following:

☐ Requests for admissions.

☐ Interrogatories.

- ☐ Demands to produce documents or things under *CCP* §§ 2031.010-2031.510.

Authority:
CCP §§ 91, 94

Discussion:
See 12.07[3]

- ☐ Consider seeking relief from the limitation by:

- ☐ Stipulation.
- ☐ Noticed motion.

Grounds:

Inability to prosecute or defend action effectively without the additional discovery.



Warning:

Court will look to good faith use of existing discovery tools and whether party has attempted to settle issue by stipulation or in other ways short of formal discovery.

Authority:
CCP § 95

Discussion:
See 12.07[c]

- ☐ Prepare Request for Admissions:

- ☐ Check Format:

- ☐ Numbering.
- ☐ Caption.
- ☐ Proper framing of questions.
- ☐ Full and complete questions.
- ☐ No subparts, compound, conjunctive or disjunctive requests.
- ☐ No preface.

☐ Follow special treatment for defined terms.

☐ Attach documents.

Authority:
CCP § 2033.060

Discussion:
See 12.10

Forms:
See 12.35 (California Judicial Council Form DISC-020), 12.36 (drafted form)

☐ Serve copies of request on:

☐ Responding party; and

☐ All parties who have answered in the action.

Authority:
CCP § 2033.070

Discussion:
See 12.11

☐ Calendar to receive responses in 30 days.

Exception:
5 days for unlawful detainer, forcible entry, and forcible detainer actions. In any case, as otherwise ordered by court.

Authority:
CCP § 2033.250

Discussion:
See 12.16

☐ Retain original of requests with proof of service and when received, responses.

☐ If desired, destroy original requests and responses six months after final disposition of the action.

Exception:
Retain as ordered by court if motion to preserve originals for longer period for good cause is granted.

Authority:
CCP § 2033.270

Discussion:

See *12.13*

Legal Topics:

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Chapter 12 Requests for Admissions
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12.04 Options and Strategies for Propounding Party.

12.04[1] Consider Early Requests for Admissions.

12.04[1][a] Determine Facts in Dispute Early. You may be able to narrow down the disputed issues of a case early, enabling you to focus efforts on the important issues. It can be an effective tool if the issues of a case are straightforward and the facts are uncomplicated.



Strategic Point:

Requests for admissions can be used effectively if counsel has a clear understanding of the proof needed for each element of a cause of action or defense asserted by that party. One effective way to design a request for admissions is to review the applicable jury instructions and identify the facts needed to support each element of a claim or defense. The request for admissions should be short and to the point, and without ambiguity. Often, if served early, an opposing party may not recognize the significance of an admission. Service of requests for admissions early in the litigation may also entitle your client to a larger recovery of expense if required to prove facts that have been denied.

12.04[1][b] Nail Down Admissions of Elusive Party. Early requests can be a very effective tool in nailing down a party to a position early in a case. Doing so can be useful in both planning the case strategy, but also, if the party denies a fact you later prove, that party may be responsible for the costs incurred in proving the fact [see CCP § 2033.420, discussed in 12.34].

12.04[1][c] Establish Facts About Relevant Documents. Admissions are particularly useful to authenticate documents. They can also be useful to establish who sent a document (and when) and who received a document (and when).



Strategic Point:

If you intend to use the admissions for the purpose of summary adjudication or summary judgment

motions, they must be served early in order to have sufficient time under the lengthy notice requirements for those motions.

12.04[2] Send Form Interrogatories Along With Request. In unlimited civil cases, always accompany the Requests for Admissions with California Judicial Council Form DISC-001 Form Interrogatories, checking Question 17.1. This interrogatory requires the responding party to state facts, declare witnesses, and identify documents utilized in each response that is not an unqualified admission.



Cross Reference:

Form, see *Ch. 9, Interrogatories*, § 9.33.

12.04[3] Consider Motion to Shorten Time to Respond to Requests for Admissions. On motion, the requesting party may request the court to order the responding party to respond to the requests for admissions sooner than 30 days from service of the requests [*CCP § 2033.250*].



Warning--Anticipate Approaching Discovery Cut Off:

A party may want to consider a motion shortening time for response if the discovery cut off date is close [*see 12.08[3]*] to allow time to file a motion to compel further responses or other discovery law and motion matter.



Warning:

Given a discovery cut-off date of thirty days before trial and a motion cut-off date of fifteen days before trial if response date is the thirtieth day one cannot file a timely motion. *CCP § 1005* currently provides for 16 court days' notice (plus five days if served by mail; plus 10 days if mailed outside the state; plus 20 days if mailed outside the United States; plus two days if served by facsimile or overnight mail). The 15-day motion cut-off period was enacted when a discovery motion required only 10 days' notice (plus five days for mailing).



Cross Reference:

Form, see *California Forms of Pleading and Practice*, Ch. 196, *Discovery: Requests for Admissions*, § 196.62A (*Matthew Bender*).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.05 Matters Subject to Requests for Admissions.

12.05[1] Dictated by Statute. Any party may serve a written request for any other party to admit [CCP § 2033.010]:

- The genuineness of documents.
- The truth of a specific fact.
- An opinion relating to a specific fact.
- An application of law as set out specifically in the request.

12.05[2] May Relate to Matter in Controversy. The request may relate to a matter in controversy [CCP § 2033.010].

12.05[3] Must Be Relevant and Not Privileged. A request for admissions may relate to any non-privileged matter that is relevant to the subject matter or reasonably calculated to lead to admissible evidence [CCP §§ 2017.010, 2033.010; *Cembrook v. Superior Court* (1961) 56 C2d 423, 429, 15 CR 127, 364 P2d 303 (prior law)].



Cross Reference:

For detail, see Ch. 2, Scope of Discovery.

12.05[4] Matter May Be Complex. A request for admissions may address complex facts [*Cembrook v. Superior Court* (1961) 56 C2d 423, 429, 15 CR 127, 364 P2d 303].

12.05[5] Subject to Protective Orders. Requests for admissions may be the subject of protective orders when the requests are unreasonably cumulative, duplicative or unduly burdensome or expensive [CCP §§ 2019.030, 2033.010].



Cross Reference:

Discussion, see 12.26.

12.05[6] Subject to Court Order on Sequence and Timing. Requests for admissions may be subject to a court order establishing the sequence and timing for the convenience of the parties and witnesses and in the interests of justice [*CCP* §§ 2019.030, 2033.010].



Cross Reference:

See Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:

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12.06 Direct Requests to Other Parties.

Requests for admissions are directed to other parties to the action [*CCP* § 2033.020]. It is unclear whether *CCP* § 2033.010 *et seq.* allows a party to serve requests for admissions on a cross complainant [*Shepard & Morgan v. Lee & Daniel, Inc.* (1982) 31 C3d 256, 259, 182 CR 351, 643 P2d 968 (defendant's denial to plaintiff's request not binding on defendant on its cross-complaint for indemnity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.07 Number of Requests Is Regulated.

12.07[1] Number Is Different for Unlimited and Limited Civil Cases. Cases in California trial courts are classified as unlimited or limited civil cases. Limited civil cases generally, involve disputes in which the amount or value of property in controversy is \$25,000 or less. In addition, certain types of relief, such as a permanent injunction, are not available in limited civil cases unless otherwise authorized by statute [*see CCP §§ 85-86.1, 580(b)*]. All other cases are unlimited civil cases [*see CCP § 88*].

Most limited civil cases are subject to the economic litigation rules in *CCP § 90 et seq.* These rules include the restrictions on the number of discovery requests, *discussed in 12.07[3]* [*see CCP §§ 94, 95*].

➡ **Cross Reference:**

Detailed discussion of what constitutes a limited civil case, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

12.07[2] Unlimited Civil Cases.

12.07[2][a] Thirty-Five Requests Not Related to Genuineness of Documents Are Allowed As Matter of Right. A party is entitled, as a matter of right, to ask another party to admit or deny no more than 35 matters that do not relate to the genuineness of a document [*CCP § 2033.030*]. A party may serve a total of 35 requests for admission on each party in the case. If a party needs to make more than 35 requests, the party must attach a declaration for additional discovery to the requests [*CCP §§ 2033.040, 2033.050*].

California Judicial Council Form DISC-020 Requests for Admission count against this total [*CCP § 2033.030*].

12.07[2][b] Declaration for Additional Discovery Allows More Than 35 Requests. A party may request more than 35 admissions by attaching a declaration for additional discovery to the request stating that the number of requests is warranted by the complexity or the quantity of the existing and potential issues in the particular case [*CCP §§ 2033.040, 2033.050*].

If the responding party files a motion for a protective order claiming the number of requests is not warranted, the

requesting party will have the burden to justify the additional requests [CCP § 2033.040].



Strategic Point--Propounding Party:

CCP § 2033.050 sets out a form of declaration for additional discovery. Many attorneys simply follow the statutory form. However, a pro forma declaration may not be adequate when attached to a large number of requests. Instead of just repeating the statutory standard, be specific as to why the number of requests is warranted. If accurate, point out that although the total number is large they should not take long to answer because all relate to a few subjects each request is simple. For example, all relate to the trail followed by a limited number of documents. A declaration stating specific reasons may convince opposing counsel to go ahead and answer the requests without the need to convince the judge. If the matter goes to the judge, the declaration with specifics will likely be better received by the judge than a pro forma.



Warning--Some Response Required:

If a declaration is served with the request, the responding party must answer the additional questions or file a motion for a protective order. If the responding party fails to respond to the additional requests, the court may deem those issues admitted [see CCP §§ 2033.040, 2033.080(b)(2), 2033.280].



Cross References:

Form of declaration, see 12.37.

Discussion of protective orders, see 12.26.

Discussion of responses and number of questions, see 12.19.

Discussion of motion to deem matters admitted, see 12.28.

12.07[2][c] Requests Related to Genuineness of Documents Are Not Restricted to Specific Number. In an unlimited civil case, the only restriction on the number of requests regarding genuineness of documents is as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [CCP § 2033.030(c)].

12.07[3] Limited Civil Cases.

12.07[3][a] Amount of Discovery Is Substantially Restricted. In limited civil cases, a party is limited to any combination of 35 of the following forms of discovery [CCP §§ 91, 94(a)]:

- Interrogatories under CCP § 2030.010 *et seq.* [see Ch. 9, Interrogatories];
- Demands to produce documents or things under CCP § 2031.010 *et seq.*;
- Requests for Admission (with no subparts) under CCP § 2033.010 *et seq.*

A party may be relieved of these strict limits on noticed motion.

Exception:

These limitations do not apply to small claims or unlawful detainer cases [CCP § 91(a), (b)].

 Cross Reference:

Demands for inspection, see Ch. 10, Inspection of Documents, Tangible Things, and Land.

Relief from discovery limits, see 12.07[3][b].

12.07[3][b] Party May Move to Withdraw Case From Restrictions for Impracticability. A party may make a noticed motion to withdraw the case from these restrictions on the ground that it is impractical to prosecute or defend the action within the limitations of the economic litigation rules of *CCP* §§ 90-100 [*CCP* § 91(c)].

Distinguish:

Without withdrawing the case from the restrictions altogether, a party may seek additional discovery under *CCP* § 95, discussed in 12.07[3][c].

Drawback:

Withdrawing the case from the economic litigation provisions will free all parties from the restrictions on pleadings and discovery. The party's needs and potential for the other party or parties to run up costs need be evaluated to ensure that this will not ultimately work to the disadvantage of the moving party. It may be more useful to move for specific additional discovery under *CCP* § 95.

 Cross Reference:

Discussion/form, see *California Forms of Pleading and Practice*, Ch. 345A, *Limited Civil Cases*, § 345A.102 (*Matthew Bender*).

12.07[3][c] Party May Move to Allow Additional Discovery. A party may seek authority to conduct specific further discovery by noticed motion. The grounds are that the party will be unable to prosecute or defend the action effectively without the additional discovery [*CCP* § 95].

Distinguish:

Complete withdrawal from the limitations applicable to limited civil cases under *CCP* §§ 90-100, discussed in 12.07[3][b].

 Cross Reference:

Discussion/form, see Ch. 1, Strategy and Planning.

Legal Topics:

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12.08 Timing of Requests.

12.08[1] Plaintiff May Request Without Leave of Court After Service of Summons or Appearance.

12.08[1][a] General Rule Is 10 Days After. A plaintiff may make requests for admissions by a party without leave of court beginning the earlier of 10 days after service of summons on, or appearance by, the party [*CCP* § 2033.020(b)].



Strategic Point--Plaintiff: Fast Focus for Lower Costs:

Propounding requests promptly may help define disputed issues so that plaintiff's resources can be focused on the truly disputed issues in the case.

Judge's Perspective:

In insurance coverage litigation, requests for admissions can be quite beneficial in both the authentication of a policy or policies and pinning down the operative policy language itself. As strange as it may seem, in many instances the policy language itself is disputed in separate statements presented in summary adjudication motions.

12.08[1][b] Exception Is Five Days in Unlawful Detainer. In unlawful detainer, forcible entry, and forcible detainer cases, a plaintiff may make requests for admissions by a party without leave of court beginning the earlier of five days after service of the summons on, or appearance by the party [*CCP* § 2033.020(c)].



Cross Reference:

Timing of requests for admission in unlawful detainer cases, see *Matthew Bender [(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][d].

12.08[1][c] May Make Earlier Request With Leave of Court. A plaintiff may move, with or without notice, for leave of court to make requests at an earlier time. The plaintiff must demonstrate good cause [*CCP* § 2033.020(d)].



Strategic Point--Plaintiff: Urgent Admissions:

Consider seeking leave to make requests earlier if you are filing a complaint and seeking a temporary restraining order. Early requests for admissions may help clarify issues for the hearing on the order to show cause on the TRO. Join with a motion to shorten the time for response so that the responses will be due a few days before the hearing.



Cross Reference:

Form, see *California Forms of Pleading and Practice*, Ch. 196, *Discovery: Requests for Admissions*, § 196.62A (Matthew Bender).

12.08[2] Defendant May Request at Any Time. A defendant may make a request for admissions at any time without leave of court [CCP § 2033.020(a)].



Strategic Point--Defendant: Evaluate and Wait:

Evaluate the case carefully before drafting requests for admissions. Review plaintiff's discovery requests to try to identify what points of the case the plaintiff considers to be weak, and target those areas with your requests for admissions.

12.08[3] Response Must Be Due and Any Motions Heard by Discovery Cut-Off Date. Discovery must be completed on or before the 30th day prior to the date initially set for trial. All motions regarding discovery must be heard on or before the 15th day prior to the date initially set for trial [CCP § 2024.020(a)]. Discovery is "complete" on the day a response is due [CCP § 2024.010].

Exception:

Discovery has an earlier imposed cut off if case is judicially arbitrated [CCP § 2024.040].



Cross Reference:

More detail, see Ch. 1, *Strategy and Planning*, 1.17.

Legal Topics:

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12.09 Requests Cannot Be Combined With Other Types of Discovery in One Document.

A single document may not combine requests for admission with any other discovery method [*CCP* § 2033.060(h)].

Legal Topics:

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12.10 Format of Request.

12.10[1] Judicial Council Form Is Not Mandatory. The Judicial Council has produced a skeletal form for use for requests for admissions [California Judicial Council Form DISC-020]. The form is basic and not designed for any specific type of case. The form is not mandatory.



Strategic Point--Draft Your Own Request:

Requests for admissions should be carefully drawn up and considered. The better practice is to create and use your own form for the request.

Judge's Perspective:

The best way for counsel to approach the use of requests for admissions is to carefully prepare a tailored set (very few in number) to emphasize on any motion to compel that these requests were and are surgical in nature and not just boiler plate forms. Form requests for admissions will simply invite evasiveness and objections.



Cross References:

Illustration of Judicial Council Form, see 12.35.

Drafted form of request, see 12.36.

12.10[2] Number Sets of Requests Consecutively. Each set of requests must be numbered consecutively [CCP § 2033.060(a)].

Case Management--Track Numbers in Multiple Requests:

Although not required, if the first set of requests for admissions does not exhaust the limit, begin set two with the number you left off with in set one. For example, if set one contains requests 1-3, begin set two with 4. This way you will not inadvertently exceed the limit of requests.

12.10[3] Identify Parties and Set Numbers in Caption. The first paragraph, immediately below the title of the case, must identify [CCP § 2033.060(b)]:

- The party requesting the admissions.
- The set number.
- The identity of the responding party.

12.10[4] Frame Requests As Statements, Not Questions. Requests for admissions must be in the form of statements of facts. If framed as questions, they are interrogatories [*Lieb v. Superior Court* (1962) 199 CA2d 364, 367, 18 CR 705].



Warning--Ask About Historical Facts, Not Current Knowledge:

Phrase statements as historical facts to avoid limiting the admission to the party's knowledge at the time the admission was made to preclude the party from introducing later discovered evidence to the contrary. Avoid phrases like "Admit that you *have* no evidence ..." [see *Burch v. Gombos* (2000) 82 CA4th 352, 356, 98 CR2d 119].



Strategic Point--Simplicity Is a Virtue:

Keep requests as simple and straightforward as possible to avoid a denial.

Example:

David Defendant was operating a blue 2002 Dodge, license number XXXXXX, at the time of the incident.

12.10[5] State Each Request Separately. Each request for admission in a set must be:

- Separately set forth and identified by letter or number [CCP § 2033.060(c)]; and
- Full and complete in and of itself [CCP § 2033.060(d)].

12.10[6] Do Not Use Subparts, Compound, Conjunctive or Disjunctive Requests. No request for admission may contain subparts, or a compound, conjunctive, or disjunctive request [CCP § 2033.060(f)].

Exception:

Requests developed and approved in the Judicial Council Form of Requests for Admissions [CCP §§ 2033.060(f), 2033.710-2033.740].

12.10[7] Do Not Include Any Preface. No preface or instruction may be included with a Request for Admissions [CCP §§ 2033.060(d), 2033.710 et seq.].

12.10[8] Capitalize Specially Defined Terms. Any term specially defined in a request for admission must be typed with all letters capitalized whenever the term appears [CCP § 2033.060(e)].

12.10[9] Attach Copies of Documents. A party requesting that the genuineness of a document be admitted must attach a copy of the document to the requests, and make the original of the document available for inspection by the responding party on demand [CCP § 2033.060(g)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.11 Serve Requests on All Appearing Parties.

The propounding party must serve a copy of the requests on the responding party and on all other parties who have appeared in the action [*CCP* § 2033.070].

Legal Topics:

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12.12 Do Not File Requests; Retain Original.

Requests for admissions are not filed with the court. The propounding party must retain the original documents pursuant to the retention policy discussed in 12.13 [CCP § 2033.270].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.13 Requesting Party Retains Original Papers.

12.13[1] Requesting Party Retains Responses; Retention Period. Neither the requests for admission nor the responses are filed with the court [*CCP* § 2033.270(a); *Cal Rules of Ct*, Rule 3.250(a)(10)].

The requesting party must keep the original of the requests for admission, with the original proof of service affixed, and the original of the sworn response until six months after final disposition of the action [*CCP* § 2033.270(b); *Cal Rules of Ct*, Rule 3.250(b)].

12.13[2] Originals May Be Destroyed After Retention Period. When the retention period has expired, the original requests and responses may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period [*CCP* § 2033.270(b)].

12.13[3] Related Papers Similarly Retained. A six-month retention period and comparable provisions for destruction also apply to agreements to extend time to respond, notices of the agreements, and declarations for additional discovery [*Cal Rules of Ct*, Rule 3.250(a)(7), (b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral Overview



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III. RESPONDING TO REQUESTS FOR ADMISSIONS

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12.14 CHECKLIST: Responding to Request.

☐ Calendar time for serving response:

Thirty days after service of requests unless shortened or extended.

Exception:

5 days if unlawful detainer, forcible entry, or forcible detainer.

Authority:

CCP § 2033.250

Exception--Extension for Manner of Service:

For service by mail, add: five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; 20 calendar days if either the place of mailing or the place of address is outside the U.S. For service by Express Mail, add two court days; for service by fax, add two court days. If service is by electronic transmission pursuant to a local court rule permitting electronic service, add two court days.

Authority:

CCP §§ 1013(a), (c), (e), 1010.6(a)(6), 2016.050

Discussion:

See 12.17

☐ Determine need for protective order, including extension of time to respond.

☐ Grounds are:

- ☐ Unwarranted annoyance;
- ☐ Embarrassment;
- ☐ Oppression; or
- ☐ Undue burden and expense.

☐ Relief available includes, but is not limited to, orders that:

- ☐ Party need not answer request or requests.
- ☐ Number of requests is unwarranted.
- ☐ Time to respond to request or requests be extended.
- ☐ Protect trade secrets and other confidential information.
- ☐ Some or all of responses be sealed.

Authority:

CCP § 2033.080

Discussion:

See 12.17, 12.26

☐ If seeking protective order:

- ☐ Make reasonable, good faith effort to resolve issue [*CCP § 2033.080*].
- ☐ Draft motion and notice of motion for protective order, with supporting declaration, and supporting memorandum.

Content Note:

Declaration must show attempt at informal resolution of issue.

- ☐ Draft proposed protective order.
- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.

- ☐ Calendar response and hearing dates.

Authority:

CCP §§ 2033.080, 2033.250

Discussion:

See 12.26[3]

Forms:

See 12.41 (motion and notice of motion for protective order), 12.42 (proposed protective orders)

- ☐ Determine responses, which may be:

- ☐ Admissions.
- ☐ Denials.
- ☐ Statements of lack of knowledge.
- ☐ Objections.

Authority:

CCP §§ 2033.210-2033.230

Discussion:

See 12.20

- ☐ Prepare response to requests for admissions.

Authority:

CCP § 2033.010 et seq.

Discussion:

See 12.23

Form:

See 12.38

- ☐ Sign and verify responses.

Authority:

CCP § 2033.240

Discussion:

See 12.24, 12.25

☐ Serve:

- ☐ Original response on propounding party.
- ☐ Copies of responses on all other parties who have answered in case.

Authority:

CCP § 2033.250

Discussion:

See 12.16

☐ If responses are being served late and include objections:

- ☐ Determine whether relief from waiver of objections is available.
- ☐ Grounds are:
 - ☐ Mistake.
 - ☐ Inadvertence.
 - ☐ Excusable mistake.
- ☐ Serve response that is in substantial compliance with requirements for responses.

Authority:

CCP § 2033.280

Discussion:

See 12.18[2]

- ☐ Draft motion and notice of motion for relief from waiver of objections, with supporting declaration and supporting memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file motion.
 - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

Authority:

CCP § 2033.280

Discussion:

See 12.19[2]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 12.43 (notice of motion and motion)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.15 Options and Strategy.

When a party receives a set of requests for admissions, the party's options are:

- To respond to all or part of them within 30 days [*CCP* §§ 2033.210-2033.250].



Cross Reference:

Discussion, see 12.16 -12.25.

- To seek a protective order as to all or part of them which [*CCP* § 2033.080]:

- ☐ Relieves the party from having to answer.
- ☐ Extends the time to answer.
- ☐ Protects confidential information.
- ☐ Otherwise eases undue burden and expense of answering.

Prerequisite:

Reasonable, good faith effort to resolve issue [*CCP* §§ 2033.080].



Cross Reference:

Discussion, see 12.26.

Distinguish--Objections vs. Protective Orders:

If objecting to an individual request for admission, a protective order is not necessary. Assert the objection in response to the individual request [Reps. Notes to Proposed Cal Civ. Discovery Act of 1986, Note to § 2033].



Cross Reference:

Discussion of objections, see *12.19[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsResponses



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III. RESPONDING TO REQUESTS FOR ADMISSIONS

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12.16 Time for Response.

12.16[1] General Rule Is to Serve Response Within 30 Days. Within 30 days after service of requests for admission the responding party must serve the original of the response on the requesting party, and a copy of the response on all other parties who have appeared [*CCP* § 2033.250(a)].

12.16[2] Exceptions.

12.16[2][a] Five Days in Unlawful Detainer. For unlawful detainer, forcible entry, and forcible detainer cases, the response must be served within five days [*CCP* § 2033.250(b)].



Cross Reference:

Timing of requests for admission in unlawful detainer cases, see *Matthew Bender [(R)] Practice Guide: California Landlord-Tenant Litigation*, 5.23[2][d].

12.16[2][b] As Shortened or Extended by Court. If, on motion, the court has shortened the time for response, or if, on motion, the court has extended the time for response, the time for responding will be altered accordingly [*CCP* § 2033.250].

12.16[3] Extensions Based on Method of Service.

12.16[3][a] Service by Regular Mail. For service of requests by mail, the time period for response is extended by five calendar days if the place of address and mailing is within California; 10 calendar days if either the place of mailing or the place of address is outside California but within the U.S.; and 20 calendar days if either the place of mailing or the place of address is outside the U.S. [*CCP* §§ 1013(a), 2016.050].

12.16[3][b] Service by Express Mail. For service of requests by express mail, the time period for response is extended by two calendar days [*CCP* §§ 1013(c), 2016.050].

12.16[3][c] Service by Fax. For service of requests by fax, the time period for response is extended by two calendar days [*CCP* §§ 1013(e), 2016.050].

12.16[3][d] Service by Electronic Transmission Pursuant to Local Court Rule. For service of requests by electronic transmission pursuant to a local court rule permitting such electronic service, the period for response is extended by two court days [*CCP* § 1010.6(a)(6)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.17 Time to Respond May Be Extended by Stipulation or Motion.

12.17[1] Parties May Stipulate.

12.17[1][a] Must Be in Writing. The propounding party and the responding party may agree to extend the time for service of a response to a set or part of a set of admission requests beyond the statutory period of 30 days (5 days in unlawful detainer forcible entry, and forcible detainer actions) set by *CCP* § 2033.250. The agreement may be informal, but must be confirmed in writing and specify the date to which the extension has been agreed [*CCP* § 2033.260].

➡ **Cross Reference:**

Form of stipulation, see 12.39.

12.17[1][b] All Types of Responses Allowed When Time Is Extended Unless Otherwise Agreed. Unless the parties' agreement expressly states otherwise, the responding party retains the right to respond by admitting, denying, stating lack of information, or objecting [*CCP* §§ 2033.220, 2033.260].

12.17[1][c] Responding Party Gives Notice of Extension. The responding party must give notice of the agreement to all other parties who were served with a copy of the request for admissions [*CCP* § 2033.260(d)].

➡ **Cross Reference:**

Form of notice, see 12.40.

12.17[2] Responding Party May Move for Extension. A responding party may seek an extension of time to respond to requests for admissions by filing a motion for a protective order [*CCP* § 2033.080(b)(3)].

➡ **Cross Reference:**

Discussion of protective orders, see 12.26.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.18 Effect of Failure to Answer Timely.

12.18[1] Objections Waived. If the responding party fails to serve a timely response, he or she waives any objection to the requests, including privilege or work product objections [*CCP* § 2033.280].

12.18[2] Responding Party May Move for Relief From Waiver. The court, on motion, may grant relief from the waiver if it determines that [*CCP* § 2033.280]:

- The responding party subsequently served a response that is in substantial compliance with *CCP* §§ 2033.210-2033.230; and
- The failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.



Cross References:

Requirements of *CCP* §§ 2033.210-2033.230, see 12.19[3] -12.22.

Form, see 12.43.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.53 (Matthew Bender)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.19 Response to Requests.

12.19[1] Determine Number of Requests Requiring Response in Unlimited Civil Case.

12.19[1][a] Number of Requests Re Genuineness of Documents Is Generally Unrestricted. The responding party must reply to all proper requests relating to the genuineness of documents [*CCP* § 2033.030(c)] unless a protective order is sought and granted.

► **Cross References:**

To determine whether a request is proper, see 12.05 -12.07.

To resist with a protective order, see 12.26.

12.19[1][b] Other Than Genuineness of Documents Only 35 Requests Allowed Absent Declaration for Additional Discovery. If a declaration for additional discovery has not been made, the answering party need only respond to the first 35 admission requests that do not relate to the genuineness of documents and object to the balance based on *CCP* § 2033.230(b) that the limit was exceeded [*CCP* § 2033.030(b)].

If a declaration for additional discovery has been made, the responding party must either answer the requests in full or seek a protective order [see *CCP* §§ 2033.050, 2033.080(b)(2)].

Judge's Perspective:

The safest course when counsel may be in doubt as to resisting is to seek a protective order.

► **Cross References:**

To determine whether a request is proper, see 12.05 -12.07.

To resist with a protective order, see 12.26.

12.19[2] Determine Number of Requests Requiring Response in Limited Civil Case. Unless the court allows additional discovery, a party is limited to any combination of 35 of the following [*CCP* §§ 91, 94(a), 95]:

- Requests for admissions.
- Interrogatories.
- Demands to produce documents or things.

Exception:

This limitation does not apply in unlawful detainer cases [CCP §§ 91, 94(a)].

Case Management--Keeping Track:

Because this limitation cuts across three discovery tools, counsel may wish to keep a separate document for internal use itemizing the dates of each discovery request or set of requests and a running total of the number of requests made.

12.19[3] Responses.

12.19[3][a] Must Be in Writing, Under Oath. The responding party must answer in writing under oath separately to each request [CCP § 2033.220].

12.19[3][b] Must Be Straightforward and Complete. Each answer in the response must be as complete and straightforward as the information reasonably available to the responding party permits [CCP § 2033.220(a); see *Collisson & Kaplan v. Hartunian* (1994) 21 CA4th 1611, 1617-1618, 26 CR2d 786 (improper responses)].

12.19[3][c] May Admit, Deny, or Assert Lack of Information. The possible responses are any combination of the following [CCP § 2033.220(b)]:

- Admit so much of the matter in the request that is true.
- Deny so much of the matter in the request that is untrue [see 12.19[4]].
- Specify so much of the matter in the request as to which the responding party lacks sufficient information or knowledge to either admit or deny [see 12.19[5]].

**Trap--Implications Within Requests:**

Some requests for admissions have many implications that should not be admitted even though the request includes facts that should be admitted. This is a time to parse the request and admit one or more facts within the request and to deny the troublesome remainder.

12.19[4] Stating a Denial. In addition to an explicit denial, a statement "as framed, denied" qualifies as a denial [*Smith v. Circle P Ranch Co.* (1978) 87 CA3d 267, 275, 150 CR 828].

12.19[5] Asserting Lack of Information.

12.19[5][a] Reasonable Inquiry Is Required. A responding party who states lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, must state in the answer that he or she conducted a reasonable inquiry and that the information known or readily obtainable is not sufficient to enable an admission [CCP § 2033.220(c)]. Mere lack of personal knowledge is not enough to justify a refusal to answer [*Lindgren v. Superior Court* (1965) 237 CA2d 743, 746, 47 CR 298 (decided under prior law)]. However, information gained from a third party does not bind the party, who may still deny based on information and belief [*Holguin v. Superior Court* (1972) 22 CA3d 812, 819, 99 CR 653].

Reasonable Inquiry:

Facts in the possession of the party's expert witness may be obtainable under this standard [*Chodos v. Superior Court* (1963) 215 CA2d 318, 30 CR 303].

Unnecessary Inquiry:

A party is not required to retain investigators in a foreign country in order to admit or deny a request [*Lindgren v. Superior Court* (1965) 237 CA2d 743, 748, 47 CR 298 (decided under prior law)].

12.19[5][b] Failure to Investigate May Result in Sanctions. A party may be subject to sanctions for failure to admit a fact based on lack of information if sources of information were available and the party failed to do a reasonable investigation [see CCP § 2033.420; *Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 510, 224 CR 838 (sanction where denial was contradicted by highway patrol report and counsel assumed report was ambiguous and did not contact officers who prepared report)].

**Cross Reference:**

Discussion of sanctions, see 12.34.

12.19[6] Asserting Objections.

12.19[6][a] State Ground and Answer Unobjectionable Parts. An objecting party must clearly state for each request the specific ground for an objection. If the objection is based privilege, the particular privilege must be clearly stated. If the objection is based on CCP § 2018.010 *et seq.* work product protection, that claim must be expressly asserted [CCP § 2033.230(b)].

The responding party must answer any unobjectionable requests or portion of requests [CCP § 2033.230(a)].

12.19[6][b] Grounds for Objections. Allowable objections to individual requests include:

- Improper form (for example, subparts, compound) [CCP § 2033.060; see 12.10[2]];
- Excessive number [CCP § 2033.030; see 12.07]; or
- Irrelevant [see Ch. 2, *Scope of Discovery*, 2.23].

Judge's Perspective:

The ability to object to requests for admissions is very limited. Counsel should seriously consider not objecting to this discovery device. Objections interposed to requests for admission will simply make the objecting party look evasive. Improper objections expose counsel to a finding by the court that the objections interposed are without substantial justification.

**Strategic Point:**

When one wants to ensure that one's objections are proper, there are reasonable grounds to object when the requests for admissions are convoluted, compound or ambiguous. One must do so in a way that does not lead a court to believe that a party is playing games, but objections or lengthy responses parsing out a request for admission and explaining the response are appropriate in certain circumstances, given the edict of CCP § 2033.220, which requires responses to be straightforward, but allows parsing out of the request when necessary.

12.19[6][c] Impermissible Objections. The following objections are not permitted:

- Calls for opinion or conclusion [*CCP* § 2033.010];
- Calls for answers to controversial matters involving complex facts [*CCP* § 2033.010];
- Request includes matters that cannot be clearly admitted or denied [*CCP* § 2033.220];
- Request is ambiguous or repetitious, although the court may sustain the objection on an individual basis [*Cembrook v. Superior Court* (1961) 56 C2d 423, 430, 15 CR 127, 364 P2d 303 (decided under prior law)];
- Request applies law to fact [*CCP* § 2033.010].



Strategic Point:

Counsel may, under certain circumstances, wish to explain an ambiguity in their answer to encourage the court to recognize that an objection has been properly made.



Cross References:

To determine whether a request is proper, see 12.05 -12.07.

To resist with a protective order, see 12.26.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.20 Effect of Admission.

12.20[1] Matter Is Conclusively Established. If a party admits any matter in response to a request for admission, that matter or fact is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission [*CCP* § 2033.410; *Kelly v. New W. Fed. Sav. (1996)* 49 *CA4th* 659, 672, 56 *CR2d* 803 (dicta; comparing effect of admission to effect of depositions and interrogatories)].

12.20[2] Later Acquired Evidence May Not Be Admissible. Even if later discovered evidence contradicts the admission, the party will not be allowed to testify or produce evidence contrary to the admission at trial unless:

- The court grants leave to withdraw or amend the response [*CCP* §§ 2033.300, 2033.410] or
- The admission was limited to the knowledge at the time it was made [*Burch v. Gombos (2000)* 82 *CA4th* 352, 356, 98 *CR2d* 119 ("Admit that you *have* no evidence ... ")].

➡ **Cross Reference:**

Discussion of withdrawal or amendment of admission, see 12.32.

12.20[3] Binds Party for Pending Action Only. A responding party's admissions are binding only on that party and only for the purpose of the pending action [*CCP* § 2033.410].

"Pending action" may not extend to a party's cross-complaint against a third party [*Shepard & Morgan v. Lee & Daniel, Inc. (1982)* 31 *C3d* 256, 259-262, 182 *CR* 351, 643 *P2d* 968 (denial did not bind party on cross-complaint for indemnity; decided under prior law)].

12.20[4] Court Determines Scope and Effect. The trial court has discretion to determine the scope and the effect of an admission. An admission may be misleading. If the admission may be susceptible of more than one meaning, the court has discretion to determine its scope and effect so that it accurately reflects what facts are admitted in light of other evidence [*Burch v. Gombos (2000)* 82 *CA4th* 352, 356, 98 *CR2d* 119 ; *Fredericks v. Kontos Indus., Inc. (1987)* 189 *CA3d* 272, 277-278, 234 *CR* 395].

The trial court retains broad discretion related to the admissibility and relevance of evidence relating to admitted facts. Evidence that explains, but does not contradict, the admitted fact may be admissible [*Fredericks v. Kontos Indus., Inc.* (1987) 189 CA3d 272, 278, 234 CR 395].

Example:

Where party admitted agreeing to make progressive payments according to documents relating to a construction project, court properly admitted evidence explaining that payments were dependent on other party performing work [*Fredericks v. Kontos Indus., Inc.* (1987) 189 CA3d 272, 277, 234 CR 395].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsEffect



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12.21 Party Has No Ongoing Duty to Update Response.

Absent mistake, inadvertence, or excusable neglect in the original response, there is no ongoing duty to update responses [*Burch v. Gombos* (2000) 82 CA4th 352, 359, 98 CR2d 119].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.22 Format of Response.

The first paragraph, immediately below the title of the case, must identify [CCP § 2033.210(c)]:

- The responding party;
- The set number; and
- The requesting party.

Each answer or objection in the response must bear the same identifying number or letter and be in the same sequence as the corresponding request. The text of the particular request need not be repeated [CCP § 2033.210(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponses



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12.23 Signature.

12.23[1] Failure to Sign Under Oath Treated As Failure to Respond. The responding party must sign the response under oath, unless the response contains only objections [CCP § 2033.240(a)].

Failure to sign a response under oath may be treated the same as failure to respond [*Appleton v. Superior Court* (1988) 206 CA3d 632, 635-636, 253 CR 762 (requests deemed admitted; denial of sanctions reversed)].



Cross Reference:

Consequences of failure to respond, see 12.28.

12.23[2] Attorney Signs Objections. The responding party's attorney must sign any response that contains an objection [CCP § 2033.240(c)].



Warning:

Neither the attorney, nor anyone on the attorney's staff should ever verify the response, even if it includes objections. CCP § 2033.240 requires the party to "sign the response under oath, unless the response contains only objections." The same section requires the attorney to "sign any response that contains an objection." Since the attorney is not required to verify, the attorney should not put himself or herself or any staff member in the awkward and dangerous situation of verifying a paper when lacking first hand knowledge of the facts underlying the paper's content.

12.23[3] Officer or Agent Signs on Behalf of Entity. If the responding party is a public or private corporation, or a partnership or association or governmental agency, one of its officers or agents must sign the response under oath on the party's behalf [CCP § 2033.240(b)].



Trap--Potential Loss of Attorney-Client Privilege:

If the officer or agent signing the response on behalf of a party is an attorney acting in that capacity for the party, the signing waives any lawyer-client privilege and any CCP § 2018.010 *et seq.* work product

protection during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response [*CCP* § 2033.240(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.24 Responses Must Be Verified.

Unverified responses are equivalent to no response and are subject to the same penalties [*Allen-Pacific, Ltd. v. Superior Court* (1997) 57 CA4th 1546, 1550-1551, 67 CR2d 804 (requests deemed admitted when response not verified), disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260, 987 P2d 727 (court may relieve responding party from deemed admissions; also involving requests deemed admitted because response not verified)].

The party must verify the responses. The attorney may not verify responses for the responding party [*Steele v. Totah* (1986) 180 CA3d 545, 550, 225 CR 635 (decided under prior law)].



Cross Reference:

Consequences of failure to respond, see 12.18, 12.28.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.25 Co-Parties Joining in Response Must Make Separate Verifications.

Where identical requests for admissions are served on co-parties, one response may be submitted; however, each party must submit a separate verification [*Tobin v. Oris* (1992) 3 CA4th 814, 829, 4 CR2d 736 , disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260, 987 P2d 727].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.26 Obtain Protective Order.

12.26[1] Objective and Grounds. A protective order protects any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The moving party must show good cause for the order [*CCP* § 2033.080]. Courts are authorized to grant relief "in light of the equities of the case and the interests of justice" [*Brigante v. Huang* (1993) 20 CA4th 1569, 1588, 25 CR2d 354 , disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260, 987 P2d 727].

Example:

When a set of requests for admission have been propounded, a protective order is appropriately based on oppression if:

- The defendant cannot be located;
- The court is satisfied that the defendant is not evading the lawsuit or the discovery demand and is unaware of them; and
- Reasonable efforts have been made and are ongoing to apprise the party of the litigation and the discovery obligations [*Brigante v. Huang* (1993) 20 CA4th 1569, 1583, 25 CR2d 354 , disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 C4th 973, 983 n12, 90 CR2d 260, 987 P2d 727].

12.26[2] Relief Available in Protective Order. A protective order may encompass any order justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*CCP* § 2033.080]. It may include, but is not limited to, one or more of the following directions:

- That a party need not answer all or part of the set of requests [*CCP* § 2033.080(b)(1)].
- That, contrary to the representations made in the declaration for additional discovery, the number of admission requests is unwarranted [*CCP* § 2033.080(b)(2); *see* 12.07].

- That the time to respond to the set or to particular requests be extended [*CCP* § 2033.080(b)(3); see 12.08].
- That a trade secret or other confidential research, development, or commercial information does not have to be admitted or admitted only in a certain way [*CCP* § 2033.080(b)(4)].
- That some or all of the answers be sealed and thereafter subject to opening only by court order [*CCP* § 2033.080(b)(5)].

12.26[3] Procedure.

12.26[3][a] Make Motion Promptly. After receiving a request for admissions, the responding party must promptly move for any desired protective order [*CCP* § 2033.080(a)].



Strategic Point--Responding Party: Shorten Time for Hearing Protective Order and Extend Time to

Respond to Requests:

In addition to filing the motion for a protective order, file a motion to shorten time for the hearing on the motion [*CCP* § 1005; *Cal Rules of Ct*, Rule 3.1300(b); for a form, see *Ch. 4, Law and Motion Procedure*, 4.58]. A motion for any protective order should include a motion for a direction extending the time to respond to the requests, under *CCP* § 2033.080(b)(3) to allow time to respond should the motion be denied.

12.26[3][b] Attempt at Informal Resolution Is Required. Before moving for a protective order, the party must make a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The motion must be accompanied by a declaration stating facts showing that attempt [*CCP* § 2033.080(a)].

12.26[3][c] Motion Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct*, Rule 3.1112(a)];
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [*CCP* §§ 2002, 2003, 2015.5, 2033.080];
- A memorandum in support of the motion [*Cal Rules of Ct*, Rule 3.1112(a)]; and
- A separate statement with all information necessary to understand each discovery request and all responses to it that are at issue [*Cal Rules of Ct*, Rule 3.1345(a), (c)].



Cross References:

Forms, see 12.41, 12.42 and separate statement in *Ch. 4, Law and Motion Procedure*, 4.56.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form for memorandum supporting motion, see *California Points and Authorities*, *Ch. 86, Discovery: Requests for Admissions*, § 86.30 (Matthew Bender).

12.26[4] Burden of Proof Is on Moving Party Unless Issue Is Number of Requests. If the motion is based on the fact that the number of requests is unwarranted, the propounding party will have the burden to justify the number of requests [*CCP* § 2033.040(b)]. Otherwise, the burden is on the moving party [see *Evid C* §§ 500, 550].

12.26[5] Court May Qualify Denial of Motion. If the motion for a protective order is denied in whole or in part, the court may order that the responding party provide or permit the discovery on terms and conditions that are more just [*CCP* § 2033.080(c)].

12.26[6] Court Is Generally Required to Sanction Losing Party. The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless the court determines that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2033.080(d)].



Cross Reference:

Discussion, see Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryProtective Orders



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Chapter 12 Requests for Admissions
IV. DEEMING MATTERS ADMITTED AFTER FAILURE TO RESPOND

1-12 MB Practice Guide: CA Civil Discovery 12.27

12.27 CHECKLIST: Deeming Matters Admitted.

12.27[1] Moving Party's Checklist.

- ☐ If responses are not received:
 - ☐ Draft motion and notice of motion to deem matters admitted and to impose sanctions, with supporting declaration and memorandum.
 - ☐ Draft proposed order.
 - ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.
 - ☐ Calendar response and hearing dates.

Authority:

CCP § 2033.280

Discussion:

See 12.28

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Form:

See 12.44

12.27[2] Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.
- ☐ Draft proposed response that substantially complies with requirements for responses.
- ☐ Serve response before hearing date for motion to deem matters admitted.
- ☐ Determine whether moving party will drop motion, if not:
 - ☐ Respond to motion with copies of response and proof of service of response.
 - ☐ Follow standard noticed motion procedure.
- ☐ If response includes objections, prepare motion for relief from waiver of objections.

Authority:

CCP § 2033.280

Discussion:

See 12.18[2] (relief from waiver), 12.28[3] (service of responses)

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Forms:

See 12.38 (responses to requests for admission), 12.43 (relief from waiver of objections)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect



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Chapter 12 Requests for Admissions
IV. DEEMING MATTERS ADMITTED AFTER FAILURE TO RESPOND

1-12 MB Practice Guide: CA Civil Discovery 12.28

12.28 Motion to Deem Matters Admitted or Documents Genuine.

12.28[1] Available When No Response Was Made.

12.28[1][a] Motion. If a party fails to respond to a request for admissions, the requesting party may move the court for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted and for *CCP* § 2023.030 monetary sanctions [*CCP* § 2033.280(b)].

Distinguish--No Meet and Confer:

Unlike other motions, there is no need to "meet and confer" before filing this motion as there was a failure to respond, not just inadequate responses.

12.28[1][b] Required Motion Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case [*CCP* §§ 2002, 2003, 2015.5]; and
- A memorandum in support of the motion [*Cal Rules of Ct, Rule 3.1112(a)*].

Distinguish--No Separate Statement:

Because the motion is based on failure to respond, the moving party is not required to provide a *Cal Rules of Ct, Rule 3.1345* separate statement [*Cal Rules of Ct, Rule 3.1345(b)*].

➡ Cross References:

Form, see 12.44.

Form for memorandum supporting motion, see *California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.50 (Matthew Bender)*.

12.28[2] Sanctions Are Mandatory. Imposition of a monetary sanction under *CCP* § 2023.030 is mandatory for the party or attorney, or both, whose failure to serve a timely response necessitated the motion to deem facts admitted [*CCP* § 2033.280(c); *Appleton v. Superior Court* (1988) 206 CA3d 632, 635-636, 253 CR 762 (unlike *CCP* § 2033.290(d) court has no discretion to deny sanctions under *CCP* § 2033.280(c); reversing denial)].

12.28[3] Motion to Be Granted If No Response Before Hearing. The court must make the order, unless it finds that the responding party, before the hearing on the motion, served a proposed response to the requests for admission that is substantially compliant with *CCP* § 2033.220 [*CCP* § 2033.280(c)].

 Cross References:

Discussion of relief from deemed admissions, see 12.32.

Discussion of requirements of *CCP* § 2033.220, see 12.19[3].

12.28[4] Order Is Equivalent to Party Having Admitted All Requests. If the court grants the motion to deem facts admitted, it is as if the responding party has admitted "the truth of all matters contained therein" [*Wilcox v. Birtwhistle* (1999) 21 C4th 973, 979, 90 CR2d 260, 987 P2d 727].

 Cross Reference:

Discussion of effect of admissions, see 12.20.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsEffect



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Chapter 12 Requests for Admissions
V. COMPELLING FURTHER RESPONSE

1-12 MB Practice Guide: CA Civil Discovery 12.29

12.29 CHECKLIST: Compelling Further Response.

12.29[1] Moving Party's Checklist.

☐ Review response for adequacy.



Time Limit:

45 days from receipt of response to serve motion to compel further response.

☐ If responses are inadequate:

☐ Make reasonable, good faith effort to resolve issue.

☐ Draft:

☐ Motion and notice of motion to compel further responses and to impose monetary sanctions.

☐ Supporting declaration including showing of attempt at informal resolution of issue.

☐ Supporting memorandum.

☐ Separate statement supporting motion.

☐ Proposed order.

- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.
- ☐ If opposing party fails to comply with order compelling further responses:
 - ☐ Draft motion to deem matters admitted and for sanctions.

Checklist for Deeming Matters Admitted:

See 12.28[1]

Authority:

CCP § 2033.290

Discussion:

See 12.30

Standard Procedure Checklist:See *Ch. 4, Law and Motion Procedure*, 4.03**Form:**

See 12.45

12.29[2] Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.

**Strategic Point:**

Consider the possibility of a counter motion for a protective order with an ex parte motion for an order shortening time so it can be heard at the same time as the motion to compel. However, this should not be done unless a protective order is clearly appropriate and the other responses made have been reasonable. If the responding party is attempting to avoid legitimate discovery, the counter motion may only serve to infuriate the court [Discussion of protective orders, see 12.26; form for shortening time, see *Ch. 4, Law and Motion Procedure*, 4.58].

- ☐ Prepare opposition:
 - ☐ Draft declarations opposing motion.
 - ☐ Draft opposing memorandum.

☐ Draft proposed order.

☐ Serve and file response.

☐ Follow standard noticed motion procedure.

Authority:

CCP § 2033.290

Discussion:

See 12.30

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMotions to Compel



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Chapter 12 Requests for Admissions
V. COMPELLING FURTHER RESPONSE

1-12 MB Practice Guide: CA Civil Discovery 12.30

12.30 Motion to Compel Further Responses.

12.30[1] Grounds. On receiving a response to the requests for admissions, the propounding party may move for an order compelling a further response, if he or she deems that:

- An answer to a particular request is evasive or incomplete; or
- An objection to a particular request is without merit or too general [*CCP* § 2033.290(a)].

Even when matters denied are unquestionably true, a court cannot force a litigant to admit a particular fact if he or she is willing to risk a perjury prosecution or financial sanction that might later be imposed [*Holguin v. Superior Court* (1972) 22 CA3d 812, 99 CR 653]. The remedy is to seek compensation for the efforts in proving the fact at the conclusion of the case [*CCP* § 2033.420; see also 12.34].

Judge's Perspective:

Inappropriate denials are made all too often. In addition to recovery of the cost for the efforts undertaken to prove the fact improperly denied, impeachment is a remedy for a request for admission that has been improperly denied.

12.30[2] Attempt at Informal Resolution Is Required. The motion must be accompanied by a declaration stating facts that demonstrate a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*CCP* § 2033.290(b)].

12.30[3] Motion Generally Must Be Within 45 Days of Response Unless Extended. To avoid waiving the right to compel further responses, the requesting party must give notice of a motion to compel further responses within 45 days of the service of the response, any supplemental response, or any specific date to which the requesting party and the responding parties have agreed in writing [*CCP* § 2033.290(c)].

Distinguish:

When a party admits in part or denies the entire request for admission (rather than merely objecting), the requesting party is not required to move to compel further responses under *CCP* § 2033.290 as a

prerequisite to recovering cost-of-proof expenses under *CCP* § 2033.420 [*American Fed'n of State, County & Mun. Employees v. Metropolitan Water Dist. (2005) 126 CA4th 247, 266-269*].

12.30[4] Motion Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct, Rule 3.1112(a)*],
- A supporting declaration establishing facts outside the record in the case, including the attempt at informal resolution [*CCP* §§ 2002, 2003, 2015.5, 2033.290(b)],
- A memorandum in support of the motion [*Cal Rules of Ct, Rule 3.1112(a)*], and
- A separate statement with all information necessary to understand each discovery request and all responses to it that are at issue [*Cal Rules of Ct, Rule 3.1345(a), (c)*].

Cross References:

Forms, see 12.45 and separate statement in Ch. 4, Law and Motion Procedure, 4.56.

Discussion of papers generally, see Ch. 4, Law and Motion Procedure, 4.10 et seq.

Forms of memoranda supporting motion, see *California Points and Authorities, Ch. 86, Discovery: Requests for Admissions*, §§ 86.10 -86.12 (Matthew Bender).

12.30[5] Sanctions Against Losing Party Are Generally Mandatory. With two exceptions, the court must impose a monetary sanction under *CCP* § 2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response [*CCP* § 2033.290(d)].

Exceptions:

Sanctions are not mandatory if the court determines that [*CCP* § 2033.290(d)]:

- The one subject to the sanction acted with substantial justification; or
- Other circumstances make the imposition of the sanction unjust.

12.30[6] Sanctions Are Available for Failure to Comply With Order. If a party fails to obey an order compelling further response to requests for admission, the court may order that the requests be deemed admitted. Alternatively or additionally, the court may impose a *CCP* § 2023.030 monetary sanction [*CCP* § 2033.290(e)].



Strategic Point:

Ask the court to include in the order to compel a self-executing order that if the responding party does not comply with the order to compel, the requested admission will be deemed to be true.

Cross References:

Discussion of deemed admissions, see 12.28.

Discussion/forms relating to sanctions, see Ch. 3, Sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to Compel



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Chapter 12 Requests for Admissions
VI. WITHDRAWING OR AMENDING ADMISSIONS

1-12 MB Practice Guide: CA Civil Discovery 12.31

12.31 CHECKLIST: Withdrawing or Amending Responses.

12.31[1] Moving Party's Checklist.

- ☐ Decide whether to move to withdraw or amend response(s).
- ☐ Grounds are:
- ☐ Mistake;
 - ☐ Inadvertence; or
 - ☐ Excusable neglect; and
 - ☐ Lack of substantial prejudice to party who obtained admission.
- ☐ Drawbacks are:
- ☐ Possibility of reopening discovery on the matter involved.
 - ☐ Possibility of bearing costs of additional discovery.

Authority:
CCP § 2033.300

Discussion:
See 12.32

☐ If seeking withdrawal or amendment:

☐ Draft motion and notice of motion for withdrawal or amendment of responses with supporting declaration and memorandum.

☐ Separate statement supporting motion.

☐ Draft proposed order.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2033.300

Discussion:

See 12.32

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Form:

See 12.46

12.31[2] Opposing Party's Checklist.

☐ Calendar response and hearing dates.

☐ Decide what, if any conditions to request should the court grant the motion:

☐ Allowance of additional discovery on the issue.

☐ Imposition of additional discovery costs on moving party.

☐ Prepare:

☐ Collect any relevant evidence.

☐ Draft declarations opposing motion, particularly to show prejudice to ability to maintain action or defense on merits if motion were to be granted.

☐ Draft opposing memorandum.

☐ Draft proposed order.

☐ Serve and file response:

☐ Follow standard noticed motion procedure.

Authority:

CCP § 2033.300

Discussion:

See 12.32

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil
ProcedureDiscoveryMethodsAdmissionsWithdrawals



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Chapter 12 Requests for Admissions
VI. WITHDRAWING OR AMENDING ADMISSIONS

1-12 MB Practice Guide: CA Civil Discovery 12.32

12.32 Withdrawal or Amendment of Admissions.

12.32[1] Noticed Motion Is Required. A party may withdraw or amend an admission only on leave of court granted after notice to all parties [*CCP* § 2033.300(a)].

➤ Cross Reference:

Form, see 12.46.

12.32[2] Grounds. The court may permit withdrawal or amendment of an admission only if it determines that [*CCP* § 2033.300(b)]:

- The admission was the result of mistake, inadvertence, or excusable neglect; and
- The propounding party will not be substantially prejudiced in maintaining the action or defense on the merits.

Example:

Trial court erred in denying motion to withdraw admission when defendant's mistaken admission was at least arguably excusable and plaintiffs failed to explain what additional discovery they would have pursued absent the admission [*New Albertsons, Inc. v. Superior Court* (2008) 168 CA4th 1403, 1421, 86 CR3d 457] .

12.32[3] Relief Is Available From Actual and Deemed Admissions. A party may obtain relief under *CCP* § 2033.300 from an order deeming matters admitted or documents genuine as well as from actual admissions [*Wilcox v. Birtwhistle* (1999) 21 C4th 973, 977, 90 CR2d 260, 987 P2d 727].

➤ Cross Reference:

Discussion of deemed admissions, see 12.28.

12.32[4] Motion Papers. The moving papers must include:

- A motion and notice of motion [*Cal Rules of Ct, Rule 3.1112(a)*];
- A supporting declaration establishing facts outside the record in the case [*CCP §§ 2002, 2003, 2015.5, 2033.290(b)*];
- A memorandum in support of the motion [*Cal Rules of Ct, Rule 3.1112(a)*]; and
- A separate statement with all information necessary to understand each discovery request and all responses to it that are at issue [*Cal Rules of Ct, Rule 3.1345(a), (c)*].



Cross References:

Forms, see 12.46 and separate statement in *Ch. 4, Law and Motion Procedure*, 4.56.

Discussion of papers generally, see *Ch. 4, Law and Motion Procedure*, 4.10 et seq.

Form for memorandum supporting motion, see *California Points and Authorities, Ch. 86, Discovery: Requests for Admissions*, § 86.51 (*Matthew Bender*).

12.32[5] Court May Impose Conditions When Granting Motion. The court may impose conditions on the granting of the motion, including, but not limited to, an order [*CCP § 2033.300(c)*]:

- Granting the propounding party permission to pursue additional discovery related to the withdrawn or amended admission; and
- Making the responding party responsible for the costs of any additional discovery.

12.32[6] May Be Used for Impeachment. Withdrawn or amended answers may be used for impeachment [*Jahn v. Brickey* (1985) 168 CA3d 399, 405, 214 CR 119 (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureDiscoveryMethodsAdmissionsWithdrawals



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Chapter 12 Requests for Admissions
VII. RECOVERING EXPENSES OF PROVING UNADMITTED MATTER

1-12 MB Practice Guide: CA Civil Discovery 12.33

12.33 CHECKLIST: Recovering Expenses of Proving Unadmitted Matters.

12.33[1] Moving Party's Checklist.

- ☐ Decide whether to move to recover costs of proving matter another party failed to admit.
 - ☐ Consider that motion is to be granted unless court finds:
 - ☐ An objection to the requested admission was sustained,
 - ☐ The requesting party waived response under *CCP § 2033.290*,
 - ☐ The requested admission was of no substantial importance,
 - ☐ The party the failed to make the admission had reasonable ground to believe that party would prevail on the issue, or
 - ☐ Other good reason for the failure to admit.

Authority:

CCP §§ 2033.290, 2033.420

Discussion:

See 12.34

- ☐ Draft motion and notice of motion for expenses incurred in proving matter which party failed to admit, with supporting declaration and memorandum.

- ☐ Prepare separate statement.
- ☐ Prepare proposed order.
- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.
- ☐ Calendar response and hearing dates.

Authority:

CCP §§ 2033.290, 2033.420

Discussion:

See 12.34

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Form:

See 12.47

12.33[2] Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.
- ☐ Determine ground for opposition:
 - ☐ An objection to the requested admission was sustained,
 - ☐ The requesting party waived response under *CCP § 2033.290*,
 - ☐ The requested admission was of no substantial importance,
 - ☐ The party the failed to make the admission had reasonable ground to believe that party would prevail on the issue,
 - ☐ Other good reason for the failure to admit, or
 - ☐ Expenses claimed exceed those incurred in proving the matter.

Authority:

CCP §§ 2033.290, 2033.420

Discussion:

See 12.34

☐ Prepare opposition:

- ☐ Collect any relevant evidence.
- ☐ Draft declarations opposing motion.
- ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response:

- ☐ Follow standard noticed motion procedure.

- ☐ Calendar response and hearing dates.

Authority:*CCP §§ 2033.290, 2033.420***Discussion:**

See 12.34

Standard Procedure Checklist:See *Ch. 4, Law and Motion Procedure, 4.03***Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct



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Chapter 12 Requests for Admissions
VII. RECOVERING EXPENSES OF PROVING UNADMITTED MATTER

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12.34 Recovery of Expenses.

12.34[1] Grounds.

12.34[1][a] Failure to Admit Matter Plus Later Proof of That Matter. If a responding party fails to admit the genuineness of any document or the truth of any matter, and if the requesting party is forced to and subsequently does prove the genuineness of that document or the truth of the matter, the requesting party may move the court for an order requiring the responding party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees [CCP § 2033.420(a)]. The determination of entitlement to expenses under section is within the sound discretion of the trial court [*American Fed'n of State, County & Mun. Employees v. Metropolitan Water Dist.* (2005) 126 CA4th 247, 267 ; *Stull v. Sparrow* (2001) 92 CA4th 860, 864, 112 CR2d 239].



Cross References:

Form, see 12.47.

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 86, Discovery: Requests for Admissions*, § 86.52 (Matthew Bender).

12.34[1][b] Example of Failure to Admit. A corporate officer and part owner who answers requests for admissions as an officer of the corporation and who has personal knowledge of matters but denies requests for admissions when any one of the business owners does not know the answer, may be sanctioned for making deceptive responses [*Rosales v. Thermex-Thermatron* (1998) 67 CA4th 187, 198-199, 78 CR2d 861 (officer's testimony at trial revealed much more knowledge than his responses to requests for admissions had reflected)].

12.34[1][c] Proof Requires Establishment by Evidence. CCP § 2033.420 expressly requires that the unadmitted matter must be proved as a prerequisite to recovery [*Stull v. Sparrow* (2001) 92 CA4th 860, 865, 112 CR2d 239]. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court [Evid Code § 190]. Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved [*Stull v. Sparrow* (2001) 92 CA4th 860, 865-866, 112 CR2d 239].

12.34[1][d] Requirement of Proof Is Not Satisfied When Later Admission Obviates Need for Proof of Matter Not Admitted in Discovery. A matter is not "proved" when the party who had earlier failed to admit the matter stipulates to its truth just before trial, obviating the need for proof on that issue [*Stull v. Sparrow* (2001) 92 CA4th 860, 864, 866, 112 CR2d 239].

Similarly, a matter is not proved when the party who failed to admit it in response to a request for admissions admits the matter (liability) for purposes of judicial arbitration only, obviating the need for proof, at least if no party requests trial de novo [*Wagy v. Brown* (1994) 24 CA4th 1, 6, 29 CR2d 48 (preparation for trial or arbitration is not the equivalent of proving the truth of a matter)].



Strategic Point:

As trial approaches, review the client's responses to requests for admissions made early in the litigation to determine whether it has become appropriate to admit matters that had earlier been denied.

12.34[1][e] Requirement of Proof May Be Satisfied on Grant of Summary Judgment or Nonsuit. A matter may be considered to have been proved by a party who prevails on a motion for summary judgment [*Barnett v. Penske Truck Leasing* (2001) 90 CA4th 494, 497-498, 108 CR2d 821].

A matter may also be considered to have been proved when the court grants a defendant nonsuit after the plaintiff has presented its case-in-chief [*Garcia v. Hyster Co.* (1994) 28 CA4th 724, 735, 34 CR2d 283 (remanding for recalculation of award, which was unreasonably large); see *Stull v. Sparrow* (2001) 92 CA4th 860, 865, 112 CR2d 239 (no requirement that party seeking reimbursement submit the proof; in *Garcia* plaintiff's evidence showed that facts defendant had sought to have admitted were true)].

12.34[2] Award Is Generally Mandatory

12.34[2][a] Exceptions to Mandatory Award Listed. The award of expenses is mandatory unless the court determines that [CCP § 2033.420(b)]:

- An objection to the request was sustained or a response to it was waived;
- The admission sought was not substantially important;
- The responding party had reasonable ground to believe that he or she would prevail on the matter; or
- There was other good reason for the failure to admit.

12.34[2][b] What Constitutes Waiver of Response. If a requesting party deems that an objection to a particular request is without merit or too general, it may move to compel further responses. If the requesting party fails to move to compel further responses within 45 days of the service of the response, it waives any right to compel further responses, and under the exception to CCP § 2033.420, may not recover cost-of-proof expenses [CCP § 2033.420(b)(1)].

Distinguish:

Where a responding party objects to a request for admission but then denies it (in part or in full), the requesting party is not required to move to compel further responses under CCP § 2033.290 as a prerequisite to recovering cost-of-proof expenses under CCP § 2033.420 [*American Fed'n of State, County & Mun. Employees v. Metropolitan Water Dist.* (2005) 126 CA4th 247 (where plaintiff objected to requests for admission but also responded by denying the requests, defendant did not waive right by failing to move to compel further responses, because plaintiff's admissions and/or denials provided

complete responses to the requests, leaving nothing to be addressed by the court in a motion to compel further responses) (interpreting former CCP § 2033(l), (o)).

12.34[2][c] "Not Substantially Important" Exception Does Not Apply If Matter Relates to Central Issue. A matter is deemed to be of "substantial importance" if it is one of the central issues in the case [*Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 509, 224 CR 838 (decided under prior law)]. To be of substantial importance, a request for admission should have some direct relationship to an issue which, if not proven, would have altered the results of the case [*Rosales v. Thermex-Thermatron* (1998) 67 CA4th 187, 198, 78 CR2d 861]. There is no requirement, however, that the fact in question would have altered the determination of the ultimate issue [*Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 509 n5, 224 CR 838 (decided under prior law)].

In determining whether a requested admission involves a central issue in the case, the court should assess whether, at the time of the denial, the denying party could have appreciated that the admission involved a central issue [*Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 510, 224 CR 838 (decided under prior law)].

12.34[2][d] What Constitutes Good Reason. If a party denies a request based on facts known at the time, and later discovers facts that would have necessitated an admission at the time of the response if the newly discovered facts were then known, the court should consider this fact when determining whether there was a good reason for the denial [*Wimberly v. Derby Cycle Corp.* (1997) 56 CA4th 618, 635, 65 CR2d 532]. However, if a party stands on its denial and then fails to contest the issue at trial, the court is justified in finding there was no good reason for the initial denial [*Wimberly v. Derby Cycle Corp.* (1997) 56 CA4th 618, 629-630, 65 CR2d 532 , citing with approval *Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 510-511, 224 CR 838 (decided under prior law)]. Misunderstandings of the law or hoping for no objection are not reasonable grounds for denying the requested admissions [*Wimberly v. Derby Cycle Corp.* (1997) 56 CA4th 618, 638, 65 CR2d 532].

12.34[3] Not Intended to Be Penalty. Reimbursement is not intended to be a penalty. It is intended to reimburse the requesting party for expenses incurred proving a fact previously denied by the respondent [*American Fed'n of State, County & Mun. Employees v. Metropolitan Water Dist.* (2005) 126 CA4th 247, 267 ; *Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 509, 224 CR 838 (decided under prior law)].

12.34[4] Recoverable Expenses Are Limited to Those Incurred in Proving Matter Denied. The party may seek reimbursement only for expenses incurred in proving matters denied by the opposing party [CCP § 2033.420]. Reimbursement does not extend to expenses:

- For trial preparation in other areas [*Garcia v. Hyster Co.* (1994) 28 CA4th 724, 736-737, 34 CR2d 283]; or
- Incurred prior to the denial [*Wimberly v. Derby Cycle Corp.* (1997) 56 CA4th 618, 638, 65 CR2d 532].

Example:

A declaration specifying the amount of attorney's fees, expenses, and costs "associated with the trial of this case and proving those Requests for Admissions numbered 1 through 15" after the date the request for admissions was propounded was an improper basis for an award of sanctions both because it was not limited to the expenses of proving the matters that were denied, and because it was not limited to expenses incurred after the denial [*Garcia v. Hyster Co.* (1994) 28 CA4th 724, 736-737, 34 CR2d 283].

12.34[5] Party May Recover Expenses Even If Not Prevailing Party in Lawsuit. The party requesting expenses does not need to be the prevailing party in the lawsuit. Thus, the fact at issue need not be one that would have altered determination of the ultimate issue [*Brooks v. American Broad. Co.* (1986) 179 CA3d 500, 509 n5, 224 CR 838

(decided under prior law)].

12.34[6] Motion Is Made After Trial. Generally, a motion to recover expenses is heard after the proof has been made; thus, after trial [*Hillman v. Stults* (1968) 263 CA2d 848, 884, 70 CR 295 (decided under prior law)].

12.34[7] Order Granting or Denying Attorney's Fees Is Appealable. An order granting or denying attorney's fees under CCP § 2033.420 is appealable [*Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 655-656, 25 CR2d 109, 863 P2d 179 (denying); *Wagy v. Brown* (1994) 24 CA4th 1, 6, 29 CR2d 48 (granting)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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Chapter 12 Requests for Admissions
VIII. FORMS
A. Requesting Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.35

12.35 Judicial Council Form DISC-020 Requests for Admission.

Judicial Council Form DISC-020 Requests for Admission

[Click here to view image.](#)

NOTES.

Authority:

California Judicial Council Form DISC-020, pictured above, was developed and approved by the Judicial Council pursuant to *CCP* §§ 2033.710-2033.740.

Use of the form is optional [*CCP* § 2033.740(a)].



Timing:

See 12.08

Drafting Requests:

See 12.10[2]

Number of Requests Allowed:

See 12.07



Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis [(R)] Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms

For a sample form for an attorney-drafted request for admissions, see 12.36.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent
& Form



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Chapter 12 Requests for Admissions

VIII. FORMS

A. Requesting Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.36

12.36 Sample Request for Admissions.

Sample Request for Admissions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	REQUEST FOR ADMISSIONS [AND DECLARA-
Defendant.	)	TION FOR ADDITIONAL DISCOVERY]
	)	
	)	

Requesting Party: _____ [Identify, e.g., Plaintiff John Smith].

Set Number: _____ [Specify].

Responding Party: _____ [Identify, e.g., Defendant Mary Jones].

To _____ [party from whom admission is requested, e.g., Defendant Mary Jones] and to his/her attorney of record:

_____ [Requesting party, e.g., Plaintiff John Smith] requests you to admit the _____
[genuineness of the following documents or the truth of the following matters of fact or both].

[If an admission of the genuineness of documents is being sought, list the documents, and state, when appropriate, the aspect of genuineness to be admitted, e.g.:]

DOCUMENTS

1. _____ *[Specify, e.g., That the original of the document, a copy of which is attached hereto as Exhibit A and made a part hereof, is a genuine undertaking executed by Defendant Mary Jones].*
2. _____ *[Specify, e.g., That the document attached hereto as Exhibit B is a genuine one of a number of pamphlets printed by you or at your request in connection with the sale of _____ (product)].*
3. _____ *[Specify any other documents].*

[If an admission of the truth of a matter of fact is being sought, list the fact to be admitted.]

MATTERS OF FACT

4. _____ *[Specify, e.g., That on August 1, 2005, Defendant Mary Jones was the registered owner of a 2001 Honda Accord sedan, bearing California license plate number XXXXXX].*
 5. _____ *[Specify any other matters of fact].*
- Date: _____

_____ *[firm name, if any]*

By: _____ *[signature]*

_____ *[typed name]*

Attorney for _____ *[requesting party]*

NOTES.

Authority:

CCP § 2033.010



Timing:

See 12.08

Drafting Requests:

See 12.10[2]

Number of Requests Allowed:

See 12.07



Cross Reference:

For an illustration of optional California Judicial Council Form DISC-020 Requests for Admission, see 12.35.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & Form



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Chapter 12 Requests for Admissions

VIII. FORMS

A. Requesting Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.37

12.37 Declaration for Additional Discovery.

Declaration for Additional Discovery

DECLARATION FOR ADDITIONAL DISCOVERY

I, _____ declare:

1. I am presently the attorney for _____ [party, e.g., Plaintiff John Smith], a party to this
_____ [action or proceeding].

[CONTINUE]

2. I am propounding to _____ [party, e.g., Defendant Mary Jones] the attached set of requests for admission.

3. This set of requests for admission will cause the total number of requests propounded to the party to whom they are directed to exceed the number of requests permitted by *Code of Civil Procedure* § 2033.030.

4. I have previously propounded a total of _____ requests for admission to this party.

5. This set of requests for admission contains a total of _____ requests.

6. I am familiar with the issues and the previous discovery conducted by all of the parties in this case.

7. I have personally examined each of the requests in this set of requests for admission.

8. This number of requests for admission is warranted under *Code of Civil Procedure* § 2033.040 because _____
 [here state specific reasons why the complexity or the quantity of issues in the instant lawsuit warrant this number of requests for admission].

9. None of the requests in this set of requests is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP § 2033.050

Limit on Number of Requests:

See 12.07

Grounds for Exceeding Limit:

See 12.07[2][b]

Different Procedures Applicable to Most Limited Civil Cases:

For stricter limits and procedures to exceed them in most limited civil cases, see 12.07[3]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral Overview



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.38

12.38 Sample Response to Requests for Admissions.

Sample Response to Requests for Admissions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	RESPONSE TO REQUEST FOR ADMISSIONS
Defendant.	)	
	)	
	)	

Responding Party: _____ [Identify, e.g., Defendant Mary Jones].

Requesting Party: _____ [Identify, e.g., Plaintiff John Smith].

Set Number: _____ [Specify].

_____ [Responding party, e.g., Defendant Mary Jones] responds to the request for admissions served on him/her by _____ [requesting party, e.g., Plaintiff John Smith] on _____ [date], as follows:

Request No. 1: _____ [Specify response, e.g., if denying genuineness of document, state, Denies the

genuineness of the document, a copy of which is attached to the request for admissions as Exhibit A].

Request No. 2: _____ [Specify response, e.g., if denying matter of fact state, Denies _____ (the truth of the matters set forth in this request or _____ (specify, e.g., that he/she was the registered owner of the vehicle described in this request on _____ [date], or at any other time))].

Request No. 3: _____ [Specify response, e.g., if admitting in part and denying in part, state, Admits that _____ (specify), but denies that _____ (specify)].

Request No. 4: _____ [State response, e.g., if cannot admit or deny, state, Cannot truthfully admit or deny the matters set forth in this request because _____ (specify reasons, e.g., neither he/she nor his/her employees, agents, attorneys, nor his/her attorney's agents and employees have any knowledge of these matters, nor have they been able, despite making a reasonable inquiry into the matter by _____ (specify efforts made), to obtain information from which the truth or falsity of the matter might be learned)].

Request No. 5: _____ [State response, e.g., if objecting to request, state, Objects to this request on the ground that _____ (specify, e.g., it is not relevant to the subject matter of the action or reasonably calculated to lead to admissible evidence) in that _____ (specify)].

_____ [date]

[EITHER, attorney signs if response contains one or more objections]

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [responding party]

[AND/OR, party, its agent, or officer signs and verifies, unless response contains only objections]

VERIFICATION

I _____ [name], am _____ [party, or if response made on behalf of corporation or other party, specify status e.g., the president of Defendant _____ (name of corporation)] in the above-entitled action. I have read the foregoing responses which are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true].

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

_____ [date]

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP §§ 2033.210-2033.260



Timing for Response:

See 12.16, 12.18

Extension of Time for Response:

See 12.17

Types of Response:

See 12.19

Format of Response:

See 12.22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponses



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.39

12.39 Stipulation to Extend Time to Respond.

Stipulation to Extend Time to Respond [CCP § 2033.260]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	STIPULATION EXTENDING TIME TO RE-
Defendant.	)	SPOND TO ADMISSIONS
	)	
	)	

IT IS HEREBY STIPULATED by and between the parties hereto through their respective undersigned attorneys that _____ [party, e.g. Defendant Mary Jones] shall have up to and including _____ [date], to respond to the Request for Admissions.

[ADD date line and signature block for the attorney of record of each party who has appeared in the action, e.g.:]

Date: _____

_____ [firm name, if any]

By: _____ [signature]

Attorney for Plaintiff [typed name]

Date: _____

[firm name, if any]

By: _____ [signature]

Attorney for Defendant [typed name]

NOTES.

Authority:

CCP § 2033.260

Extension of Time for Response:

See 12.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral
OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.40

12.40 Notice of Stipulation to Extend Time to Respond.

Notice for Stipulation to Extend Time to Respond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	NOTICE OF STIPULATION TO EXTEND TIME
Defendant.	)	TO RESPOND
	)	
	)	

To _____ [specify names of all parties in case, e.g., Plaintiff John Smith, Defendant Mary Jones] and to their attorneys of record:

NOTICE IS HEREBY GIVEN that _____ [parties, e.g., Cross Defendant, Michael Ng, and Cross Complainant, Joseph Woods], have stipulated to the extend time for _____ [specify stipulated facts, e.g., Cross Defendant, Michael Ng, to respond to Cross Complainant's First Set of Requests for Admission dated June 23, 2005. Cross Defendant, Michael Ng, must now respond to the Requests for Admission by 5:00 p.m. on August 17, 2005].

Date: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

NOTES.

Authority:

CCP § 2033.260

Extension of Time for Response:

See 12.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.41

12.41 Notice of Motion and Motion for Protective Order Concerning Request for Admissions With Supporting Declaration.

Notice of Motion and Motion for Protective Order Concerning Request for Admissions With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Petitioner,
vs.
_____, [name],
Defendant.

)
)
) NOTICE OF MOTION AND MOTION FOR PRO-
) TECTIVE ORDER RESTRICTING DISCOVERY
) AND IMPOSING MONETARY SANCTION, SUP-
) PORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM IN SUPPORT OF MOTION
) (Request for Admissions)
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [street address], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for a protective order _____ [specify order sought, e.g., that Request Number 7 in Request For Admissions, Set One, propounded by Plaintiff John Smith and served on Defendant Mary Jones on June 27, 2005, need not be answered], and an order imposing a monetary sanction against _____ [propounding party and/or his/her attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] in the amount of \$ _____. The motion will be made on the grounds that _____ [grounds for protective order, e.g., the request relates to confidential research that Defendant Mary Jones has been conducting], and that _____ [moving party, e.g., Defendant Mary Jones] made a reasonable and good faith attempt to resolve informally the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____

I, _____, declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, e.g., Defendant Mary Jones] _____ is seeking a protective order from this court directing that _____ [order sought, e.g., she not be required to answer Request Number 7 in Request For Admissions, Set One].

3. Good cause exists for the protective order sought by _____ [moving party, e.g., Defendant Mary Jones] in that _____ [set forth facts showing good cause for particular order sought, e.g., Request Number 7 relates to highly confidential research that defendant has been conducting and is of marginal relevance to the issues involved in this litigation].

4. On _____ [date], I _____ [specify actions taken to confer with opposing party in a reasonable and good faith attempt to resolve the issues covered by the motion informally, e.g., sent a letter to plaintiff's attorney asking that plaintiff withdraw Request Number 7. A copy of the letter is attached as Exhibit A and made a part of this declaration. To date, I have not received an answer to the letter, nor have my subsequent telephone calls to plaintiff's attorney been returned].

5. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a

sanction in the amount of \$_____ on _____[*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

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

Date: _____

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Set out memorandum here]

NOTES.

Authority:

CCP § 2033.080

Grounds for Protective Order:

See 12.26[1]

Relief Available by Protective Order:

See 12.26[2]

Prerequisite:

See 12.26[3]



Timing:

See 12.26[3]

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Related Form of Order:

See 12.42

Related Form of Memorandum:

See California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.30 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryProtective Orders



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.42

12.42 Order on Motion for Protective Order Concerning Request for Admissions.

Order on Motion for Protective Order Concerning Request for Admissions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Petitioner,	)	ORDER
vs.	)	Date: _____
_____ [name],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

The motion of _____ [moving party, e.g., Defendant Mary Jones] for a protective order directing that _____ [describe motion, e.g., Request Number 7 in Request For Admissions, Set One, propounded by Plaintiff John Smith and served on Defendant Mary Jones on June 27, 2005, need not be answered] and for monetary sanctions came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name, e.g., Tom Doe]; Defendant appeared by counsel _____ [name, e.g., Jane Lee].

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [state order, e.g., Request Number 7 in Request For Admissions, Set One, propounded by Plaintiff John Smith and served on Defendant Mary Jones on June 27, 2005, need not be answered].

[AND EITHER, if imposing sanctions]

IT IS FURTHER ORDERED that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] pay forthwith to _____ [successful party, e.g., Defendant Mary Jones] the sum of \$_____ as reasonable expenses and attorney's fees.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court that _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith and his attorney Tom Doe] _____ [acted with substantial justification or specify other circumstances making imposition of a sanction unjust],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [unsuccessful party, person, or attorney, e.g., Plaintiff John Smith or his attorney Tom Doe].

Judge of the Superior Court

NOTES.

Authority:

CCP § 2033.080

Related Form of Motion:

See 12.41

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryProtective Orders



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Chapter 12 Requests for Admissions
VIII. FORMS
B. Responding to Requests for Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.43

12.43 Notice of Motion and Motion to Relieve Party From Waiver of Objections for Requests for Admissions With Supporting Declaration.

Notice of Motion and Motion to Relieve Party From Waiver of Objections for Requests for Admissions With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
_____ [name],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO RE-
vs.	)	LIEVE PARTY FROM WAIVER OF OBJECTIONS
_____ [name],	)	FOR REQUESTS FOR ADMISSIONS, SUPPORT-
Defendant.	)	ING DECLARATION OF _____
	)	[name], AND MEMORANDUM IN SUPPORT OF
	)	MOTION
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [street address], _____ [city], _____ [party e.g., Defendant Mary Jones] will, and hereby does, move for relief from waiver of objections for Request for Admissions, propounded by _____ [party, e.g., Plaintiff John Smith] and served on _____ [party, e.g., Defendant Mary Jones] on _____ [date]. The motion will be made on the ground that _____ [specify grounds for relief, e.g., on June 14, 2005, Defendant Mary Jones, served an answer to Plaintiff John Smith's Requests for Admissions and the failure to file a timely response was due to the mistake, inadvertence or excusable neglect of Jane Lee, attorney for Defendant.]

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the above-described action].

2. _____ [Party, e.g., Defendant] is seeking relief from waiver of objections for Request for Admissions from this court.

3. Good cause exists for the relief sought by defendant in that _____ [set forth facts showing good cause for order sought, e.g., on June 14, 2005, Defendant, Mary Jones, served answers to the Requests for Admissions propounded by Plaintiff, John Smith, in the above entitled action. Defendant, Mary Jones, failed to respond to the requests for admissions in a timely fashion when the answers were inadvertently mailed to the wrong office. My secretary, Cathy Peters, mailed the answers on June 11, 2005, the day they were due; however, she mistakenly sent them to the attorneys on another case our office handles. Once the mistake was discovered on June 14, Ms. Peters immediately phoned Tom Doe, attorney for Plaintiff, John Smith, and explained the error and both faxed and mailed the responses to his office].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2033.280

Waiver and Relief From Waiver:

See 12.18

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Related Form of Memorandum:

See California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.53 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil

ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals



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Chapter 12 Requests for Admissions

VIII. FORMS

C. Deeming Matters Admitted After Failure to Respond

1-12 MB Practice Guide: CA Civil Discovery 12.44

12.44 Notice of Motion and Motion that Requests for Admissions Be Deemed Admitted With Supporting Declaration.

Notice of Motion and Motion that Requests for Admissions Be Deemed Admitted With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER THAT MATTERS IN REQUEST FOR AD-
) MISSIONS BE DEEMED ADMITTED AND IM-
) POSING MONETARY SANCTIONS, SUPPORT-
) ING DECLARATION OF _____
) [name], AND MEMORANDUM IN SUPPORT OF
) MOTION
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [address], _____ [city], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move the court for an order pursuant to *Sections 2023.010, 2023.030 and 2033.280 of the Code of Civil Procedure* that the truth of all specified matters, and the genuineness of all specified documents, in the Request For Admissions, Set _____ [specify number, e.g., One], propounded by _____ [moving party, e.g., Plaintiff John Smith] and served on _____ [responding party, e.g., Defendant Mary Jones] on _____ [date], be deemed admitted, and for monetary sanctions against _____ [responding party and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$ _____. The motion will be made on the grounds that _____ [responding party, e.g., Defendant Mary Jones] failed to serve a timely response to _____'s [moving party, e.g., Plaintiff John Smith] above-described Request For Admissions.

The motion will be based on this notice of motion; on the declaration(s) of _____ [name(s)] and the copies of the requests for admissions and responses attached to his/her declaration as Exhibits, and the memorandum set forth below; on the records and file herein; and on such evidence as may be presented at the hearing of the motion.
Date: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____ [name]

I _____ [name], declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] served his/her _____ [specify number, e.g., first] set of requests for admissions on _____ [responding party, e.g., Defendant Mary Jones] _____ [personally or by mail]. A copy of those requests for admissions is attached hereto as Exhibit A and made a part hereof.

3. Under *Code of Civil Procedure Section 2033.250* _____ [party to whom request was made, e.g., Defendant Mary Jones] was required to respond by _____ [specify date by which response was due].

4. The time for _____ [party to whom request was made, e.g., Defendant Mary Jones] to serve a response on _____ [moving party, e.g., Plaintiff John Smith] in a timely manner expired on _____ [specify date by which response is due under Code Civ. Proc. § 2033.250], and _____ [party to whom request was made, e.g., Defendant Mary Jones] has not at this time served any response on _____ [moving party, e.g., Plaintiff John Smith].

5. As a result of the failure of _____ [specify party to whom request was made, e.g., Defendant Mary Jones] to respond to the request for admissions described above, _____ [moving party, e.g., Plaintiff John Smith] has necessarily incurred the following reasonable expenses: _____ [itemize expenses, including attorney's fees, and give amounts, explaining basis of computation].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2033.280

Deemed Admissions:

See 12.28

Alternative Use:

Form may be adapted to move for order for deemed admissions under CCP § 2033.290 after failure to comply with order compelling further response

Related Form of Memorandum:

See *California Points and Authorities*, Ch. 86, *Discovery: Requests for Admissions*, § 86.50 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect



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Chapter 12 Requests for Admissions

VIII. FORMS

D. Compelling Further Responses

1-12 MB Practice Guide: CA Civil Discovery 12.45

12.45 Notice of Motion and Motion to Compel Further Responses to Requests for Admission With Supporting Declaration.

Notice of Motion and Motion to Compel Further Responses to Requests for Admission With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER REQUIRING FURTHER RESPONSE TO RE-
) QUEST FOR ADMISSIONS AND IMPOSING
) MONETARY SANCTIONS, SUPPORTING DE-
) CLARATION OF _____ [name],
) STATEMENT OF REQUESTS AND RESPONSES
) IN CONTENTION, AND MEMORANDUM IN
) SUPPORT OF MOTION
Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [address], _____ [city], _____ [moving party, e.g., Plaintiff John Smith] will, and hereby does, move the court for an order pursuant to *Sections 2023.010, 2023.030, and 2023.290 of the Code of Civil Procedure* that _____ [responding party, e.g., Defendant Mary Jones] serve further responses to Request(s) No. _____ [specify] of _____'s [party, e.g., Plaintiff John Smith] _____ [specify number, e.g., first] set of requests for admissions served on _____ [party, e.g., Defendant Mary Jones] on _____ [date], and for an order imposing monetary sanctions against _____ [responding party and/or his/her attorney, e.g., Defendant Mary Jones and her attorney Jane Lee] in the amount of \$_____. The motion will be made on the grounds that the _____ [documents and/or matters of fact] that are the subject of the requests for admission specified above are relevant to the subject matter of this action and are not privileged, and that _____ [specify type of response to each request in question and specify reasons response is improper, e.g., the objection to Request No. 2 is improper in that the matter in question is not privileged under the attorney-client privilege, and the response to Request No. 4 does not comply with *Sections 2023.220 and 2023.290(a) of the Code of Civil Procedure* and is improper in that the Defendant Mary Jones refused to admit or deny the genuineness of the document in question but gave no reason whatsoever for his/her purported inability to admit or deny the genuineness of the documents in question].

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)], and the copies of the requests for admissions and responses [and correspondence] attached to that/those declaration(s) as Exhibit(s), on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum set forth below; and on the records and file herein and such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____ [name]

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. This is an action _____ [specify the subject matter and issues of the action, specifically referring to pleadings or other documents on file, summarizing or attaching portions of those pleadings or documents as exhibits when appropriate].

3. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] served his/her _____ [specify number, e.g., first] set of requests for admissions on _____ [party, e.g.,

Defendant Mary Jones]. A copy of those requests for admissions is attached to as Exhibit A and incorporated by reference.

4. On _____ [date], _____ [party, e.g., Defendant Mary Jones] served his/her purported responses to those requests for admissions on _____ [moving party, e.g., Plaintiff John Smith]. A copy of those purported responses is attached hereto as Exhibit B and made a part hereof.

5. The _____ [objection(s) or failure of the response(s) to comply with Sections 2033.220 and 2033.290(a) of the Code of Civil Procedure or both] was/were without substantial justification in that _____ [specify, e.g., the objections raised were improper as Defendant, Mary Jones, refused to admit or deny the genuineness of the document and gave no reason for her lack of ability and/or willingness to do so.

6. On _____ [date], I _____ [specify actions taken to confer with opposing party in a reasonable and good faith attempt to resolve the issues covered by the motion informally, e.g., sent a letter to plaintiff's attorney asking that plaintiff withdraw Request Number 7. A copy of the letter is attached as Exhibit A and made a part of this declaration. To date, I have not received an answer to the letter, nor have my subsequent telephone calls to plaintiff's attorney been returned].

7. _____ [Moving party, e.g., Defendant Mary Jones] bases his/her request for the imposition of a sanction in the amount of \$_____ on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2033.290

Grounds for Compelling Further Response:

See 12.30[1]

Prerequisite to Motion:

See 12.30[2]



Timing:

See 12.30[3]

Form of Separate Statement:

See *Ch. 4, Law and Motion Procedure*, 4.56

Related Forms of Memorandum:

See *California Points and Authorities*, Ch. 86, *Discovery: Requests for Admissions*, §§ 86.10 -86.12
(Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil

ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMotions to Compel



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Chapter 12 Requests for Admissions
VIII. FORMS
E. Withdrawing or Amending Admissions

1-12 MB Practice Guide: CA Civil Discovery 12.46

12.46 Notice of Motion and Motion to Amend and/or Withdraw Responses to Requests for Admissions With Supporting Declaration.

Notice of Motion and Motion to Amend and/or Withdraw Responses to Requests for Admissions With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR WITH-
_____ [name],	)	DRAWAL OF ADMISSION, SUPPORTING DE-
Defendant.	)	CLARATION OF _____ [name],
	)	AND MEMORANDUM IN SUPPORT OF MOTION
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located

at _____ [street address], _____ [city], _____ [moving party, e.g., Defendant Mary Jones] will, and hereby does, move for the court for permission to withdraw _____ [specify admission that moving party seeks to withdraw, e.g., Response Number 1 to Request Number 1 in Request For Admissions, Set One, propounded by Plaintiff John Smith]. The motion will be made on the grounds of _____ [specify grounds, e.g., mistake].

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. _____ [Moving party, e.g., Defendant Mary Jones] is seeking to withdraw his/her response(s) to Requests for Admissions, Set _____ (specify number, e.g., One), as set forth below.

REQUEST NO. _____ [Specify number as it appears in the original request for admissions, e.g., 1]:
_____ [Set forth the request verbatim].

RESPONSE: _____ [Set forth the response or objection served by responding party verbatim].

3. The above-specified response(s) was/were incorrect because _____ [set forth facts showing that the response was incorrect due to mistake, inadvertence, or excusable neglect.]

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2033.300

Withdrawing or Amending Response to Admissions:

See 12.32

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Related Form of Memorandum:

See California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.51 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsWithdrawals



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Chapter 12 Requests for Admissions

VIII. FORMS

F. Recovering Expenses of Proving Unadmitted Matters

1-12 MB Practice Guide: CA Civil Discovery 12.47

12.47 Notice of Motion and Motion to Recover Expenses Incurred in Proof With Supporting Declaration.

Notice of Motion and Motion to Recover Expenses Incurred in Proof With Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [name],	)	DER REQUIRING _____ [party,
Defendant.	)	e.g., DEFENDANT] _____ [name]
	)	TO PAY EXPENSES OF PROOF, SUPPORTING
	)	DECLARATION OF _____ [name],
	)	AND MEMORANDUM IN SUPPORT OF MOTION
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To _____ [party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located

at _____ [address], _____ [city], _____ [party, e.g., Plaintiff John Smith] will, and hereby does, move the court for an order that _____ [party, e.g., Defendant Mary Jones] pay to _____ [moving party, e.g., Plaintiff John Smith] the sum of \$ _____, as his/her reasonable expenses, including reasonable attorney's fees, incurred in proving the _____ [truth of facts or genuineness of documents] denied by [party, e.g., Defendant Mary Jones] in his/her response to a request for admissions. The motion will be made on the grounds that _____ [party, e.g., Defendant Mary Jones] served denials to certain requests for admissions that were served on him/her by _____ [moving party, e.g., Plaintiff John Smith] pursuant to *Section 2033.010 et seq. of the Code of Civil Procedure* and that _____ [moving party, e.g., Plaintiff John Smith] thereafter proved the _____ [genuineness of those document(s) or the truth of those matter(s) of fact or both].

The motion will be based on this notice of motion; on the declaration(s) of _____ [name(s)], including the copies of the requests for admissions and responses attached to his/her declaration as Exhibits and on the memorandum, all of which are served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Date: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

SUPPORTING DECLARATION OF _____ [name]

I _____ [name], declare:

1. I am _____ [declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones in the action described above].

2. On _____ [date], _____ [moving party, e.g., Plaintiff John Smith] served his/her _____ [specify number, e.g., first] set of requests for admissions on _____ [party, e.g., Defendant Mary Jones], a copy of which is attached hereto as Exhibit A and made a part hereof.

3. On _____ [date], _____ [party, e.g., Defendant Mary Jones] served his/her responses to those requests for admission on _____ [moving party, e.g., Plaintiff John Smith], a copy of which is attached hereto as Exhibit B and made a part hereof.

4. Among the matters that _____ [party, e.g., Defendant Mary Jones] was requested to admit was/were the following;

REQUEST NO. _____ [specify number of request as it appears in the original request for admissions, e.g., 2]: _____ [Set forth the request verbatim].

5. _____ [Party, e.g., Defendant Mary Jones] served [a] sworn denial(s) to Request(s) No. _____ [specify request number(s)].

6. This/These matter(s) is/are of substantial importance in this action in that _____ [specify, e.g., defendant's liability is based on his/her ownership of the vehicle in question].

7. It appears that there were no good reasons for the denial(s) in that _____ [specify, e.g., evidence that _____ (specify facts), introduced at trial as shown in the partial transcript attached hereto as Exhibit C, shows that Defendant Mary Jones made her sworn denial with full knowledge that she was the registered owner of the vehicle involved in the accident which caused plaintiff's injuries was not in fact true].

8. As a result of _____'s [party, e.g., Defendant Mary Jones] denial of this/these matter(s), _____ [moving party, e.g., Plaintiff John Smith] was required to prove the matter(s) at the trial of this action by _____ [specify, e.g., the testimony of _____ (name of witness), concerning defendant's ownership of the vehicle involved in the accident that caused plaintiff's injuries].

9. The reasonable expenses of such proof amounted to \$_____, and were: _____ [itemize expenses of proof, including attorney's fees, attaching supporting documents, such as bills from experts, as exhibits, if available].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2033.420

Right to Recover Expenses:

See 12.34[1]-[4]



Timing:

See 12.34[5]

Form of Separate Statement:

See Ch. 4, Law and Motion Procedure, 4.56

Related Form of Memorandum:

See California Points and Authorities, Ch. 86, Discovery: Requests for Admissions, § 86.52 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconduct



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Chapter 13 Exchanging Expert Witness Information

1-13 MB Practice Guide: CA Civil Discovery 13.syn

§ 13.syn Synopsis to Chapter 13: Exchanging Expert Witness Information

13.01 Scope.

13.02 Objective and Strategy.

13.02[1] Parties Obtain Discovery Regarding Each Other's Expert Witnesses.

13.02[2] Expert Witness Information Exchange Aids Trial Preparation.

13.02[3] Information Exchanged Includes Expert Witness Lists, Declarations, and Writings and Reports.

13.02[4] Disclosure Requirements and Protections for Certain Types of Witnesses.

13.02[4][a] Retained Expert Identities and Opinions Are Protected Until Listed As Expert Witnesses.

13.02[4][b] No Declaration Requirement or Work Product Protection for Percipient Expert Witness.

13.02[4][c] Percipient Witnesses May Provide Opinions.

13.03 Finding and Investigating Experts.

13.04 CHECKLIST: Demanding the Exchange of Expert Witness Information.

13.05 Demand Requires Parties to Select Experts for Trial.

13.06 When Demand May Be Made.

13.06[1] Leave of Court Not Required.

13.06[2] Demand Is Made Within 10 Days After Trial Date Initially Set or Seventy Days Before Initial Trial Date.

13.06[3] Trial Court Delay Reduction Act May Affect Timing of Demand.

13.06[4] Parties May Request Relief From Untimely Demand.

13.06[4][a] Party Served With Untimely Demand May Seek Protective Order.

13.06[4][b] Propounding Party Might Obtain Relief From Untimely Demand.

13.06[5] Order for New Trial May Reopen Discovery.

13.07 Preparing Demand and Setting Date of Exchange.

13.07[1] Elements of the Demand.

13.07[2] Information That May Be Demanded.

13.07[2][a] Party May Demand Name and Address of All Expert Witnesses.

13.07[2][b] Expert Witness Declaration Required If Expert Is Party, Party's Employee, or Hired in Relation to Action.

13.07[2][c] Party May Demand Production of Expert's Reports and Writings.

13.07[3] Demand Must Specify Date of Exchange 50 Days Before Initial Trial Date or 20 Days After Service of Demand.

13.08 Demand Is Served on All Parties.

13.09 Demand Not Filed With Court.

13.10 Original Papers Are Retained.

13.10[1] Demanding Party Retains Demand and Responses Until Six Months After Case's Final Disposition.

13.10[2] Originals May Be Destroyed After Retention Period.

13.11 CHECKLIST: Responding to Demand for the Exchange of Expert Witness Information.

13.12 Options and Strategy.

13.13 Time and Method of Exchanging Expert Witness Information.

13.13[1] Expert Witness Information Must Be in Writing.

13.13[2] Exchange Must Be 50 Days Before Initial Trial Date or 20 Days After Service of Demand.

13.13[3] Exchange May Be by Mail or in Person.

13.14 Contents of Expert Witness Documents.

13.14[1] Each Party Must Provide List of Experts or Statement of Intent Not to Use Experts.

13.14[2] Expert Witness Declaration Required for Party-Affiliated Experts.

13.14[2][a] Expert Witness Declaration Required for Party-Affiliated or Retained Experts.

13.14[2][b] Expert Witness Declaration Requirements.

13.14[2][c] Declaration Should Cover All Issues As to Which Expert Will Testify.

13.14[2][d] Attorney or Unrepresented Party Signs Declaration.

13.14[3] Parties Must Provide Discoverable Reports and Writings If Requested.

13.15 Obtaining Protective Orders.

13.15[1] Moving for Protective Order Only Way to Challenge Demand.

13.15[2] Court May Tailor Relief Granted.

13.15[3] Declaration Must Accompany Motion.

13.15[4] Court Must Impose Sanctions Against Unsuccessful Party.

13.15[5] On Denial of Motion, Discovery Permitted on Terms That Are Just.

13.16 CHECKLIST: Changing Expert Witness Information After Exchange Date.

13.16[1] Submitting Supplemental Expert Witness List.

13.16[2] Moving to Augment or Amend Expert Witness Information.

13.16[3] Opposing Motion to Augment or Amend Expert Witness Information.

13.16[4] Moving to Submit Tardy Expert Witness Information.

13.16[5] Opposing Motion to Submit Tardy Expert Witness Information.

13.17 Supplementing the Expert Witness List.

13.17[1] Supplementing Party Must Serve Within 20 Days After First Exchange.

13.17[2] Supplementing Party May Not Substitute One Expert for Another.

13.17[3] Supplementing Party Must Provide Expert Declaration, Reports, and Writings.

13.17[4] Expert Must Be Made Available for Deposition Immediately.

13.18 Amending or Augmenting Expert Witness Information.

13.18[1] Parties May Move to Amend or Augment Expert Witness Information.

13.18[2] Declaration Must Accompany Motion.

13.18[3] Conditions for Granting Leave to Augment or Amend Expert Witness Information.

13.18[3][a] Court Must Make Statutory Determinations.

13.18[3][b] Expert Must Be Made Available Immediately for Deposition.

13.18[3][c] Expert Witness Documents Lodged With Court If Relevant.

13.18[3][d] Court May Impose Additional Conditions.

13.18[4] Court Must Impose Monetary Sanction.

13.19 Moving to Submit Tardy Expert Witness Information.

13.19[1] Party Must File Motion for Leave to Submit Tardy Information.

13.19[2] Conditions for Granting Leave.

13.19[3] Expert Must Be Made Available Immediately for Deposition.

13.19[4] Court May Impose Additional Conditions.

13.19[5] Court Must Impose Monetary Sanctions.

13.20 [Reserved]

13.21 Expert Not Designated by Party May Testify If Called to Impeach Another Expert or If Designated by Another Party.

13.22 CHECKLIST: Deposing Expert Witnesses.

13.22[1] Deposing Expert Witness.

13.22[2] Responding to Deposition Notice Regarding Expert Witness.

13.22[3] Resolving or Moving to Set Expert's Compensation.

13.22[4] Opposing Motion to Set Expert's Compensation.

13.23 Options and Strategies.

13.23[1] Secure Priority in Taking Depositions.

13.23[2] Prepare for Deposition.

13.23[3] Lay Groundwork to Limit Opposing Party's Expert.

13.24 Parties May Depose Any Designated Expert Witness.

13.25 Deposition Must Be Within 75 Miles of Court.

13.26 Deposition Notice Requires Expert's Attendance at Deposition.

13.27 Payment of Expert Witness Fees.

13.27[1] Expert Witnesses Entitled to Compensation.

13.27[2] Expert Fees Paid by Deposing Party.

13.27[2][a] Deposing Party Must Pay "Reasonable" Fee for Time Spent at Deposition.

13.27[2][b] Daily Fee May Be Charged.

13.27[2][c] Fees Charged Deposing Party Must Not Exceed Fees Charged Retaining Party.

13.27[2][d] Deposing Party Must Tender Anticipated Fee With Deposition Notice or at Deposition.

13.27[3] Designating Party Pays Expert's Preparation and Travel Expenses.

13.27[4] Counsel Late to Deposition Must Pay for Time Delay.

13.27[5] Deposing Party May Ask Court to Set Expert Compensation.

13.27[5][a] Deposing Party Must File Motion and Provide Notice to Expert.

13.27[5][b] Designating Party or Expert Must Provide Evidence of Expert's Customary Fees.

13.27[5][c] Declaration Must Accompany Motion.

13.27[5][d] Court May Set Expert's Fee If Fee Demanded Is Unreasonable Based on Factors Considered.

13.27[5][e] Court Must Impose Monetary Sanction on Unsuccessful Party.

13.27[5][f] Expert May Appeal Order Setting Fee.

13.28 CHECKLIST: Excluding Expert Witness Testimony.

13.29 Party in Compliance May Object to Testimony.

13.30 Court Must Find "Unreasonable Failure" to Comply With Discovery.

13.31 Failure to Comply May Include Insufficient Submissions.

13.32 Court May Exclude Opinions That Go Beyond Those Expressed in Deposition.

13.33 Demand for Exchange of Expert Witnesses Information.

13.34 Expert Witness Declaration.

13.35 Notice of Motion to Obtain Protective Order Prior to Exchange of Expert Witness Information; Supporting Declaration.

13.36 Protective Order Prior to Exchange of Expert Witness Information.

13.37 Notice of Motion and Motion to Augment Expert Witness Information; Supporting Declaration.

13.38 Order Allowing Party to Augment Expert Witness Information.

13.39 Notice of Motion and Motion to Amend Expert Witness Information; Supporting Declaration.

13.40 Order Allowing Party to Amend Expert Witness Information.

13.41 Notice of Motion and Motion to Submit Tardy Expert Witness Information; Supporting Declaration.

13.42 Order Allowing Party to Submit Tardy Expert Witness Information.

13.43 Notice of Motion, Motion and Supporting Declaration for Order Setting Compensation of Expert.

13.44 Order Setting Compensation of Expert.



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Chapter 13 Exchanging Expert Witness Information
I. STRATEGY

1-13 MB Practice Guide: CA Civil Discovery 13.01

13.01 Scope.

This chapter covers:

- Objectives and strategies for exchanging expert witness information [see 13.02].
- Finding and investigating experts [see 13.03].
- Making demands for and exchanging demands for expert witness information [see 13.04 -13.10; Form: see 13.33].
- Responding to demand for expert witness information [see 13.11 -13.15; Forms: see 13.34 -13.36], including obtaining protective orders [see 13.15; Form: see 13.35 -13.36] and exclusion of expert testimony for failure to comply [see 13.28 -12.32].
- Supplementing [see 13.16 -13.17] and amending or augmenting expert witness information [see 13.16, 13.18; Forms: see 13.37 -13.40].
- Moving to submit tardy expert witness information [see 13.16, 13.19; Forms: see 13.41 -13.42].
- Testimony of non designated expert [see 13.21].
- Depositions of expert witnesses [see 13.22 -13.27; Forms: see 13.43 -13.44].

Core Statute:

CCP § 2034.010 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
I. STRATEGY

1-13 MB Practice Guide: CA Civil Discovery 13.02

13.02 Objective and Strategy.

13.02[1] Parties Obtain Discovery Regarding Each Other's Expert Witnesses. After the initial trial date is set in an action, any party may obtain discovery by demanding that all parties simultaneously exchange information regarding each other's expert witnesses [CCP § 2034.210].

CCP § 2034.010 *et seq.* authorizes only simultaneous exchange [*Fairfax v. Lords* (2006) 138 CA4th 1019, 1021, 41 CR3d 850 (trial court committed prejudicial error by allowing medical malpractice defendant to delay his designation of retained expert witnesses until 20 days after plaintiff had designated his own expert) (decided under former CCP § 2034)]. Even in complex litigation, the court cannot properly provide for unilateral disclosure of expert information [*Hernandez v. Superior Court* (2003) 112 CA4th 285, 297-300 (case management order improperly provided for early disclosure by plaintiffs) (decided under former CCP § 2034(c), (e))].

Distinguish:

The California provision does not require parties to divulge as much information as is required by *Fed R Civ P* 26. Rule 26 requires the disclosure to include a complete statement of the opinions to be expressed, underlying information and exhibits, as well as a list of publications the expert has authored and cases in which the expert has testified.



Warning:

Be aware that the court can appoint a witness under *Evid Code* § 730. An expert appointed by the court is not subject to the discovery requirements of CCP § 2034.010 *et seq.*, which by its terms applies to experts whose opinions the party plans to introduce.



Cross Reference:

Moore's Federal Practice, Ch. 26, General Provisions Governing Discovery; Duty of Disclosure, § 26.23 (Matthew Bender 3d ed.).

13.02[2] Expert Witness Information Exchange Aids Trial Preparation. The exchange of expert trial witness information assists parties in preparing for trial by:

- Identifying and narrowing the subjects to be addressed by experts.
- Demonstrating which subjects require opposing expert testimony.
- Allowing parties to prepare to cross-examine experts by:
 - ☐ Learning the basis of an expert's opinions;
 - ☐ Assessing a witness's qualifications as an expert; and
 - ☐ Researching an expert's prior writings and testimony.

**Warning--Responding Party:**

A failure to respond adequately to a demand for expert witness information may result in the exclusion of your expert witness's opinions from trial [CCP § 2034.300].

**Warning--Requesting Party:**

Because service of an expert witness information demand triggers a mutual obligation to disclose, the failure by the requesting party to adequately disclose expert witness information may result in the exclusion of its experts.

**Strategic Point:**

It is important to identify and retain experts early in the litigation to obtain early opinions from them to help you evaluate your case and to make sure that your client is prepared for the expert witness fees that will be incurred. It is also important to remember that one's own experts can make mistakes and to rigorously examine the opinions you receive from your own experts, just as you question what you ultimately obtain from the other side.

**Cross References:**

Excluding expert witness testimony, see 13.28.
Discussion of timing demand, see 13.06.

13.02[3] Information Exchanged Includes Expert Witness Lists, Declarations, and Writings and Reports. A demand for the mutual and simultaneous exchange of expert witness information requires every party to respond as follows [CCP §§ 2034.210, 2034.260, and 2034.270]:

- Provide a list, with the names and addresses of all people whose oral or deposition testimony in the form of an expert opinion will be offered at trial, to all parties who have appeared in the action;
- If a listed expert is a party, a party's employee, or "has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action," provide:
 - ☐ An expert witness declaration; and

 All discoverable reports and writings made by the expert in the course of preparing his or her opinion, if requested.



Warning:

Keep in mind that you must exchange expert witness information for any expert you plan to have testify, even if the expert is your client or an employee of your client.

Exception:

Expert witness lists and valuation data in eminent domain proceedings are specifically exempted from expert witness exchange requirements [*CCP* § 2034.010; see *CCP* §§ 1258.010-1258.300 (eminent domain discovery)].



Trap:

Avoid designating your client as an expert witness. Doing so risks waiving the attorney-client privilege as to communications between you and your client regarding the subject of his or her expert testimony if the client states his opinion in a declaration or at a deposition [see *Shooker v. Superior Court* (2003) 111 CA4th 923, 930].



Cross References:

Discussion of contents of exchange, see 13.13, 13.14.

Hogan & Weber's California Civil Discovery, Ch. 10, Expert Witness Disclosure (Matthew Bender 6th ed.).

DeMeo, California Deposition and Discovery Practice, Ch. 64, Exchange of Expert Trial Witness Information (Matthew Bender).

California Forms of Pleading and Practice, Ch. 198, Discovery: Exchange of Expert Witness Information (Matthew Bender).

13.02[4] Disclosure Requirements and Protections for Certain Types of Witnesses.

13.02[4][a] Retained Expert Identities and Opinions Are Protected Until Listed As Expert Witnesses. Often, an expert is employed by counsel to serve both as a professional consultant on technical issues and as a potential witness, if the expert develops favorable opinions on specific issues [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1422, 116 CR2d 570]. Until an expert is designated to testify, the identity and opinions of retained experts are protected from discovery as work product [see *CCP* §§ 2018.010 et seq., 2034.210; see also *Schreiber v. Estate of Kiser* (1999) 22 C4th 31, 37, 91 CR2d 293, 989 P2d 720].

Once a demand for the exchange of expert witness information is served, a party must identify its expert witnesses whose oral or deposition testimony the party expects to offer at trial [*CCP* § 2034.210(a)]. For any designated expert trial witness who is a party, employee of a party, or has "been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action," the party must also provide a declaration as to the general substance of the expert's anticipated testimony [*CCP* §§ 2034.210(b), 2034.260(c)]. Moreover, the demand can, and invariably will, include a demand for any reports and writings made by any expert in the course of preparing his or her opinion [*CCP* §§ 2034.210(c), 2034.270].

**Warning:**

If you have retained an expert as a consultant, you may well have shared attorney work product information with the consultant and by later designating your consultant as an expert trial witness, you will allow the other side access to that information. This is, potentially, an extremely dangerous decision. At times, you might retain multiple experts in the similar area but only wish to designate one of these experts.

A designated expert can be withdrawn before his or her deposition is taken, and if so withdrawn, the work product protection remains.

**Trap:**

Anticipate protecting your work product when experts are disclosed. Be very circumspect in written communications with your experts. Because the demand to exchange information can extend to all discoverable reports and writings made by any expert employed by a party or retained to testify at trial, what you send the expert will be discoverable if you name that expert as a trial witness. Thus, for example, a letter to the consultant is best limited to an itemized list of the materials sent to the consultant and a note to call and discuss the matter. Avoid correspondence containing statements that could be used by your opponent to argue that you have attempted to lead the expert to a favorable conclusion. You want to be sure that any consultant you may wish to designate as an expert witness reports to you orally and never in writing because all of the expert's writings are discoverable.

**Cross Reference:**

Discussion of work product protection in general, see *Ch. 2, Scope of Discovery, 2.25 et seq.*

Exception:

Experts whose testimony is used to support or oppose summary judgment or summary adjudication proceedings may be deposed prior to the exchange of expert witness information under *CCP § 2034.010 et seq.* [see *St. Mary Med. Ctr. v. Superior Court* (1996) 50 CA4th 1531, 1538-1540, 58 CR2d 182 ; see also *CCP § 437c(a)*].

Example:

When a significant question is raised as to the foundation of an expert's opinion, filed in support of or opposition to a summary judgment or adjudication motion, a deposition limited to that subject may be allowed [see *St. Mary Med. Ctr. v. Superior Court* (1996) 50 CA4th 1531, 1538-1540, 58 CR2d 182]. Whether to grant such discovery falls within the discretion of the trial court, and the process may not be used to turn summary proceedings into mini-trials [see *St. Mary Med. Ctr. v. Superior Court* (1996) 50 CA4th 1531, 1540-1541, 58 CR2d 182].

Judge's Perspective:

It is extremely rare for this type of discovery to be granted. If the foundational defect contained in the expert's declaration is significant, the party responding generally asserts an evidentiary objection rather than run the risk of having the declaration cleaned up for the deposition. Counsel should be circumspect when requesting this type of discovery.

13.02[4][b] No Declaration Requirement or Work Product Protection for Percipient Expert Witness. A

percipient expert witness is neither a party-affiliated witness nor an expert retained specifically to render an opinion at trial (see *CCP § 2034.210(b)*), but is a witness who obtained personal knowledge of relevant facts independently of the litigation, and is designated as an expert witness because a party intends to ask that witness questions that "may call for the rendering of an expert opinion" [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1421-1423, 116 CR2d 570]. When a

percipient witness is designated as an expert, no expert witness declaration is required [CCP § 2034.210(a), (b)]. Moreover, the work product doctrine does not protect the identity or opinions of a percipient witness because his or her opinions are formed independently of the litigation, not in preparation for it [see *Schreiber v. Estate of Kiser* (1999) 22 C4th 31, 38, 91 CR2d 293, 989 P2d 720].

Distinguish:

An attorney's analysis of a percipient witness's anticipated testimony is protected by the work product doctrine, because such analysis is comprised of the thought processes of an attorney in preparation for trial [*Hurtado v. Western Med. Ctr.* (1990) 222 CA3d 1198, 1203, 272 CR 324].



Warning:

Although a party need not submit a declaration for a percipient expert witness, the witness must be designated as an expert in order to offer expert testimony at trial [see *McCoy v. Gustafson* (2009) 180 CA4th 56, 99-101, 103 CR3d 37 (witness was precluded from testifying because he was not designated as an expert and his testimony was beyond the scope of lay opinion)]. The requirement for submitting a declaration for percipient expert witnesses also applies to treating physicians [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1418, 116 CR2d 570 ("the transformation from treating physician to expert does not occur unless the treating physician is identified by name and address in the proponent's designation and it is not enough that a plaintiff has 'designated' as experts 'all past or present examining and/or treating physicians'")].

13.02[4][c] Percipient Witnesses May Provide Opinions. By definition, an expert witness is entitled to give opinion testimony [see *Evid Code* § 801]. If properly identified, a percipient witness may testify as to any opinions he or she has that are based on facts acquired independently of the litigation and are informed by his or her training, skill, and experience [see *Schreiber v. Estate of Kiser* (1999) 22 C4th 31, 35, 91 CR2d 293, 989 P2d 720].

Example:

A common example of a percipient witness is a physician who formerly treated a patient who later became involved in a personal injury suit, but who is not a party or an expert retained with respect to the litigation [see, e.g., *Torres v. Superior Court* (1990) 221 CA3d 181, 270 CR 401].

Distinguish:

A treating physician does not become a "retained" expert within the meaning of CCP § 2034.210(b) merely because the physician is expected to give expert opinion testimony [*Schreiber v. Estate of Kiser* (1999) 22 C4th 31, 35-36, 91 CR2d 293, 989 P2d 720 (decided under former CCP § 2034)]. What distinguishes a treating physician from a retained expert is not the *content* of the testimony, but the *context* in which the witness became familiar with the facts to which he or she is testifying [*Schreiber v. Estate of Kiser* (1999) 22 C4th 31, 35-36, 91 CR2d 293, 989 P2d 720 (italics added)].



Warning:

Different rules apply to a physician conducting an independent medical examination pursuant to CCP § 2032.010 *et seq.*



Cross Reference:

Discussion of independent medical examination procedures, see Ch. 11, Physical and Mental Examinations.



Strategic Point:

Percipient witnesses are subject to identification and can be deposed early in the litigation, as opposed to retained experts, who are not required to be identified and made available for deposition until shortly before trial [see *CCP* §§ 93(c), 2030.010, 2032.630, 2032.640, 2034.230(b), 2034.410; see also *Kalaba v. Gray* (2002) 95 CA4th 1416, 1421-1423, 116 CR2d 570]. There is strong incentive to depose percipient witnesses well before the exchange of expert information, to ascertain whether their observations and conclusions support a party's allegations and to help determine whether a party should locate an expert who can respond with a competing opinion [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1422-1423, 116 CR2d 570].

When a percipient witness whose deposition has been taken is later designated as an expert for trial, the opposing party should seek to take the expert's deposition again on his or her expert opinion. Courts will generally allow a second deposition under these circumstances.



Trap:

A percipient expert may have opinions regarding causation and standard of care. Thus, a party deposing a percipient expert witness would be prudent to anticipate the possibility that the witness will be included on the opposing party's expert witness list and ask whether the expert holds any opinions on those issues and, if so, the manner in which the expert obtained the facts supporting his or her opinions [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1422, 116 CR2d 570].



Warning:

A party providing its expert witness list must identify all percipient witnesses who might provide expert opinion testimony, whether live or through deposition testimony, by name and address rather than generically, e.g., as "all past or present examining and/or treating physicians," which could result in the exclusion of expert testimony from witnesses so identified [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1423, 116 CR2d 570].



Strategic Point:

A general statement in the expert witness list that the party reserves the right to call any expert witness listed by any other party does not establish the right to do so. However, it is common practice to include such a "reservation of rights" in the list because you do have the right to call as a witness at trial an expert designated by another party if that expert has been deposed under *CCP* §§ 2034.410-2034.470[*CCP* § 2034.310(a); see *Powell v. Superior Court* (1989) 211 CA3d 441, 443-444, 259 CR 390].



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
I. STRATEGY

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13.03 Finding and Investigating Experts.

Many services and directories exist to help find consultants and expert witness.



Strategic Point:

If litigation involves an area in which few experts exist, move fast to retain experts so that the opposing party does not have time to corner the market on that area of expertise. Conversely, consider retaining multiple experts, as well as consultants who are expert in a particular field you know will be involved in the litigation, and potentially corner the market on that field of expertise. In this regard, it may be useful to retain an expert whose opinion is unfavorable to your client's case as a consultant as long as you do not designate the expert to testify at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
II. DEMANDING THE EXCHANGE OF EXPERT WITNESS INFORMATION

1-13 MB Practice Guide: CA Civil Discovery 13.04

13.04 CHECKLIST: Demanding the Exchange of Expert Witness Information.

☐ Determine if action is subject to discovery statute governing the exchange of expert witness information:

☐ It is a limited or unlimited civil action.

☐ "Action" includes a civil action and a special proceeding of a civil nature.

Exception:

Discovery provisions of *CCP § 2034.010 et seq.* do not apply to eminent domain proceedings.

Authority:

CCP §§ 2016.020(a), 2034.010

Discussion:

See 13.02

☐ Ascertain timing for issuing demand:

☐ Demand for exchange of expert witness information may be issued if:

☐ Initial trial date has been set.

☐ Demand is made no later than 10 days after initial trial date set or 70 days before trial date, whichever is closer to initial trial date.

- ☐ Timing of demand is likely to be addressed at case management conference.

Authority:

CCP § 2034.220; see, e.g., San Diego County Super Ct Rules, Div II, Rule 2.1.11

Discussion:

See 13.06

- ☐ If action is set for new trial following mistrial, grant of new trial, or appellate reversal, and discovery is reopened, general time requirements are recalculated based on new trial date.

Authority:

See *Fairmont Ins. Co. v. Superior Court* (2000) 22 C4th 245, 247, 92 CR2d 70, 991 P2d 156 (mistrial); *Guzman v. Superior Court* (1993) 19 CA4th 705, 707-708, 23 CR2d 585 (new trial); *Beverly Hosp. v. Superior Court* (1993) 19 CA4th 1289, 1292-1296, 24 CR2d 238 (reversal)

Discussion:

See 13.06[5]

- ☐ Prepare demand for exchange of expert witness information:

- ☐ Identify party making demand below title of case.
- ☐ State that demand is being made under *CCP § 2034.010 et seq.*
- ☐ Demand production of expert reports and writings, if desired.
- ☐ Give date for the exchange of expert witness information.

Authority:

CCP § 2034.210, 2034.220, 2034.230

Discussion:

See 13.07

Form:

See 13.33



- Select date of exchange that complies with statutory time frame:

- ☐ 50 days before initial trial date or 20 days after service of demand, whichever is closer to trial date.

- ☐ Determine if date of exchange should be different than dates indicated by application of statute:

- ☐ If good causes exists for earlier or later exchange date, move to set a different date of exchange.

Authority:

CCP §§ 2034.230(b), 2034.250

Discussion:

See 13.07

- ☐ Serve copies of demand on all parties who have appeared in action.

Authority:

CCP § 2034.240

Discussion:

See 13.08

- ☐ Calendar date specified in demand for exchange of expert information.

- ☐ Calendar date to mail documents containing expert witness information, or to meet with attorneys for all parties, on or before date specified in demand.

Authority:

CCP § 2034.260(a)

Discussion:

See 13.07, 13.11, 13.13

- ☐ Retain original demand with original proof of service attached.

Authority:

CCP § 2034.290(b)

Discussion:

See 13.10

- ☐ Determine whether expert testimony is needed to establish any element of your cause of action or defense.

- ☐ Locate and consult with experts in subjects that require expert testimony:

- ☐ Provide consultants with case information and have them review relevant materials.
- ☐ Determine what, if any, opinions consultants have regarding issues in case.
- ☐ Ascertain what expert's testimony would be if called at trial.

- ☐ Select which experts should provide expert opinion testimony at trial.

☐ Prepare demand for exchange of expert witness information:

- ☐ Identify party making demand below title of case.
- ☐ State that demand is being made under *CCP § 2034.010 et seq.*
- ☐ Demand production of expert reports and writings, if desired.
- ☐ Give date for the exchange of expert witness information.

Authority:

CCP §§ 2034.210, 2034.220, 2034.230

Discussion:

See 13.07

Form:

See 13.33



Verify that date of exchange complies with statutory time frame:

- ☐ 50 days before initial trial date or 20 days after service of demand, whichever is closer to trial date.
- ☐ Determine if date of exchange should be different than dates indicated by application of statute:

☐ If good causes exists for earlier or later exchange date, move to set a different date of exchange.

Authority:

CCP §§ 2034.230(b), 2034.250

Discussion:

See 13.07

☐ Serve copies of demand on all parties who have appeared in action.

Authority:

CCP § 2034.240

Discussion:

See 13.08

☐ Calendar date specified in demand for exchange of expert information.

☐ Calendar date to mail documents containing expert witness information, or to meet with attorneys for all parties, on or before date specified in demand.

Authority:

CCP § 2034.260(a)

Discussion:

See 13.07, 13.11, 13.13

☐ Retain original demand with original proof of service attached.

Authority:

CCP § 2034.290(b)

Discussion:

See 13.10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
II. DEMANDING THE EXCHANGE OF EXPERT WITNESS INFORMATION

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13.05 Demand Requires Parties to Select Experts for Trial.

Counsel might retain a number of experts with whom to consult in preparation for a trial, some might develop opinions favorable to a party's case, and some might not [see, e.g., *Kalaba v. Gray* (2002) 95 CA4th 1416, 116 CR2d 570]. A demand for the exchange of expert witness information requires each party to analyze its consultants' opinions, and select which experts and opinions to present at trial [see CCP §§ 2034.210, 2034.260]. Counsel may refrain from having certain experts testify in order to protect work product and trial strategies [see CCP §§ 2018.010 et seq., 2034.260]. The selection of expert trial witnesses is a critical strategic point, as the disclosure of experts may highlight strengths and weaknesses in a party's case.

Strategic Point:



Oftentimes you might choose not to designate an expert in a particular field in the initial disclosure statement, but wait to see if the opposing party designates an expert in that area. You have 20 additional days [CCP § 2034.280] to supplement your expert witness list and, therefore, can strategically wait to see if an expert will be required.

For example, in a personal injury action in which failure to use a seat belt may be an issue, plaintiff may want to wait to see if the defense designates a biomechanical engineer rather than highlighting the issue by designating one in the initial disclosure.

In some instances an expert should be necessary even if the issue is addressed. For example, you generally do not need an economist to establish the present value of future damages, which can be easily established from tables. Therefore, you may not want to go to the expense of bringing in an economist unless the opposing party does so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
II. DEMANDING THE EXCHANGE OF EXPERT WITNESS INFORMATION

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13.06 When Demand May Be Made.

13.06[1] Leave of Court Not Required. Any party may demand the exchange of expert witness information without leave of court, by serving a demand on all parties who have appeared in the action [*CCP* §§ 2034.210, 2034.220, 2034.240].

13.06[2] Demand Is Made Within 10 Days After Trial Date Initially Set or Seventy Days Before Initial Trial Date. A party must make its demand for the exchange of expert witness information no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date [*CCP* § 2034.220].



Trap:

The rescheduling of the trial date initially set in a case does not reopen or extend the time to institute or reinstitute expert discovery under former *CCP* § 2034 (now see *CCP* § 2034.010 et seq.) [*Beverly Hosp. v. Superior Court* (1993) 19 CA4th 1289, 1292-1296, 24 CR2d 238].



Cross Reference:

Discussion of when expert discovery might be reopened, see 13.06[5].

13.06[3] Trial Court Delay Reduction Act May Affect Timing of Demand. Local court rules promulgated pursuant to the Trial Court Delay Reduction Act [*Gov Code* §§ 68600-68620] may impact when the demand for the exchange of expert information occurs.

Example:

San Diego County local rule provides that the demand requirement of *CCP* § 2034.010 et seq. may be dispensed with at the case management conference [see San Diego Super Ct Rules, Div. II, Rule 2.1.11].

13.06[4] Parties May Request Relief From Untimely Demand.

13.06[4][a] Party Served With Untimely Demand May Seek Protective Order. A party who is served with an untimely demand for the exchange of expert witness information, whether the demand is premature or late, may seek relief from the demand by filing a motion for a protective order [see *CCP* § 2034.250(a); see also *Zellerino v. Brown*

(1991) 235 CA3d 1097, 1109-1110, 1 CR2d 222]. On such a motion and for good cause shown, the court may quash the demand as untimely, or may order that the date for the information exchange be earlier or later than the date specified in the demand [see CCP § 2034.250(b)(1), (2)]. The court also may tailor additional or alternative relief to the specific circumstances of the case [see CCP § 2034.250(b); see also *Zellerino v. Brown* (1991) 235 CA3d 1097, 1111, 1 CR2d 222].

On a CCP § 2034.250 motion, the court may make any order that justice requires "to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden or expense" [CCP § 2034.250(b)].



Cross Reference:

Discussion of protective orders, see 13.15.

Prerequisite:

CCP § 2034.250 includes a "meet and confer" requirement, which requires the party challenging a demand first to attempt to informally resolve the issues raised by the demand before filing a motion for a protective order [CCP §§ 2016.040, 2034.250(a)].

13.06[4][b] Propounding Party Might Obtain Relief From Untimely Demand. A party who serves a demand prematurely might be able to cure the untimeliness under CCP § 473(a)(1), which affords a party the opportunity, after notice and on such terms as are just, to amend a "proceeding," which has been deemed to include an erroneous discovery demand made under CCP § 2034.010 *et seq.* [see *Zellerino v. Brown* (1991) 235 CA3d 1097, 1105-1108, 1 CR2d 222 (decided under former CCP § 2034)].

Example:

An expert witness demand mistakenly served 4 days prematurely was deemed effective, following a motion by the propounding party for relief under CCP § 473, and a resulting order setting an exchange date later than that specified in the demand, pursuant to the authority of CCP § 2034.230(b) [see *Zellerino v. Brown* (1991) 235 CA3d 1097, 1108, 1 CR2d 222 (language court relied upon now under CCP § 473(a)(1))].

Consider:

Although the court in *Zellerino v. Brown* (1991) 235 CA3d 1097, 1 CR2d 222 did not base its ruling on the language of CCP § 473(b), which relieves a party from a "proceeding" taken *against* him or her based on mistake, inadvertence, surprise, or excusable neglect, a propounding party might avoid the quashing of a premature demand by seeking relief under that section in response to an opponent's motion for a protective order [see CCP § 2034.250; see also *Zellerino v. Brown* (1991) 235 CA3d 1097, 1104, 1109, 1 CR2d 222].



Warning:

Courts may not shorten the statutorily prescribed time for serving demands under CCP § 2034.010 *et seq.* [*County of Los Angeles v. Superior Court* (1990) 224 CA3d 1446, 1456, 274 CR 712 (*sua sponte* court order shortening time for service of demand improper)].

Distinguish:

After *Zellerino v. Brown* (1991) 235 CA3d 1097, 1 CR2d 222 , whether a party who serves a demand *after* the deadline set forth in CCP § 2034.220 might obtain relief from that error under CCP § 473 is unclear [see *Zellerino v. Brown* (1991) 235 CA3d 1097, 1107, 1 CR2d 222]. Courts may shorten the time for parties to exchange the information demanded [see CCP § 2034.230(b), 2034.250(b)(2)] however, and, if there is insufficient time to depose witnesses before trial, a party may move to continue the trial and extend discovery [CCP § 2024.050(a)].

**Warning:**

Relief under *CCP* § 473(b), which is available to remedy the consequences of an attorney's mistake, inadvertence, surprise, or neglect, might not be available to remedy discovery violations when the client is also at fault [see *Lang v. Hochman* (2000) 77 CA4th 1225, 1228, 92 CR2d 322].

**Cross References:**

Discussion of timing demand, see DeMeo, California Deposition and Discovery Practice, Ch. 64, Exchange of Expert Trial Witness Information (Matthew Bender).

Hogan & Weber's California Civil Discovery, Ch. 10, Expert Witness Disclosure (Matthew Bender 6th ed.).

Discussion/forms regarding *CCP* § 473 motions, see California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

13.06[5] Order for New Trial May Reopen Discovery. If an action is set for a new trial following a mistrial, an order granting a new trial, or on remand after reversal of a judgment on appeal, discovery may be reopened, and new discovery deadlines will be set in relation to the new trial date [see *Fairmont Ins. Co. v. Superior Court* (2000) 22 CA4th 245, 247, 92 CR2d 70, 991 P2d 156 ; see also *Hirano v. Hirano* (2007) 158 CA4th 1, 6-7, 69 CR3d 646 ; *Guzman v. Superior Court* (1993) 19 CA4th 705, 708, 23 CR2d 585].

Example:

If a new trial is ordered, a party's new demand for the exchange of expert witness information will likely be considered timely if served more than 70 days before the new trial date [see *Guzman v. Superior Court* (1993) 19 CA4th 705, 708, 23 CR2d 585 ; *Beverly Hosp. v. Superior Court* (1993) 19 CA4th 1289, 1291, 24 CR2d 238].

A motion to augment an expert witness list on the retrial of a case may also be allowed, based on the new trial date [see *CCP* § 2034.620; *Guzman v. Superior Court* (1993) 19 CA4th 705, 707-708, 23 CR2d 585 (decided under former *CCP* § 2034)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13.07 Preparing Demand and Setting Date of Exchange.

13.07[1] Elements of the Demand. A demand for the exchange of expert witness information must be in writing and [CCP § 2034.230]:

- Identify party making the demand below the title of the case;
- State that demand is being made under *CCP § 2034.010 et seq.*; and
- Specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings.

► **Cross References:**

Discussion of setting exchange date, see *13.07[3]*.

Form of demand, see *13.33*.

13.07[2] Information That May Be Demanded.

13.07[2][a] Party May Demand Name and Address of All Expert Witnesses. A demand for the exchange of expert witness information requests the mutual and simultaneous exchange among all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at trial [CCP § 2034.210].

13.07[2][b] Expert Witness Declaration Required If Expert Is Party, Party's Employee, or Hired in Relation to Action. An expert witness declaration that complies with *CCP § 2034.260* must be supplied for any designated expert who is [CCP § 2034.210(b)]:

- A party;
- An employee of a party; or

- An expert retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action.



Cross References:

Discussion of required declaration contents, see 13.14[2].
Form of declaration, see 13.34.

13.07[2][c] Party May Demand Production of Expert's Reports and Writings. A demand for expert information also may request the mutual and simultaneous production of all discoverable reports and writings made by any party-affiliated expert, described in *CCP* § 2034.210(b), in the course of preparing his or her opinion [*CCP* § 2034.210(c)].

13.07[3] Demand Must Specify Date of Exchange 50 Days Before Initial Trial Date or 20 Days After Service of Demand. The date specified for the exchange of expert witness information must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date [*CCP* § 2034.230(b)].

Exception:

On motion and showing of good cause, the court may order that the exchange of expert information occur on a date earlier or later date than specified in the demand [*CCP* § 2034.230(b)]. In addition, if the parties cannot agree to change the date for the exchange, a party served with the demand may seek a protective order directing that the exchange be made at a different time than specified in the demand [see *CCP* § 2034.250(b)(2), (4)].

In addition, the parties may want to stipulate to extend the time for designation of expert witnesses if settlement discussions are pending or dispositive motions to be heard to save the expense of expert preparation and discovery.



Cross References:

Discussion of protective orders, see 13.15.

Form of motion to change date of exchange, see *California Forms of Pleading and Practice*, Ch. 198, *Discovery: Exchange of Expert Witness Information*, § 198.52 (Matthew Bender).



Strategic Point:

Sometimes where the issues are complex and expert-driven, the parties will stipulate to an early disclosure of expert witnesses in order to assist them in case preparation. Sometimes the court will order the parties to disclose experts on an expedited basis for similar reasons. Finally, the parties may stipulate to an expert witness exchange after some discovery has been completed if the 50 day prior to trial date is too soon to identify expert witnesses.

Judge's Perspective:

Generally, in cases where there will be an extensive list of expert witnesses the parties want the exchange date as early as possible so preparation for the depositions can likewise begin as early as possible.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.08 Demand Is Served on All Parties.

A demand for the exchange of expert witness information requests a mutual, simultaneous exchange of information by all parties [CCP §§ 2034.210, 2034.260]; therefore, the party issuing the demand must serve a copy of the demand on all parties who have appeared in the action [CCP § 2034.240]. The demanding party must retain the original demand with the original proof of service attached to it [CCP § 2034.290(b)].



Cross Reference:

Discussion of document retention rules, see 13.10.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13.09 Demand Not Filed With Court.

The demand for the exchange of expert witness information should not be filed with the court [*CCP* § 2034.290(a)].

Exception:

If the demand, or any document containing expert witness information exchanged by the parties, becomes relevant to any issue pending in the action, such documents must be lodged with the court [*see, e.g., CCP* § 2034.290(c) (demand and responses may be filed in connection with motions to augment or amend expert witness information)].



Cross Reference:

Discussion of motions to augment or amend expert witness information, see *13.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13.10 Original Papers Are Retained.

13.10[1] Demanding Party Retains Demand and Responses Until Six Months After Case's Final Disposition.

The party who issues a demand for the exchange of expert information must retain the original of the demand with the original proof of service attached, as well as the originals of all lists, declarations, and reports exchanged, until six months after final disposition of the action [*CCP* § 2034.290(b)]. A six-month retention period also applies to agreements to extend the time to respond to discovery requests, notices of the agreements, and declarations for additional discovery [*Cal Rules Ct, Rule 3.250(a)(6) and (7), (b)*].

13.10[2] Originals May Be Destroyed After Retention Period. When the retention period has expired, the original demand, the responses, and related papers may be destroyed [*CCP* § 2034.290(b)].

Exception:

The papers related to the exchange of expert witness information must not be destroyed if the court, on the motion of any party and for good cause shown, orders that the originals be preserved for a longer period [*CCP* § 2034.290(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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13.11 CHECKLIST: Responding to Demand for the Exchange of Expert Witness Information.



Determine if demand complies with statutory timing requirements:

- ☐ Initial trial date has been set.
- ☐ Demand is made no later than 10 days after initial trial date is set or 70 days before that trial date, whichever is closer to the trial date.

Authority:

CCP §§ 2034.210, 2034.220

Discussion:

See 13.06[1] -[3]



Required elements are in demand:

- ☐ Party making demand is identified below title of case;
- ☐ There is statement that demand is being made under *CCP § 2034.010 et seq.*;
- ☐ Date of exchange of expert witness information is specified.

Authority:

CCP § 2034.230

Discussion:

See 13.07[1]

☐ Date of exchange is 50 days before initial trial date or 20 days after service of demand, whichever is closer to the trial date.

Authority:

CCP § 2034.230(b)

Discussion:

See 13.07[3]

☐ Determine if date of exchange should be different than specified:

☐ Consider whether exchange date should be less than 50 days before trial or more than 20 days after service of demand:

☐ If so, and good cause to set an earlier or later date, file motion to set a different date of exchange.

Authority:

CCP § 2034.230(b)

Discussion:

See 13.07[3]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

☐ Serve demand on all parties who have appeared in the action.

Authority:

CCP § 2034.240

Discussion:

See 13.08

☐ Consider bringing a motion for a protective order:

☐ Grounds are:

☐ Unwarranted annoyance,

☐ Embarrassment,

☐ Oppression, or

☐ Undue burden and expense.

Prerequisite:

Party must attempt to informally resolve issues raised by demand before filing motion

☐ Protective order may:

☐ Quash demand for being untimely served.

☐ Specify an earlier or later date of exchange.

☐ Provide that the exchange be made only on specified terms and conditions.

☐ Specify that the production and exchange of any reports and writings of experts be made at a different time or place.

☐ Divide some or all parties into sides based on their identity of interests.

☐ Reduce a party's or side's list of retained experts.

Authority:

CCP § 2034.250

Discussion:

See 13.12, 13.15

☐ If seeking protective order:

☐ Make motion promptly.

☐ Draft motion and notice of motion for protective order, with supporting declaration and memorandum.

☐ Draft proposed protective order.

☐ Serve and file motion:

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2034.250

Discussion:

See 13.15

Forms:

See 13.35 (notice of motion and declaration for protective order), 13.36 (proposed protective order)

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

☐ If not seeking protective order:

- ☐ Determine if exchange of information will occur at meeting or, more typically, by mail.
- ☐ Ask demanding party to stipulate in writing to exact date of exchange to avoid questions of extensions of time for delivery by mail.
- ☐ Calendar date, before date specified in demand to have information compiled.
- ☐ If exchange will be by mail, calendar date, prior to date specified in demand, to mail expert documents.

Authority:

CCP § 2034.260(a)

Discussion:

See 13.13

- ☐ Determine whether to present expert testimony on any subject and provide either:
 - ☐ Statement that the party does not presently intend to offer expert witness testimony; or
 - ☐ List of names and addresses of any experts whose opinion you expect to offer in evidence at trial. For experts listed, determine if expert witness declaration is required:
 - ☐ Expert is party.
 - ☐ Expert is employee of party.
 - ☐ Expert was retained by any party for purpose of expressing an opinion.

Exception:

Declaration not required for percipient expert witnesses.

☐ If declaration required, include:

- ☐ Brief narrative of expert's qualifications.
- ☐ Brief narrative of general substance of testimony expert intends to give.
- ☐ Representation that expert agrees to testify at trial.
- ☐ Representation that expert will be sufficiently familiar with pending action, and will submit to meaningful oral deposition, including opinions and basis of opinions.
- ☐ Statement of expert's hourly and daily fee for deposition testimony and for consulting with retaining attorney.

☐ If exchange of reports and writings made by expert in forming his or her opinion determine what discoverable reports and writings exist.

☐ Obtain reports and writings from expert that must be produced pursuant to demand.

Authority:

CCP §§ 2034.260, 2034.270

Discussion:

See 13.14

☐ Review expert witness documents for statutory compliance.

☐ Exchange information on or before demand date:

- ☐ Prepare proof of service showing that all parties appearing in action have been served with information.

Authority:

CCP § 2034.260(a)

Discussion:

See 13.13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.12 Options and Strategy.

When a party receives a demand for expert witness information, the options are:

- To exchange the information in writing on or before the date of exchange specified in the demand [CCP § 2034.260(a)]; or,
- To protect a party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense, to seek a protective order that [CCP § 2034.250(a), (b)]:
 - ☐ Quashes the demand for being untimely served;
 - ☐ Specifies an earlier or later date of exchange;
 - ☐ Provides that the exchange be made only on specified terms and conditions;
 - ☐ Specifies that the production and exchange of any reports and writings of experts be made at a different time or place;
 - ☐ Divides some or all parties into sides based on their identity of interests; and/or;
 - ☐ Reduces a party's or side's list of retained experts.

The last two items, however, may be more appropriately addressed in response to the opponent's designation.

➡ Cross References:

Discussion of information exchanged, see 13.13.

Discussion of protective orders, see 13.15.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.13 Time and Method of Exchanging Expert Witness Information.

13.13[1] Expert Witness Information Must Be in Writing. All parties who have appeared in the action must exchange their information concerning expert trial witnesses in writing on or before the date of exchange specified in the demand [CCP § 2034.260(a)].

13.13[2] Exchange Must Be 50 Days Before Initial Trial Date or 20 Days After Service of Demand. The specified date of exchange must be 50 days before the initial trial date or 20 days after service of the demand, whichever is closer to the trial date [CCP § 2034.230(b)].

Exception:

By stipulation or on motion and showing of good cause, the court may order an earlier or later date of exchange [CCP § 2034.230(b)].



Strategic Point:

If the date for the exchange falls on a weekend or holiday get a stipulation regarding whether the exchange is to be made on the day before or the day after the weekend or holiday, particularly if the 50th day before trial falls on the weekend or holiday.



Cross Reference:

Form of motion to change date of exchange, see *California Forms of Pleading and Practice*, Ch. 198, *Discovery: Exchange of Expert Witness Information*, § 198.52 (Matthew Bender).

13.13[3] Exchange May Be by Mail or in Person. The exchange of expert information may occur at a meeting of the attorneys for the parties involved, or by a mailing, on or before the specified date of exchange [CCP § 2034.260(a)].



Strategic Point:

The exchange is almost always done by mail. To protect a party from allegations of noncompliance with exchange requirements, if the exchange is made by mail, a proof of service, containing the complete addresses of all recipients, must be prepared. There is rarely any reason to exchange expert information before the specified date because it will only subject your expert to the first deposition.

Legal Topics:

For related research and practice materials, see the following legal topics:

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13.14 Contents of Expert Witness Documents.

13.14[1] Each Party Must Provide List of Experts or Statement of Intent Not to Use Experts. The documents provided by the parties in the simultaneous exchange of expert witness information must include one of the following:

- A list setting forth the name and address of any person whose expert opinion testimony the party expects to offer in evidence at the trial [CCP § 2034.260(b)(1)]; or,
- A statement that the party does not presently intend to offer the testimony of any expert witness [CCP § 2034.260(b)(2)].



Warning:

Even a party who does not intend to call an expert witness to testify at trial must respond to another party's demand for the exchange of expert witness information, by providing a statement to that effect [see *Zellerino v. Brown* (1991) 235 CA3d 1097, 1115-1116, 1 CR2d 222]. Also, general witness designations, such as "all past or present examining and/or treating physicians," especially those that encompass retained experts, may be deemed insufficient under CCP § 2034.010 *et seq.*, resulting in the exclusion of expert testimony [see *Kalaba v. Gray* (2002) 95 CA4th 1416, 1423-1424, 116 CR2d 570 (decided under former CCP § 2034)]. Nor may a party provide a list of treating physicians and other healthcare professionals and reserve the right to call them as expert witnesses, without designating any as an "expected" witness [*Fairfax v. Lords* (2006) 138 CA4th 1019, 1025, 41 CR3d 850 (decided under former CCP § 2034)].

13.14[2] Expert Witness Declaration Required for Party-Affiliated Experts.

13.14[2][a] Expert Witness Declaration Required for Party-Affiliated or Retained Experts. If a party's expert witness list includes an expert who is a party, an employee of a party, or who was retained by any party to form and express an opinion in anticipation of the litigation or in preparation for the trial of the action, the list must be accompanied by an expert witness declaration for that witness [CCP § 2034.210(b)].

Distinguish:

No expert witness declaration is required for a percipient expert witness who acquires personal knowledge of the relevant facts independently of the litigation; the most common type of expert in this category is a treating physician [see CCP § 2034.210; see also *Huntley v. Foster* (1995) 35 CA4th 753, 756, 41 CR2d 358].

 Cross References:

Discussion of percipient witnesses, see 13.02[4].

Form, expert declaration, see 13.34.

**Trap:**

Any party that designates a retained expert on its witness list is required to provide an expert witness declaration relative to that expert, regardless of whether the party designating the retained expert is the party who actually retained the expert [CCP § 2034.210(b); see also *Huntley v. Foster* (1995) 35 CA4th 753, 756-757, 41 CR2d 358 ; *Zellerino v. Brown* (1991) 235 CA3d 1097, 1116, 1 CR2d 222].

13.14[2][b] Expert Witness Declaration Requirements. The expert witness declaration required by CCP § 2034.210(b) must contain the following:

- A brief narrative statement of the qualifications of the expert [CCP § 2034.260(c)(1); see also *Evid Code* § 720 (defining "expert")];
- A brief narrative statement of the general substance of the testimony the expert is expected to give [CCP § 2034.260(c)(2)];
- A representation that the expert has agreed to testify at trial [CCP § 2034.260(c)(3)];
- A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony that the expert is expected to give, including any opinion and the basis for that opinion [CCP § 2034.260(c)(4)];
- A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney [CCP § 2034.260(c)(5)]; and
- The signature of the attorney for the party submitting the declaration, or of the party if he or she has no attorney [CCP § 2034.260(c)].

13.14[2][c] Declaration Should Cover All Issues As to Which Expert Will Testify. The narrative statement describing the substance of an expert witness's testimony should include the substance of the testimony on all issues as to which the expert is expected to testify to avoid potential sanctions [CCP §§ 2034.260(c)(2), 2034.300(b); see also *Bonds v. Roy* (1999) 20 C4th 140, 142-143, 145-146, 83 CR2d 289, 973 P2d 66].

**Warning:**

If the statement of an expert's anticipated testimony is incomplete, vague, or too general, and the submitting party does not attempt to amend it later, the court may exclude testimony on any issues not adequately described in the statement [see CCP § 2034.300(b); see also *Bonds v. Roy* (1999) 20 C4th 140, 142-143, 145-146, 83 CR2d 289, 973 P2d 66].

**Strategic Point:**

In describing the testimony expected to be given by an expert, counsel should consider closing the summary of the expected testimony with a statement to the effect that the expert will also testify regarding "all related opinions and conclusions and the bases therefore." This statement may help counter a claim that the more specific summary limits the scope of the expert's testimony.

13.14[2][d] Attorney or Unrepresented Party Signs Declaration. The expert witness declaration must be signed under penalty of perjury by only the attorney for the submitting party, or by the party if he or she has no attorney [CCP § 2034.260(c)].

13.14[3] Parties Must Provide Discoverable Reports and Writings If Requested. If a demand for the exchange of expert witness information includes a demand for the production of reports and writings as described in CCP § 2034.210(c), all parties must produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings made by any designated expert, who is a party, an employee of a party, or a retained witness, in the course of preparing his or her opinion [CCP § 2034.270; *see also* CCP § 2034.210(c)].

**Warning:**

As a practical matter expert reports and writings are typically exchanged at the time of the deposition because they are generally not ready until then. If your expert is not going to be deposed by the opposing party make sure the expert's reports are produced when ready to avoid having the expert's testimony precluded by the trial court [*see* CCP § 2034.270]. Even if a party receives its expert's report as late as the date of trial, the party should file the report with a motion for leave to submit tardy information [*see Zellerino v. Brown* (1991) 235 CA3d 1097, 1116-1117, 1 CR2d 222]. A motion may not be necessary if other information has previously been provided regarding the expert.

**Cross Reference:**

Discussion of tardy expert witness information, *see* 13.19.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13.15 Obtaining Protective Orders.

13.15[1] Moving for Protective Order Only Way to Challenge Demand. A motion for a protective order is the only method of properly challenging a demand for the exchange of expert witness information [see *CCP* § 2034.250; see also *Zellerino v. Brown* (1991) 235 CA3d 1097, 1109-1112, 1 CR2d 222]. An objection is an improper challenge to such a demand [see *Zellerino v. Brown* (1991) 235 CA3d 1097, 1109-1111, 1 CR2d 222].

Grounds:

A court may enter a protective order on the motion of a party and for good cause shown, to protect a party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*CCP* § 2034.250(a), (b)].

Prerequisite:

Before moving for a protective order, a party wishing to challenge a demand must make a reasonable, good faith attempt to informally resolve each issue presented by the demand [see *CCP* §§ 2016.040, 2034.250(a)].



Timing:

Although no specific time limit is given for a party who has been served with a demand to move for a protective order, a party wishing to challenge some aspect of a demand should file its motion as soon as possible, or "promptly," as the statute indicates [see *CCP* § 2034.250(a); see also *Zellerino v. Brown* (1991) 235 CA3d 1097, 1109-1111, 1 CR2d 222 (party who "objected to" demand failed to move for protective order, and demand later deemed effective)].

13.15[2] Court May Tailor Relief Granted. On a motion by a party and for good cause shown, the court may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*CCP* § 2034.250(a), (b); see also *Torres v. Superior Court* (1990) 221 CA3d 181, 188, 270 CR 401 (*ex parte* interviews of witness temporarily prohibited to prevent disclosure of privileged information)].

The protective order may include, but is not limited to, one or more of the following directions [*CCP* § 2034.250(b)]:

- The demand be quashed because it was not timely served [*CCP* § 2034.250(b)(1)];
- The date of exchange be earlier or later than that specified in the demand [*CCP* § 2034.250(b)(2)];
- The exchange be made only on specified terms and conditions [*CCP* § 2034.250(b)(3)];
- The production and exchange of any reports and writings of experts be made at a different place or at a different time than that specified in the demand [*CCP* § 2034.250(b)(4)];
- Some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and the designation of any experts as described in *CCP* § 2034.210(b) be made by any side so created [*CCP* § 2034.250(b)(5)]; or,
- A party or a side reduce the list of employed or retained experts designated by that party or side under *CCP* § 2034.210(b) [*CCP* § 2034.250(b)(6)].

13.15[3] Declaration Must Accompany Motion. If a party's attempt to informally resolve the issues raised by a demand is unsuccessful, his or her motion for a protective order must be accompanied by a declaration setting forth the facts that demonstrate a reasonable and good faith attempt was made [*see CCP* §§ 2016.040, 2034.250(a)].



Cross References:

Forms: see 13.35 (motion), 13.36 (proposed order).

Form of memorandum supporting motion, see *California Points and Authorities*, Ch. 88, *Discovery: Exchange of Expert Witness Information*, § 88.10 (Matthew Bender).

13.15[4] Court Must Impose Sanctions Against Unsuccessful Party. The court must impose a monetary sanction, under *CCP* § 2023.010 *et seq.* (misuse of discovery process), against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order [*CCP* § 2034.250(d)].

Exception:

The court may decline to impose sanctions against the unsuccessful party on a motion for a protective order if it finds the party acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2034.250(d)].



Cross Reference:

Discussion, see Ch. 3, Sanctions.



Strategic Point:

Because the unsuccessful party on a motion for a protective order will likely incur a monetary sanction [*CCP* § 2034.250(d)], such a motion should only be brought if the moving party believes a significant benefit will result, such as preventing prejudice to that party caused by the untimeliness of the demand [*see Zellerino v. Brown* (1991) 235 CA3d 1097, 1110, 1 CR2d 222 (decided under former *CCP* § 2034)]. The burden will be on the moving party to establish why particular requests in the demand should not be met [*Zellerino v. Brown* (1991) 235 CA3d 1097, 1111, 1 CR2d 222], and the statute's "meet and confer" requirement, coupled with the threat of sanctions, indicates that a party served with a demand should make every effort to come to an agreement with the propounding party regarding the

specifics of the exchange before seeking court intervention [*see Zellerino v. Brown (1991) 235 CA3d 1097, 1110-1111, 1 CR2d 222*].



Cross Reference:

See Ch. 4, Law and Motion Procedure.

13.15[5] On Denial of Motion, Discovery Permitted on Terms That Are Just. If a motion for a protective order is denied in whole or in part, the court may order that the party responding to the motion provide or permit the discovery on those terms and conditions as are just [*CCP § 2034.250(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryProtective Orders



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Chapter 13 Exchanging Expert Witness Information
IV. CHANGING EXPERT WITNESS INFORMATION AFTER EXCHANGE DATE

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13.16 CHECKLIST: Changing Expert Witness Information After Exchange Date.

13.16[1] Submitting Supplemental Expert Witness List.

☐ Determine availability:

Submission of supplemental expert witness list must occur within 20 days of date of initial exchange of expert witness lists.

- ☐ Demand for exchange of expert witness information has been made.
- ☐ Exchange of expert witness information has occurred.
- ☐ Party participated in exchange of expert information.
- ☐ New expert must be immediately available for deposition.

Authority:

CCP § 2034.280

Discussion:

See 13.17

☐ Determine if supplemental witness list is needed and limitations:

- ☐ Review opposing parties' expert designations and ascertain subjects on which expert testimony will be provided.

- ☐ Determine if expert is needed to testify on subjects for which you have not previously retained an expert to testify, but an opposing party has.
- ☐ Party who has already designated expert to testify on particular subject may not replace that expert with one identified on a supplemental list.

Authority:

CCP § 2034.280

Discussion:

See 13.17

☐ Identify, interview, and select witnesses who might provide expert testimony on subjects as to which party must present expert testimony.

- ☐ Confirm that witnesses selected to testify will be available immediately for deposition.

☐ Prepare supplemental witness list.

- ☐ List names and addresses of supplemental expert witnesses.

☐ Prepare expert witness declarations for those witnesses who are parties, employees of parties, or retained experts under *CCP § 2034.210(b)*.

☐ Include all discoverable reports and writings, if any, made by additional experts, regardless of whether such were requested in initial exchange demand.

Authority:

CCP § 2034.280; see also CCP § 2034.210(c), 2034.260(c)

Discussion:

See 13.17

☐ Serve copies of supplemental list on all parties who have appeared in action within 20 days of the date expert information initially exchanged.

Authority:

CCP §§ 2034.240, 2034.280

Discussion:

See 13.08, 13.14

13.16[2] Moving to Augment or Amend Expert Witness Information.

- ☐ Determine timing for bringing motion to augment or amend.

- ☐ Motion must be brought in time for deposition of expert to whom motion relates to be completed within time for discovery under *CCP § 2024.010 et seq.*, unless court orders otherwise based on exceptional circumstances.
- ☐ Decide whether expert witness information should be augmented or amended.
- ☐ Purposes:
- ☐ Augment to add expert witnesses retained after the timely exchange of expert witness lists.
- ☐ Amend expert witness declaration with respect to different or additional general substance of testimony expected to be given.
- ☐ To replace one expert with another.
- ☐ Consider drawbacks:
- ☐ Possibility of reopening discovery.
- ☐ Possibility of bearing costs of additional discovery.
- ☐ Possible imposition of monetary sanction if motion unsuccessful.

Authority:

CCP §§ 2034.610-2034.630

Discussion:

See 13.18

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

- ☐ Consider extent to which opposing party may argue that it has relied on existing list of experts, and whether party can meet conditions for court to grant leave to amend or augment list.
- ☐ Conditions:
- ☐ Opposing party may not be prejudiced in maintaining its action or defense on merits.
- ☐ Moving party in exercise of reasonable diligence would not have determined to

call the expert witness or offer different testimony; or, failed to call the expert or to offer different testimony of an expert due to mistake, inadvertence, surprise or excusable neglect.

☐ Moving party sought leave promptly.

☐ Moving party promptly served copy of the proposed expert witness information on all parties that have appeared in the action.

☐ Make a reasonable and good faith attempt at an informal resolution of augmentation/amendment issue.

☐ Confer with opposing parties regarding augmentation or amendment of expert information.

☐ Obtain agreement of parties regarding deposition of expert who is subject of proposed motion.

☐ If seeking amendment or augmentation:

☐ Prepare notice of motion, motion, supporting declaration and memorandum.

☐ Draft proposed order.

☐ Serve and file motion on all parties:

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP §§ 2016.040, 2034.610-2034.620

Discussion:

See 13.18

Forms:

See 13.37, 13.38 (motion and order to augment), 13.39, 13.40 (motion and order to amend)

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

13.16[3] Opposing Motion to Augment or Amend Expert Witness Information.

Timing: Calendar response and hearing dates.

☐ Analyze prejudice to your party's claims or defenses, considering:

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- ☐ Discovery conducted to date.
- ☐ Time remaining before trial.
- ☐ Time and resources needed to respond to new witness or testimony.
- ☐ Consider diligence of party seeking to augment or amend expert information.
- ☐ Consider possible exposure to sanctions.
- ☐ Decide what, if any, conditions to ask court to impose if motion granted:
 - ☐ Grant opposing party leave to designate additional expert witnesses or to elicit additional opinions from exiting witnesses;
 - ☐ Grant continuance of the trial for reasonable period of time;
 - ☐ Impose additional discovery costs on moving party;
 - ☐ Other terms as may be just.
- ☐ Assemble evidence in opposition to motion:
 - ☐ Collect any relevant evidence of prejudice to your party, including deposition testimony, correspondence among the parties, etc.
 - ☐ Draft declarations opposing motion, particularly to show prejudice to your party's ability to maintain action or defense on merits if motion were to be granted.
 - ☐ Note if moving party has continually failed to comply with discovery orders or requests in the litigation.
 - ☐ Specify any expenses incurred as a result of the previous designation.
- ☐ Draft opposing memorandum, proposed order.
- ☐ Serve and file response:
 - ☐ Follow standard noticed motion procedure.

Authority:

CCP §§ 2023.010-2023.040, 2034.610-2034.630

Discussion:

See 13.18

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

13.16[4] Moving to Submit Tardy Expert Witness Information.

- ☐ Decide whether to submit tardy expert witness information.
- ☐ Motion and deposition of expert must be made within time for discovery.
 - ☐ Drawbacks:
 - ☐ Possibility of reopening discovery on the matter involved.
 - ☐ Possibility of bearing costs of additional discovery.

Authority:

CCP §§ 2034.710-2034.720

Discussion:

See 13.24

- ☐ Consider extent to which opposing party may have relied on absence of list of expert witnesses, and whether grounds exist for court to grant leave to submit tardy list.
 - ☐ Grounds:
 - ☐ Opposing party will not be prejudiced in maintaining action or defense on merits.
 - ☐ Moving party failed to submit list of expert witnesses due to mistake, inadvertence, surprise or excusable neglect.
 - ☐ Moving party sought leave promptly.
 - ☐ Moving party promptly served copy of the proposed expert witness information on all parties that have appeared in action.
- ☐ Seek reasonable and good faith attempt at informal resolution.
- ☐ If seeking leave to submit tardy information:

- ☐ Draft motion and notice of motion with supporting declaration and memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file motion:
 - ☐ Follow standard noticed motion procedure.

- ☐ Calendar response and hearing dates.

Authority:

CCP §§ 2034.710-2034.720

Discussion:

See 13.18

Forms:

See 13.41 (motion), 13.42 (order)

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

13.16[5] Opposing Motion to Submit Tardy Expert Witness Information.

- ☐ Calendar response and hearing dates.
 - ☐ Focus court's attention on whether moving party has been diligent.
- ☐ Decide what, if any conditions to request if court were to grant motion:
 - ☐ Granting leave to any party opposing motion to designate additional expert witnesses or to elicit additional opinions from existing witnesses.
 - ☐ Granting continuance of trial for reasonable period of time.
 - ☐ Imposition of additional discovery costs on moving party.
 - ☐ Imposing monetary sanctions.
 - ☐ Other terms as may be just.
- ☐ Prepare:

- ☐ Collect any relevant evidence.
- ☐ Draft declarations opposing motion, particularly to show prejudice to ability to maintain action or defense on merits if motion were to be granted.
- ☐ Draft opposing memorandum.
- ☐ Draft proposed order.
- ☐ Serve and file response:
 - ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2034.710-2034.720

Discussion:

See 13.19[4], [5]

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.17 Supplementing the Expert Witness List.

13.17[1] Supplementing Party Must Serve Within 20 Days After First Exchange. Within 20 days after the parties' initial exchange of expert witness information, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any expert who will express an opinion on a subject to be covered by an expert designated by an adverse party, if the party supplementing its expert witness list *has not previously retained an expert to testify on that subject* [CCP § 2034.280(a) (emphasis added)].



Strategic Point:

The rule allowing the submission of a supplemental expert witness list should be used by the parties to reconsider calling experts to testify on certain subjects [see CCP § 2034.280]. For example, a party initially may decide not to call an expert to testify on a particular subject, based on the party's belief the subject would not require or involve expert testimony, yet when the initial exchange of expert witness information reveals that another party will be presenting expert testimony on that subject, the first party may submit a supplemental expert witness list to allow it to present expert testimony to controvert that of the other party [see CCP § 2034.280].

13.17[2] Supplementing Party May Not Substitute One Expert for Another. A party who has already designated an expert to testify on a particular subject may not replace that expert with another one by submitting a supplemental expert witness list [CCP § 2034.280(a); see also *Basham v. Babcock* (1996) 44 CA4th 1717, 1723-1724, 52 CR2d 456].



Cross Reference:

Discussion of procedure for substituting experts, see 13.18.

13.17[3] Supplementing Party Must Provide Expert Declaration, Reports, and Writings. A party's supplemental expert witness list must be accompanied by an expert witness declaration for any expert who falls within CCP § 2034.210(b) (party, party-employee, retained expert), and all discoverable reports and writings of any experts listed must be submitted [CCP § 2034.280(b)].

**Warning:**

Note that discoverable expert reports and writings must be submitted, regardless of whether they were requested in the initial demand under *CCP* § 2034.210(c) [*CCP* § 2034.280(b)].

13.17[4] Expert Must Be Made Available for Deposition Immediately. A party submitting a supplemental expert witness list must make any newly added experts available for deposition immediately [*CCP* § 2034.280(c); see also *CCP* §§ 2034.410-2034.470 (expert deposition procedures)]. The newly added expert's deposition may be taken even if the time limit for discovery under *CCP* § 2024.010 *et seq.* has expired [*CCP* § 2034.280(c)].

**Cross Reference:**

Checklist and discussion of procedures for arranging expert witness depositions, see 13.28 *et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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13.18 Amending or Augmenting Expert Witness Information.

13.18[1] Parties May Move to Amend or Augment Expert Witness Information. Any party who has engaged in a timely exchange of expert witness information may move for leave to do either of the following [*CCP* § 2034.610]:

- Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom the party has subsequently retained;
- Amend an expert witness declaration submitted by that party with respect to the general substance of the testimony that a previously designated expert is expected to give.



Timing:

The motion to augment or amend expert information must be made a sufficient time in advance of the time limit for the completion of discovery under *CCP* § 2024.010 *et seq.* to permit the deposition of any expert to whom the motion relates [*CCP* § 2034.610(b)]. Under exceptional circumstances, the court may permit the motion to be made at a later time [*CCP* § 2034.610(b)].

Prerequisite:

There is a "meet and confer" requirement implicit in *CCP* § 2034.610, in that the moving party must make a reasonable and good faith attempt to informally resolve its expert information amendment/augmentation issues before filing a motion with the court [*CCP* §§ 2016.040, 2034.610(c)].



Strategic Point:

The court does not need to be involved in augmenting or amending the expert witness list or changing the timing of discovery, which the parties can do by stipulation.

Judge's Perspective:

Attempts to augment and/or amend expert witness lists are always problematic since it is the rare instance that a meet and confer or a stipulation will be able to resolve what inevitably results in an

impasse. It appears that the trial judge in most instances needs to resolve these issues. Counsel should act promptly if there is a need to augment and/or amend. Immediately request a meet and confer and if unsuccessful proceed by noticed motion. Any delay will simply inure to the benefit of the party seeking to prohibit amendment or augmentation by claiming prejudice in the timing and proximity to the trial date.

Distinguish:

A motion to augment a party's expert witness list, not a supplemental witness list, is the proper method for substituting an expert already designated in the initial exchange of expert information [see *CCP* §§ 2034.280(a), 2034.610].

 Cross References:

Forms: see 13.37, 13.38 (motion and order to augment); 13.39, 13.40 (motion and order to amend).

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 88, Discovery: Exchange of Expert Witness Information, § 88.12 (Matthew Bender)*.

13.18[2] Declaration Must Accompany Motion. A declaration, stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion, must accompany the motion to augment or amend expert witness information [*CCP* §§ 2016.040, 2034.610(c)].

If a party is seeking to augment its list because a previously designated expert is unavailable, the declaration should include sufficient evidence showing reasons for the unavailability.

 Cross References:

Discussion of supplemental witness lists, see 13.17.

Discussion of general time requirements under *CCP* § 2024.010 et seq., see Ch. 1, Strategy and Planning.

13.18[3] Conditions for Granting Leave to Augment or Amend Expert Witness Information.

13.18[3][a] Court Must Make Statutory Determinations. The court may grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the existing list of expert witnesses, and after determining that [*CCP* § 2034.620]:

- Any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits;
- The moving party either:
 - ☐ Would not, in the exercise of reasonable diligence, have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness; or
 - ☐ Failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness, as a result of mistake, inadvertence, surprise, or excusable neglect;
- The moving party sought leave to augment or amend promptly after deciding to call the expert

witness or to offer the different or additional testimony; and

- The moving party promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in *CCP § 2034.260* on all other parties who have appeared in the action.

Examples:

- A party will be prejudiced by augmentation when, due to its reliance on the previous list of experts, it is not prepared for the new testimony, and cannot be prepared to respond to the new testimony in time for trial [*see Dickison v. Howen (1990) 220 CA3d 1471, 1478-1480, 270 CR 188* (no prejudice shown)]. The fact that the new expert will give testimony adverse to a party or will give testimony that is not merely cumulative of other testimony does not cause prejudice [*see Dickison v. Howen (1990) 220 CA3d 1471, 1478-1479, 270 CR 188*].

- A change of testimony by an expert witness may constitute surprise sufficient to support augmentation of a witness list when the attorney for the designating party has previously interviewed the witness and determined the substance of the testimony expected [*see Dickison v. Howen (1990) 220 CA3d 1471, 1478, 270 CR 188*].



Warning:

The court has the discretion to determine whether a party seeking to augment or amend its expert information sought leave to do so in a prompt fashion, and properly may deny a motion made too late to allow the opposing party to depose the witness or prepare a response to the new testimony [*see Bonds v. Roy (1999) 20 C4th 140, 148-149, 83 CR2d 289, 973 P2d 66* (party sought to expand testimony on last day of trial testimony)].

13.18[3][b] Expert Must Be Made Available Immediately for Deposition. Leave to amend or augment expert information must be conditioned on the moving party making the expert who is the subject of the motion immediately available for a deposition under *CCP §§ 2034.410-2034.470* [*CCP § 2034.620(d)*].

13.18[3][c] Expert Witness Documents Lodged With Court If Relevant. The demand for the exchange of expert witness information, and all expert witness lists and declarations exchanged in response to it, must be lodged with the court if their contents are relevant to an issue in the motion to augment or amend expert information [*CCP § 2034.290(c)*].

13.18[3][d] Court May Impose Additional Conditions. Leave to amend or augment expert information may also be conditioned on other terms as are just [*CCP § 2034.620(d)*]. These may include, but are not limited to, the following [*CCP § 2034.620(d)*]:

- Any party opposing the motion may be granted leave to designate additional expert witnesses or to elicit additional opinions from those previously designated;
- A continuance of the trial may be granted for a reasonable period of time;
- Costs and litigation expenses may be awarded to any party opposing the motion.

Example:

The court may impose additional conditions, such as limiting the number of new experts added, requiring the augmenting party to pay deposition expenses, and requiring additional disclosures regarding the witness, where appropriate under the circumstances [*see Dickison v. Howen (1990) 220 CA3d 1471, 1479-1480, 270 CR 188*].

13.18[4] Court Must Impose Monetary Sanction. The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information [CCP § 2034.630].

Exception:

The court may decline to impose a monetary sanction if it finds that the one subject to the sanction acted with substantial justification, or that other circumstances make the imposition of the sanction unjust [CCP § 2034.630].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.19 Moving to Submit Tardy Expert Witness Information.

13.19[1] Party Must File Motion for Leave to Submit Tardy Information. On the motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date [*CCP* § 2034.710(a)].

Cross References:

Forms: See 13.41 (motion), 13.42 (order); see also Ch. 4, Law and Motion Procedure.

Form of memorandum supporting motion, see *California Points and Authorities*, Ch. 88, *Discovery: Exchange of Expert Witness Information*, § 88.13 (Matthew Bender).

Timing:

A motion to submit tardy information must be made a sufficient time in advance of the time limit for the completion of discovery under *CCP* § 2024.010 *et seq.* to permit the deposition, within that time limit, of any expert to whom the motion relates [*CCP* § 2034.710(b)]. Therefore, a party should make an *ex parte* application to shorten time for the hearing of a motion.

Exception:

Under exceptional circumstances, the court may permit a motion to submit tardy expert information to be made at a later time [*CCP* § 2034.710(b)]

Cross Reference:

Discussion of time requirements under *CCP* § 2024.010 *et seq.*, see Ch. 1, *Strategy and Planning*, 1.17.

13.19[2] Conditions for Granting Leave. The court may grant leave to submit tardy information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits [*CCP* § 2034.720(a), (b)]. The court must also find that [*CCP* § 2034.720(c)]:

- The moving party failed to submit the information as a result of mistake, inadvertence, surprise, or excusable neglect;
- The moving party sought leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect; and
- The moving party, in seeking leave, also promptly served a copy of the proposed expert witness information described in *CCP* § 2034.260 on all other parties who have appeared in the action.

13.19[3] Expert Must Be Made Available Immediately for Deposition. Leave to submit tardy expert information must be conditioned on the moving party making the expert who is the subject of the motion available immediately for a deposition under *CCP* §§ 2034.410-2034.470 [*CCP* § 2034.720(d)].

13.19[4] Court May Impose Additional Conditions. Leave to submit tardy information may also be conditioned on other terms as may be just. These may include, but are not limited to, the following [*CCP* § 2034.720(d)]:

- Granting leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated;
- Granting a continuance of the trial for a reasonable period of time;
- Awarding costs and litigation expenses to any party opposing the motion.

13.19[5] Court Must Impose Monetary Sanctions. The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information [*CCP* § 2034.730].

Exception:

The court may decline to impose sanctions if it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*CCP* § 2034.730].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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[Reserved]

13.20[Reserved]



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13.21 Expert Not Designated by Party May Testify If Called to Impeach Another Expert or If Designated by Another Party.

A party who has not previously designated an expert witness may call that expert witness to testify at trial in either of the following situations [CCP § 2034.310]:

- The expert was designated by another party, and was thereafter deposed under CCP §§ 2034.410-2034.470 [CCP § 2034.310(a); see also *Powell v. Superior Court* (1989) 211 CA3d 441, 445, 259 CR 390]; or
- The expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony as to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion [CCP § 2034.310(b); see *Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1067-1068, 113 CR2d 649 (testimony properly excluded as not relating to foundational fact; trial courts to strictly construe term "foundational fact" to prevent party from offering contrary opinion under guise of impeachment)].

Example:

When an expert in a personal injury case testified, based on a photograph and a percipient witness's testimony, that the tire tracks in the photograph were that of the plaintiff's car, the opposing party's expert, who had not been designated to testify on that subject, could not give a rebuttal opinion that the tracks did not belong to plaintiff's car, because that would be simply be a contrary opinion. Impeachment would be testimony that the photograph did not accurately depict the accident scene or that the percipient witness' testimony was inherently improbable [*Kennemur v. State of California* (1982) 133 CA3d 907, 924-925, 184 CR 393 (trial court properly excluded testimony because it did not go to foundational facts)].



Warning:

As illustrated by the above-cited cases, the definition of impeachment is very narrow so counsel should not hold back experts for strategic reasons with the hope that they can be called for impeachment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
V. DEPOSING EXPERT WITNESSES

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13.22 CHECKLIST: Deposing Expert Witnesses.

13.22[1] Deposing Expert Witness.

☐ Review opposing party's list of designated experts to determine which experts to depose.

☐ Purposes:

☐ Deposing all opposing experts prevents surprise.

☐ Deposing experts reveals focus of opposing party's trial strategy.

☐ Deposing experts reveals strengths and weaknesses of foundations of opinions.

☐ Provides information for review by own experts for rebuttal.

☐ Provides information regarding expert's background so investigation can be performed.

☐ Tests qualifications of experts.

☐ Identifies needs for deposing party to seek other experts on overlooked issues.

☐ Considerations:

☐ Time and expense of paying expert fees for deposition.

☐ Place of deposition is a smaller range than deposition of non-experts, which may be more costly.

Authority:

CCP §§ 2034.420-2034.470

Discussion:

See 13.26

☐ Determine place of deposition:

☐ If expert is a party, party's employee, or retained for litigation, place of deposition is within 75 miles of courthouse where action is pending.

☐ All other experts are deposed in a place in accordance with *CCP § 2025.250*.

☐ Determine time of deposition:

☐ Select time at least 10 days after service of notice of deposition, or 15, 20, or 30 days if the deposition notice is served by mail.

☐ Review discovery cut-off date and plan accordingly, including possibility for delays.

☐ Determine expert's fee for attending deposition:

☐ Assess whether expert's hourly and daily fee stated in expert witness declaration is reasonable:

☐ If unreasonable, move for order setting expert's fees.

☐ Follow standard motion procedure.

☐ Estimate amount of time needed for deposition.

☐ Calculate fee.

☐ Prepare notice of deposition:

☐ Include address, date, and time of taking deposition.

☐ List all parties or attorneys on whom notice is being served.

- ☐ List name, address and telephone number of each deponent.
 - ☐ Specify materials to be produced by deponent.
 - ☐ State whether any intention to record testimony by audiotape or videotape.
 - ☐ State whether any intention to record the testimony by stenographic method through the instant visual display of the testimony.
 - ☐ State whether any intention to reserve right to use videotape of deposition of physician or other expert witness at trial.
 - ☐ Specify anticipated length of deposition and amount of fee to be paid.
 - ☐ Specify whether expert's fee will accompany deposition notice or be tendered at commencement of deposition.
 - ☐ Specify if a motion to set the expert's fee will be filed.
- ☐ Serve notice on every party who has appeared in the action.
- ☐ Prepare proof of service.

Authority:

CCP §§ 2034.410-2034.470

Discussion:

See 13.26

- ☐ Calendar date of deposition.
- ☐ Retain original deposition notice with proof of service.

13.22[2] Responding to Deposition Notice Regarding Expert Witness.

- ☐ Review deposition notice to determine if:
- ☐ Expert to be deposed is on expert witness list exchanged.
 - ☐ Time of deposition is within discovery period.
 - ☐ Place of deposition is within statutory distance.

- ☐ Expert's fee is properly calculated.
- ☐ Expert's fee is tendered or there is statement that it will be tendered at commencement of deposition.
- ☐ There is an accompanying motion to set expert's fees:
 - ☐ Calendar response and hearing dates.
 - ☐ Follow standard motion procedure.
- ☐ Confirm deposition date with expert.
- ☐ Determine whether to seek another date for the deposition.
- ☐ Determine amount of expenses for expert to prepare and travel to deposition.
- ☐ Calendar date of deposition.
- ☐ Review expert's files and reports.
- ☐ Determine which reports are to be produced at the deposition.

Authority:

CCP §§ 2034.410-2034.470

Discussion:

See 13.26

13.22[3] Resolving or Moving to Set Expert's Compensation.

- ☐ Make a good faith attempt at an informal resolution regarding expert's fees.
- ☐ Determine whether to move for an order setting compensation of the expert.
 - ☐ Factors to consider:
 - ☐ Ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.
 - ☐ Total number of times the presently demanded fee has been charged and received by that expert.

☐ Frequency and regularity of demanded fee has been charged and received by the expert within the two-year period preceding the motion.

☐ Ordinary and customary fee charge by similar experts for similar services within relevant community.

☐ Any other necessary or appropriate factors.

☐ Drawback: Possibility of monetary sanctions for unsuccessful motion.

Authority:

CCP §§ 2016.040, 2034.470

Discussion:

See 13.26

☐ If seeking motion to set compensation of expert:

☐ Prepare motion and notice of motion with supporting declaration and memorandum.

☐ Prepare proposed order.

☐ Serve and file motion on:

☐ All parties who have appeared in the action.

☐ Expert whose fees are to be set.

☐ Follow standard noticed motion procedure.

☐ Calendar response and hearing dates.

Authority:

CCP § 2034.470

Discussion:

See 13.27[5]

Forms:

See 13.43 (notice of motion), 13.44 (order)

Standard Procedure Checklist:

See Ch. 4, Law and Motion Procedure, 4.03

13.22[4] Opposing Motion to Set Expert's Compensation.

- ☐ Calendar response and hearing dates.
- ☐ Assess whether there has been a good faith attempt at an informal resolution regarding expert's fees.
- ☐ Determine whether to oppose motion to set expert compensation:
 - ☐ Possibility of monetary sanctions for unsuccessfully opposing motion.
 - ☐ Consult with expert regarding factors for court's determination of fees and gather relevant evidence of expert's customary fees.
- ☐ If opposing motion:
 - ☐ Prepare opposition papers:
 - ☐ Prepare opposing brief, supporting declaration and memorandum.
 - ☐ Prepare proposed order.
 - ☐ Serve and file opposing papers on:
 - ☐ All parties who have appeared in the action.
 - ☐ Expert whose fees are to be set.
 - ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2034.470

Discussion:

See 13.26

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

- ☐ Assess whether actions that can affect expert's fee occurred during deposition:
 - ☐ Was expert witness fee tendered by beginning of deposition.
 - ☐ Was counsel or party tardy.

- ☐ Did deposition occur all day or only a portion of a day.
- ☐ Did deposition last longer than stated in the deposition notice.

Authority:

CCP §§ 2034.430-2034.470

Discussion:

See 13.27

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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V. DEPOSING EXPERT WITNESSES

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13.23 Options and Strategies.

13.23[1] Secure Priority in Taking Depositions. The order of taking expert witness depositions is, perhaps, one of the trickiest aspects of litigation strategy. Immediately setting the depositions of the opposing party's experts upon receipt of the designation, along with a check for at least one hour of the expert witness fees is critical in establishing "priority" (which really does not exist) in the taking of the expert witness depositions.

Strategic Point:



Consider working out a stipulation to agree to the order in which the parties will address topics of expert testimony in depositions. Also work out which side will go first. A reasonable resolution of this priority question would be for the party with the burden of proof on the underlying issue to go first.

13.23[2] Prepare for Deposition. To get the greatest value out of the deposition time, review any reports and writings provided by the expert under *CCP § 2034.270*. You may wish to discuss them with your own experts in assessing the most important and vulnerable points to address in questioning the expert. It will also be useful to review the expert's prior writing and transcripts of the expert's testimony in prior litigation that may be available.

Strategic Point:



There is no obligation to pay a minimum number of hours for an expert. You are only required to pay the expert for the time actually spent in the deposition. Regardless of the content of the experts fees (such as a minimum number of hours), *CCP § 2034.430(b)* imposes no such requirement.

At times it is strategically appropriate to send a subpoena to a designated expert prior to the taking of an expert's deposition so you will have an opportunity to review the expert's file prior to the day of the deposition and, thereby, potentially save a fortune by making efficient use of the deposition time.

13.23[3] Lay Groundwork to Limit Opposing Party's Expert. Because the court may exclude an expert witness'

testimony beyond that covered in the deposition [see *Jones v. Moore* (2000) 80 CA4th 557, 564-565, 95 CR2d 216], ask what opinions the expert will have at trial to pin the expert down. Although the expert may be able to give opinions beyond those expressed at the deposition as long as the opinions are on the subjects covered at the deposition, he or she will not be able to go beyond that subject.



Strategic Points:

- If an expert in deposition fails to provide adequate foundation for factual assumptions, the expert opinion may be excluded at trial [see *Maatuk v. Guttman* (2009) 173 CA4th 1191, 93 CR3d 381 (trial court properly excluded expert testimony regarding damages from loss of patents when product was still in development because opinion was based on inadequate foundation for factual assumptions as to whether product was marketable)].
- If a motion to restrict the expert's testimony at trial is necessary, attach the pertinent part of the deposition transcript to the motion so the judge can quickly see the parameters of the opinions expressed at deposition.
- An effective technique for raising questions about the opposing party's expert's testimony is to get the expert to agree that a particular treatise is the ultimate authority on a topic. If you then ask a question based on that treatise (without stating the source) and the expert contradicts the treatise, you may be able to set up a clash that will weaken the value of the expert's testimony.
- It is critical to obtain previous deposition transcripts of expert witnesses to see if they have testified consistently throughout the years. This can also be a source of information that can be used to weaken the expert's current testimony if it is inconsistent with past positions.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.24 Parties May Depose Any Designated Expert Witness.

When any party receives an expert witness list from another party, he or she may take the deposition of any person on the list [CCP § 2034.410]. The procedures for taking depositions set forth in CCP §§ 2025.010 *et seq.*, 2026.010, 2027.010 and 2028.010 *et seq.* apply to the deposition of expert trial witnesses, except as modified by CCP § 2034.410-2034.470 [CCP § 2034.410].

► **Cross References:**

Discussion of procedures for taking depositions, see Ch. 6, Oral Depositions in California, and Ch. 7, Oral Depositions Outside of California.

See also *DeMeo, California Deposition and Discovery Practice*, § 64.01[1][c] (Matthew Bender); or *Hogan & Weber's California Civil Discovery*, § 10.1 (Matthew Bender 6th ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.25 Deposition Must Be Within 75 Miles of Court.

The deposition of an expert who is a party, an employee of a party, or a retained expert as described in *CCP* § 2034.210(b) must be taken within 75 miles of the courthouse where the action is pending [*CCP* § 2034.420].

Exception:

If the designating party moves for a protective order and is able to demonstrate exceptional hardship, the court may order the deposition to be taken at a place more distant from the courthouse [*CCP* § 2034.420].



Cross References:

Discussion of protective orders, see 13.15.

See also Ch. 4, Law and Motion Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.26 Deposition Notice Requires Expert's Attendance at Deposition.

The service of a proper deposition notice is effective to require a party employing or retaining the expert to produce that expert for deposition [CCP § 2034.460(a)]. The obligation to produce an expert witness is limited to a designating party who employs or has retained the expert, since only these experts are under the "control" of the designating party [see CCP § 2034.460(a); see also *Hurtado v. Western Med. Ctr.* (1990) 222 CA3d 1198, 1203, 272 CR 324].

➡ **Cross Reference:**

Form, see 6.62 (notice of deposition).

Distinguish:

To compel the deposition attendance of an expert who is not a party, an employee of a party, or a retained expert, the party noticing a deposition must serve the witness with a subpoena and pay the applicable witness fees [see CCP §§ 2020.210-2020.240, 2025.280, 2028.010].

➡ **Cross Reference:**

Forms, see 6.64 -6.65 (deposition subpoenas).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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13.27 Payment of Expert Witness Fees.

13.27[1] Expert Witnesses Entitled to Compensation. An "expert witness" who must be compensated for time spent at a deposition taken pursuant to *CCP* § 2034.410-2034.470, is one who is not a party or an employee of a party, and who is one of the following [*CCP* § 2034.430(a)]:

- An expert who has been retained by a party for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for the trial of the action [*see CCP* § 2034.210(b)];
- A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony. This includes opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but does not include testimony requiring only the reading of words and symbols contained in the relevant medical record, or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words and symbols are;
- An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which the expert is asked to express an opinion both within the expert's expertise and relevant to the action or proceeding; or
- A designated expert in a workers' compensation case arising under *Lab Code* §§ 3201-6002 or *Lab Code* §§ 6100-6149.

Consider:

A treating physician who is later deposed as a percipient witness by an opposing party is not entitled to an expert witness fee unless he or she is asked to express an opinion during the deposition [*CCP* § 2034.430(a)(2)]; however, being designated as an expert is not a condition precedent to the entitlement to an expert fee [*see Brun v. Bailey (1994) 27 CA4th 641, 652, 32 CR2d 624*]. Therefore, it is advisable to arrange reasonable compensation for such a witness prior to his or her deposition.

Compare:

Expert witnesses who are required to testify at a deposition in situations not included within *CCP* § 2034.430 must also be compensated, but their compensation is not governed by that statute [*see, e.g., Evid Code* § 731 (payment of court-appointed experts)].

13.27[2] Expert Fees Paid by Deposing Party.

13.27[2][a] Deposing Party Must Pay "Reasonable" Fee for Time Spent at Deposition. An expert who is deposed under *CCP* § 2034.410-2034.470 and who falls within one of the categories described in *CCP* § 2034.430(a), must be paid his or her reasonable and customary hourly or daily fee for any time spent at the deposition [*CCP* § 2034.430(b)]. The time spent at the deposition commences at the time noticed in the deposition subpoena/notice or, alternately, at the time the expert arrives, if it is later than the time noticed [*CCP* § 2034.430(b)]. The time spent at the deposition terminates when the expert is dismissed from the deposition, whether or not the expert was actually deposed by any party attending the deposition [*CCP* § 2034.430(b)].



Strategic Point:

Make sure your client is aware in advance of the need to pay the fees of any expert you are planning to depose.



Cross Reference:

Discussion of mechanism for resolving fee disputes, see 13.27[5].

13.27[2][b] Daily Fee May Be Charged. A daily fee may only be charged for a full day's attendance at a deposition, or when the deposing party required the expert to be available for a full day, and the expert necessarily had to forego all business he or she would have otherwise conducted that day [*CCP* § 2034.430(e)].

13.27[2][c] Fees Charged Deposing Party Must Not Exceed Fees Charged Retaining Party. The hourly or daily fee to be charged by an expert witness must not exceed the fee charged to the party who retained the expert, except when the expert has donated his or her services to a charitable or other nonprofit organization [*CCP* § 2034.430(d)].

Distinguish:

The provisions regulating the payment of expert witness fees do not prohibit variable fee schedules, based on the type of services rendered by the expert [*see CCP* § 2034.430(d)]. They simply require an expert to charge the deposing party the same fee for deposition testimony as he or she would charge the retaining party for testimonial, as opposed to non-testimonial (e.g., consultative or investigative), services [*see Rancho Bernardo Dev. Co. v. Superior Court* (1992) 2 CA4th 358, 361-363, 2 CR2d 878].

13.27[2][d] Deposing Party Must Tender Anticipated Fee With Deposition Notice or at Deposition. The deposing party must either accompany the service of the deposition notice with a tender of the expert's fee, based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition [*CCP* § 2034.450(a); *True v. Shank* (2000) 81 CA4th 1250, 1256-1257, 97 CR2d 462]. In either event, the deposing party is required to deliver the expert's fee to the designating party's attorney [*CCP* § 2034.450(b)].



Strategic Point:

Although the statute allows tender of the expert's fee with the deposition notice, this is rarely done since you can wait until the beginning of the deposition to tender the fee.



Warning:

If the deposing party fails to tender the expert's fee either with the deposition notice or at the commencement of the deposition, the expert will not be deposed at the time specified in the notice, unless the parties stipulate otherwise [CCP § 2034.460(b)]. If an expert's fees are not properly tendered, a court may not impose sanctions based on the expert's failure to appear at the deposition [see *Tahoe Forest Inn v. Superior Court* (1979) 99 CA3d 509, 513, 160 CR 314 (decided under prior law); see also CCP § 2034.460(b)].

Exception:

If the deposition takes longer than anticipated, the party noticing the deposition must pay the balance of the fee within five days of receipt of an itemized statement from the expert [CCP § 2034.450(c)].

13.27[3] Designating Party Pays Expert's Preparation and Travel Expenses. While the deposing party is responsible for the expert's fees for the time spent at the deposition, the party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any of the expert's travel expenses [CCP § 2034.440].

13.27[4] Counsel Late to Deposition Must Pay for Time Delay. If any counsel representing the expert or any party but the deposing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period, determined from the time noticed in the deposition subpoena until the time of that counsel's late arrival, must be paid by that tardy counsel [CCP § 2034.430(c)].

13.27[5] Deposing Party May Ask Court to Set Expert Compensation.

13.27[5][a] Deposing Party Must File Motion and Provide Notice to Expert. If a party desiring to take the deposition of an expert witness under CCP §§ 2034.410-2034.470 deems the expert's hourly or daily fee for providing deposition testimony unreasonable, that party may move for an order setting the expert's compensation [CCP § 2034.470(a)]. Notice of the motion must be given to the expert [CCP § 2034.470(a)].

Prerequisite:

A party disputing an expert's fee must make a reasonable, good faith attempt to resolve the dispute informally before filing a motion to set the expert's compensation [CCP §§ 2016.040, 2034.470(b)].



Cross Reference:

See Ch. 4, Law and Motion Procedure.

13.27[5][b] Designating Party or Expert Must Provide Evidence of Expert's Customary Fees. Both in any informal attempts to resolve the fee dispute, and at the hearing on a motion to set an expert's compensation, either the designating party or the expert must provide the other party and, at the hearing, the court with the following [CCP § 2034.470(b)]:

- (1) Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation;
- (2) The total number of times the presently demanded fee has ever been charged and received by that expert; and
- (3) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

13.27[5][c] Declaration Must Accompany Motion. The motion to set expert compensation must be accompanied by a declaration stating facts that show there was a reasonable and good faith attempt to informally resolve each issue

presented by the motion [CCP §§ 2016.040, 2034.470(b)].

13.27[5][d] Court May Set Expert's Fee If Fee Demanded Is Unreasonable Based on Factors Considered. If the court determines that the fee demanded by an expert is unreasonable, it must set a fee based on the evidence and factors considered [CCP § 2034.470(f)]. The court's determination as to the reasonableness of an expert's fee must be based on the evidence of that expert's customary fees, which is provided by the expert or designating party pursuant to CCP § 2034.470(b) (described in items CCP § 2034.470(b)(1), (2) and (3), and may also be based on evidence of the ordinary and customary fees charged by similar experts for similar services within the relevant community, as well as any other factors the court deems necessary or appropriate to make its determination [CCP § 2034.470(c), (e)].



Cross References:

Discussion of evidence expert or designating party must provide, see 13.27[5][b].
Form notice of motion to set compensation and supporting declaration, see 13.43.
Form order setting compensation of expert, see 13.44.



Warning:

CCP § 2034.430 makes the deposing party liable for those expert fees that are "reasonable," yet, an expert is not precluded from charging or receiving an additional fee from the designating party who hired him or her [see CCP § 2034.430]. Thus, an expert may bill his or her client for any amounts that have been disallowed by the court in a proceeding to set fees, for being excessive or "unreasonable," which sums will remain a matter of negotiation between the expert and the designating party [*Marsh v. Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 300, 50 CR2d 493 (decided under former CCP § 2034)].

13.27[5][e] Court Must Impose Monetary Sanction on Unsuccessful Party. The court must impose a monetary sanction under CCP § 2023.010 *et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to set an expert witness fee [CCP § 2034.470(g)].

Exception:

The court may decline to impose a sanction if it finds that the one subject to the sanction acted with substantial justification, or that other circumstances make the imposition of sanctions unjust [CCP § 2034.470(g)].

13.27[5][f] Expert May Appeal Order Setting Fee. An expert witness has standing to appeal an order setting the expert's deposition testimony fee [see *Marsh v. Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 297, 50 CR2d 493].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery



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Chapter 13 Exchanging Expert Witness Information
VI. EXCLUDING EXPERT TESTIMONY FOR UNREASONABLE FAILURE TO COMPLY WITH EXCHANGE
REQUIREMENTS

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13.28 CHECKLIST: Excluding Expert Witness Testimony.

- ☐ Determine whether any party has failed to comply with expert discovery requirements:
 - ☐ Determine whether any party has failed to:
 - ☐ List an expert witness under *CCP § 2034.260*;
 - ☐ Submit an expert witness declaration where required;
 - ☐ Produce reports and writings of expert witnesses under *CCP § 2034.270*;
 - ☐ Make an expert available for deposition under *CCP §§ 2034.410-2034.470*.
- ☐ Verify that you are in compliance with all expert discovery requirements.
- ☐ Exclusion of testimony does not apply:
 - ☐ In proceedings to augment or amend expert witness information.
 - ☐ Proceedings to submit tardy expert witness information.
 - ☐ When a nonlisted expert is called to testify by another party or for impeachment.

Authority:

CCP § 2034.300

Discussion:

See 13.29

☐ Determine whether, where expert discovery was provided, it was sufficient to apprise parties of expert's exact identity and anticipated testimony:

- ☐ Was every expert witness listed by name, with address included?
- ☐ Any surprise in testimony/anticipated testimony?
- ☐ Is any testimony/anticipated testimony beyond the scope disclosed?
- ☐ Is witness anticipated to offer opinions not stated in his or her deposition?

☐ Assemble evidence of prejudice to your client, including deposition testimony, correspondence, etc. that may have induced reasonable reliance on previous expert disclosures.

☐ Assemble evidence of other party's unreasonableness in failing to comply with discovery requirements.

☐ Object to introduction of expert testimony if party who has failed to comply with expert discovery disclosure requirements attempts to introduce testimony not contemplated or described in previous discovery responses.

Authority:

CCP § 2034.300

Discussion:

See 13.29 -13.32

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility



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13.29 Party in Compliance May Object to Testimony.

On the objection of a party that has made a complete and timely exchange of expert witness information, the court must exclude the expert opinion testimony offered by any party who has unreasonably failed to do any of the following [CCP § 2034.300]:

- List the witness as an expert under CCP § 2034.260.
- Submit an expert witness declaration.
- Produce reports and writings of expert witnesses under CCP § 2034.270.
- Make the expert available for deposition under CCP §§ 2034.410-2034.470.

Exceptions:

The exclusionary provisions of CCP § 2034.300 do not apply when [CCP § 2034.300]:

- A party is allowed to augment or amend expert witness information [see 13.18].
- A party is allowed to submit tardy expert witness information [see 13.22].
- A nonlisted expert is called to testify by another party or for impeachment [see 13.21].
- A party is allowed to augment or amend expert witness information [see *Kennedy v. Modesto City Hosp.* (1990) 221 CA3d 575, 580-582, 270 CR 544 (summary judgment motion)].

Distinguish:

If no demand for exchange of expert witness information is made by any party, the obligation to comply with CCP § 2034.260 does not arise, and there is no basis for excluding expert opinion testimony for noncompliance [*Hirano v. Hirano* (2007) 158 CA4th 1, 8, 69 CR3d 646] .

Monetary sanctions are not authorized for disclosing for the first time during the trial a theory that the expert did not disclose in the expert witness declaration [*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 CA4th 887, 905-906, 91 CR3d 617] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility



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13.30 Court Must Find "Unreasonable Failure" to Comply With Discovery.

In order to exclude expert witness testimony, the court must first make a finding that the party unreasonably failed to provide required discovery [*CCP § 2034.300; Bonds v. Roy (1999) 20 C4th 140, 148-149, 83 CR2d 289, 973 P2d 66*].

Example:

Plaintiff's failure to provide expert reports and writings by the date specified or mutual exchange of information pursuant to *CCP § 2034.230(b)* was not unreasonable because the reports and writings were not yet in existence on that date, and once plaintiff's attorneys received the reports and writings from their experts, they turned them over to the defendant within about a day. In addition, the defendant had the opportunity to depose plaintiff's experts and chose not to do so [*Boston v. Penny Lane Centers, Inc. (2009) 170 CA4th 936, 953, 88 CR3d 707*].



Strategic Point:

It has been held that when an expert testifies as to specific opinions and affirmatively states those are the only opinions he or she intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial [*Bonds v. Roy (1999) 20 C4th 140, 147, 83 CR2d 289*].

When deposing an opposing expert, counsel should always ask whether the expert has any opinions that he or she intends to offer at trial in addition to those described in the expert disclosure or during the deposition.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility



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Chapter 13 Exchanging Expert Witness Information

VI. EXCLUDING EXPERT TESTIMONY FOR UNREASONABLE FAILURE TO COMPLY WITH EXCHANGE REQUIREMENTS

1-13 MB Practice Guide: CA Civil Discovery 13.31

13.31 Failure to Comply May Include Insufficient Submissions.

The "failure" to submit required expert information can include not only a failure to submit the information altogether, but also the submission of information that is insufficiently descriptive and fails to comply fully with the requirements of *CCP § 2034.010 et seq.* [see *Bonds v. Roy* (1999) 20 C4th 140, 145 ; see also *Kalaba v. Gray* (2002) 95 CA4th 1416, 1423, 116 CR2d 570].

Examples:

- It is sufficient if a percipient witness is identified by name and address in a party's expert witness list, however, where treating physicians were not listed or identified by name but simply referred to in witness designation as "all past or present examining and/or treating physicians," there was not compliance with the letter or the spirit of former *CCP § 2034(f)(1)(A)* (now see *CCP § 2034.260(b)(1)*), and the trial court properly exercised its discretion in excluding expert testimony by the "non-designated" doctors [*Kalaba v. Gray* (2002) 95 CA4th 1416, 1423, 116 CR2d 570].

- Submission of a timely expert witness declaration that did not reflect the expanded scope of witness's anticipated testimony amounted to an unreasonable failure to comply with the content requirements of former *CCP § 2034(f)* (now see *CCP § 2034.260*), resulting in the exclusion of testimony not described in the declaration [*Bonds v. Roy* (1999) 20 C4th 140, 149, 83 CR2d 289, 973 P2d 66 (disapproving contrary rulings in *Castaneda v. Bornstein* (1995) 36 CA4th 1818, 1828-1830, 43 CR2d 10 and *Martinez v. City of Poway* (1993) 12 CA4th 425, 429-430)].



Strategic Point:

A party who wishes to have an expert testify on matters not described in the witness declaration should move to amend the expert witness declaration with respect to the general substance of the testimony the previously designated expert is expected to give [*Bonds v. Roy* (1999) 20 C4th 140, 145, 83 CR2d 289, 973 P2d 66 ; see *CCP § 2034.610(a)(2)*].



Cross References:

Discussion of motions to augment or amend expert information, see *13.18*.

See also Ch. 4, Law and Motion Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility



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REQUIREMENTS

1-13 MB Practice Guide: CA Civil Discovery 13.32

13.32 Court May Exclude Opinions That Go Beyond Those Expressed in Deposition.

Expert opinion testimony may be excluded to the extent that it goes beyond the opinions expressed by the expert during deposition; exclusion is based on the essential "unavailability" of the witness for deposition as to the additional opinions [see *Jones v. Moore (2000) 80 CA4th 557, 564-565, 95 CR2d 216* ; see also *CCP § 2034.300(d)*].

Examples--Testimony Excluded:

- In excluding opinion testimony that went beyond opinions stated during an expert's deposition, a court held that the objecting party was entitled to rely on the expert's express representation during deposition that the opinions stated were the only ones he intended to offer at trial, and to allow additional testimony by the expert, who was in effect not made available for deposition as to the additional opinions, would be grossly unfair and prejudicial [*Jones v. Moore (2000) 80 CA4th 557, 564-565, 95 CR2d 216*].
- In a nuisance action, the trial court properly precluded plaintiff's expert from offering any opinion about the cost and reasonableness of a plan to abate the contamination on plaintiff's property because the expert had not been designated to testify on that topic and had testified at his deposition that he had no information or opinion on that topic [*McCoy v. Gustafson (2009) 180 CA4th 56, 96-98, 103 CR3d 37*].

Examples--Testimony Allowed:

- When a party made an expert available for deposition, but the deposition was not completed because the expert needed more time to develop an opinion, this was not considered an "unreasonable" failure to make the expert available for deposition, especially when opposing party waited until two weeks before trial to object [*Stanchfield v. Hamer Toyota, Inc. (1995) 37 CA4th 1495, 1503-1504, 44 CR2d 565*].
- In a dental malpractice action, plaintiff's expert declined to offer an opinion on the cause of plaintiff's injury during his deposition, but plaintiff's counsel notified the defendants approximately three months before trial that the expert would go beyond his original deposition testimony and offer a causation

opinion at trial. Because the defendants were explicitly notified that the expert would offer an opinion that was different from the opinion he offered in his deposition, and the defendants had the opportunity to take the expert's deposition again in light of his changed opinion and prepare for cross-examination and rebuttal of his testimony, the trial court erred in striking the expert's trial testimony on causation [*Easterby v. Clark* (2009) 171 CA4th 772, 780-783, 90 CR3d 81] .

**Warning:**

If a party cannot demonstrate reasonable grounds for the insufficient or lack of preparation of one's expert, the expert's testimony may be excluded by the court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility



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Chapter 13 Exchanging Expert Witness Information

VII. FORMS

A. Making a Demand for the Exchange of Witness Information

1-13 MB Practice Guide: CA Civil Discovery 13.33

13.33 Demand for Exchange of Expert Witnesses Information.

Demand for Exchange of Expert Witnesses Information

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND BY _____ [party design-
_____ [name],	)	nation and name] FOR EXCHANGE OF EXPERT
Defendant.	)	WITNESS INFORMATION
	)	TRIAL DATE: _____
	)	

To each party who has appeared in this action and to his/her attorney of record:

Demand is hereby made, pursuant to *Section 2034.210 of the California Code of Civil Procedure*, for the exchange, on or before _____ [specify date that is 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date], (referred to below as the "date of exchange"), of a list containing the name and address of any person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion you expect to offer in evidence at the trial of this _____ [action or proceeding]. If any expert designated on your witness list is a party, is your employee, or has been retained by you for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of this _____ [action or proceeding], the list must be accompanied by an expert witness declaration as described in *Code of Civil Procedure section 2034.260(c)*.

If you do not presently intend to offer the testimony of any expert witness, you are requested to provide a statement to that effect, on or before the date of exchange.

[*INCLUDE, if demanding party seeks the production of expert reports and writings, described in CCP § 2034.210(c)*]

You are also requested to produce for inspection and copying, on or before the date of exchange, all discoverable reports and writings made by any expert designated on your witness list who is a party, is your employee, or has been retained by you for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for this _____[*specify action or proceeding*], in the course of preparing his/her opinion.

You are requested to produce the documents requested in this demand at: _____[*demanding party's or attorney's address, or other place designated for exchange*].

[*CONTINUE*]

Dated: _____

By: _____

[*attorney's or unrepresented party's signature*]

_____ [typed name]

_____ [firm name, if any]

Attorney for _____

[*party's designation and name*]

NOTES.

Authority:

CCP §§ 2034.210, 2034.230



Timing:

See 13.06

Related Form:

Expert witness declaration, see 13.34



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VII. FORMS

B. Responding to Demand for Exchange of Expert Witness Information

1-13 MB Practice Guide: CA Civil Discovery 13.34

13.34 Expert Witness Declaration.

Expert Witness Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	EXPERT WITNESS DECLARATION
Defendant.	)	
	)	
	)	

I, _____ [name of demanding party's attorney], declare:

1. I am an attorney at law duly admitted to practice before all courts of the State of California and the attorney of record herein for _____ [specify party's name and designation].

[EITHER if expert is a party]

2. This declaration is made pursuant to *Code of Civil Procedure Section 2034.260(c)*, with regard to _____ [name of expert], who is a party to this _____ [action or proceeding].

[OR, if expert is employee of a party]

2. This declaration is made pursuant to *Code of Civil Procedure Section 2034.260(c)*, with regard to _____ [name of expert], who is an employee of _____ [specify employing party, e.g., Defendant Mary Jones].

[OR, if expert is retained by a party]

2. This declaration is made pursuant to *Code of Civil Procedure Section 2034.260(c)*, with regard to _____ [name of expert], who has been retained by _____ [specify party who has retained expert, e.g., Defendant Mary Jones] for the purpose of forming and expressing an opinion in anticipation of this litigation and/or for the trial of this action.

[CONTINUE]

3. _____ [name of expert] is qualified to testify as an expert on the subjects of _____ [specify area(s) of expertise] based on his/her _____ [provide a brief narrative statement of expert's qualifications, including, for example, a list degrees, experience, and any other basis for qualification as an expert].

4. The general substance of the testimony that _____ [name of expert] is expected to give is as follows: _____ [set forth brief narrative statement of general substance of expert's expected testimony], and all related opinions and conclusions and the bases therefore.

5. _____ [name of expert] has agreed to testify at the trial of this matter.

6. _____ [name of expert] will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony he/she is expected to give, including any opinion and its basis.

7. _____ [name of expert] charges an hourly fee of \$_____ and a daily fee of \$_____ for providing deposition testimony and for consulting with the retaining attorney.

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

Dated: _____

[signature of attorney or unrepresented party]

_____ [typed name]

_____ [firm name, if any]

Attorney for _____

NOTES.

Authority:

CCP §§ 2034.210(b) 2034.260



Timing and Method of Responding:

See 13.13

Contents of Expert Witness Documents:

See 13.14

When Declaration not Required:

See 13.02[4], 13.14[1]



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B. Responding to Demand for Exchange of Expert Witness Information

1-13 MB Practice Guide: CA Civil Discovery 13.35

13.35 Notice of Motion to Obtain Protective Order Prior to Exchange of Expert Witness Information; Supporting Declaration.

Notice of Motion to Obtain Protective Order Prior to Exchange of Expert Witness Information; Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR PRO-
_____ [name],	)	TECTIVE ORDER RESTRICTING DISCOVERY
Defendant.	)	AND IMPOSING MONETARY SANCTIONS; SUP-
	)	PORTING DECLARATION OF
	)	_____ [name] AND MEMOR-
	)	ANDUM IN SUPPORT OF MOTION
	)	Date: _____
		Time: _____
		Location _____
		Judge: _____
		Trial Date: _____

To each party who has appeared in this action and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located

at _____ [court address], _____ [identify moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order with respect to the demand for an exchange of expert witness information submitted by _____ [identify demanding party] on _____ [date demand served] directing that _____ [specify relief sought, e.g., the demand be quashed or that the date for the exchange of expert information be January 15, 2004, rather than January 2, 2004, as specified in the demand] and will further move this court for an order requiring _____ [specify every party or attorney, or both, against whom sanction is sought] to pay a monetary sanction in the amount of \$ _____ to _____ [identify moving party] as a sanction pursuant to *Code of Civil Procedure Sections 2023.010 et seq. and 2034.250*. The motion will be made on the grounds that good cause exists for the order sought, and that the order is required to protect _____ [identify moving party] from unwarranted _____ [annoyance and/or embarrassment and/or oppression and/or undue burden and expense] and that _____ [specify other grounds, e.g., the demand was not timely served] and that _____ [identify moving party] made an unsuccessful but reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [declarant name(s)], the memorandum set forth below, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones or other statement as appropriate].

2. This declaration is made in support of _____'s [identify moving party] motion for a protective order with respect to the demand for the exchange of expert witness information served by _____ [identify demanding/responding party], pursuant to *Code of Civil Procedure Section 2034.250*.

3. On _____ [date demand served], _____ [identify demanding/responding party] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [date of exchange].

4. _____ [Set forth facts showing unwarranted annoyance, embarrassment, oppression, or undue burden and expense, e.g., This action is set for trial on March 4, 2004. Thus, defendant's demand was submitted 70 days

before the trial date, and would require Defendant Mary Jones to provide expert information before she has had adequate opportunity to assess which, if any, expert witnesses to call at trial].

5. On _____ [date moving party met and conferred with opposing counsel]
 _____ [specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g., I sent a letter to plaintiff's attorney requesting that plaintiff withdraw her demand in that it was not timely submitted. A copy of the letter is attached as Exhibit A and made a part hereof. To date, I have not received an answer to that letter, and my subsequent telephone calls to defendant's attorney have not been returned].

6. _____ [identify moving party] bases his/her request for the imposition of a sanction against
 _____ [identify opposing party(s)], in the amount of \$ _____, on
 _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the amount of sanction requested].

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

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2023.010 et seq., 2034.250

Requirements for Obtaining Protective Order:

See 13.15

Related Form of Order:

See 13.36

Related Form of Memorandum:

See California Points and Authorities, Ch. 88, Discovery: Exchange of Expert Witness Information § 88.10 (Matthew Bender)



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VII. FORMS

B. Responding to Demand for Exchange of Expert Witness Information

1-13 MB Practice Guide: CA Civil Discovery 13.36

13.36 Protective Order Prior to Exchange of Expert Witness Information.

Protective Order Prior to Exchange of Expert Witness Information

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party] for an order _____ [specify relief requested, e.g., directing that the demand for an exchange of expert witness information submitted by Plaintiff John Smith on January 1, 2004 be quashed] and for imposition of monetary sanction came on regularly for hearing by the court on _____ [hearing date]. _____ [identify all parties who appeared] appeared by counsel _____ [counsels' names] respectively;

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[OR]

The court finds that _____[*identify moving party*] has engaged in a reasonable and good faith attempt at an informal resolution of the issue(s) presented by the motion.

On good cause being shown and proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____[*specify relief granted, e.g., the demand for an exchange of expert witness information submitted by Plaintiff John Smith on January 1, 2004 is quashed*].

[*EITHER if imposing sanctions*]

IT IS FURTHER ORDERED that _____[*identify unsuccessful opposing party, person, or attorney*] has not shown that he/she acted with substantial justification or that other circumstances make imposition of a sanction unjust, and shall pay forthwith to _____[*specify successful party*] the sum of \$_____ as a sanction pursuant to *Code of Civil Procedure Sections 2023.010 et seq. and 2034.250*.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____[*specify unsuccessful opposing party, person, or attorney*] _____[*acted with substantial justification or specify other circumstances*], making imposition of a sanction unjust.

Dated: _____

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2023.010 et seq., 2034.250

Grounds for Granting Protective Order:

See 13.15

Related Form of Notice:

See 13.35



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C. Changing Expert Witness Information Post-Exchange

1-13 MB Practice Guide: CA Civil Discovery 13.37

13.37 Notice of Motion and Motion to Augment Expert Witness Information; Supporting Declaration.

Notice of Motion and Motion to Augment Expert Witness Information; Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION TO AUG-
_____ [name],	)	MENT EXPERT WITNESS INFORMATION AND
Defendant.	)	FOR IMPOSITION OF MONETARY SANCTION;
	)	SUPPORTING DECLARATION OF
	)	_____ [name]; SUPPORTING
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To each party who has appeared in this action and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located

at _____ [court address], _____ [identify moving party, e.g., Defendant Mary Jones] will, and hereby does, move under *Code of Civil Procedure Section 2034.610* for an order allowing him/her to augment his/her expert witness list and declaration to add the name and address of a subsequently retained witness. Defendant will further move for an order imposing a monetary sanction against any party who unsuccessfully opposes this motion, and his/her attorney, in the amount of \$ _____ [specify amount]. The motion is made on the grounds that _____ [identify moving party] retained _____ [name of expert], an expert in the field of _____ [specify area of expertise], as an additional expert witness after the date specified for the demand for the exchange of expert witness information, and failed to provide information concerning _____ [name of expert] as a result of _____ [mistake, inadvertence, surprise, excusable neglect or because in the exercise of reasonable diligence he/she would not have determined to call _____ (name of expert)] and that _____ [identify moving party] made this motion promptly after retaining _____ [name of expert], and promptly served a copy of the proposed augmentation of expert witness information on all other parties who have appeared in the action. Further, _____ [identify opposing party] will not be prejudiced in maintaining his/her/their _____ [action or defense] on the merits by the proposed augmentation. The motion for imposition of a monetary sanction is made on the ground that _____ [identify moving party] made an unsuccessful but reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)], the memorandum set forth below, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [describe declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones or other statement as appropriate].

2. This declaration is made in support of _____'s [moving party] motion to augment expert witness information, pursuant to *Code of Civil Procedure Section 2034.610(a)(1)*.

3. On _____ [date], _____ [identify demanding party] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [specified date of exchange].

4. On _____ [specify date moving party provided original expert witness information], _____ [identify moving party] timely submitted _____ [specify what party submitted, e.g., a list setting forth the name(s) and address(es) of the person(s) whose expert opinion he/she expected to offer in evidence at trial, together with a declaration stating the general substance of the testimony each expert is expected to give or a statement that he/she did not presently intend to offer the testimony of any expert witness].

5. Since submitting his/her expert witness list, _____ [moving party] has retained _____ [name of expert] to give his/her expert opinion on the issue of _____ [describe] at trial.

6. _____ [Set forth facts showing that failure to include name of expert witness was due to mistake, inadvertence, surprise, or excusable neglect or that the party would not have determined to call the witness in the exercise of reasonable diligence].

7. On _____ [date(s) moving party met and conferred with opposing counsel], _____ [specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues, e.g., Defendant Mary Jones sent a letter to Plaintiff John Smith's attorney asking that she be allowed to augment his/her expert witness list by adding the name of the newly retained expert, and stating that a copy of her proposed expert witness information, was being served on all parties to the litigation. A copy of the letter is attached as Exhibit A and made a part hereof. To date, defendant has not received an answer to her letter, and subsequent telephone calls to plaintiff's attorney have not been returned].

8. _____ [Identify moving party] bases his/her request for the imposition of a sanction against _____ [identify opposing party(s)], in the amount of \$ _____, on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the amount of sanction requested].

9. _____ [If the motion is not timely under CCP § 2034.620(d), state facts establishing exceptional circumstances why the court should permit the motion to be made at a time that is not sufficiently in advance to permit the deposition of the expert to whom the motion relates to be taken within the time limit for discovery under CCP § 2024.010 et seq.].

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

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2016.040, 2034.610, 2034.620



Timing:

See 13.18

Related Form of Order:

See 13.38

Related Form of Memorandum:

See California Points and Authorities, Ch. 88, Discovery: Exchange of Expert Witness Information § 88.12 (Matthew Bender)



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1-13 MB Practice Guide: CA Civil Discovery 13.38

13.38 Order Allowing Party to Augment Expert Witness Information.

Order Allowing Party to Augment Expert Witness Information

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party] for an order for leave to augment expert witness information and for the imposition of monetary sanction came on regularly for hearing by the court on _____ [date]. _____ [Identify parties who attended hearing] appeared by counsel.

On proof made to the satisfaction of the court that _____ [identify party opposing the motion] will not be prejudiced in maintaining his/her _____ [action or defense] on the merits and that _____ [identify moving party]:

1. Retained and decided to call _____ [expert name(s)], as _____ [an expert witness or expert witnesses] on _____ [date(s) party decided to have expert(s) testify at trial], and sought leave to augment his/her expert witness information promptly thereafter;

[EITHER]

2. Would not in the exercise of reasonable diligence have determined to call the expert witness(es); and,

[OR]

2. Failed to include the name(s) and address(es) of the expert(s) as a result of mistake, inadvertence, surprise, or excusable neglect; and,

[CONTINUE]

3. Promptly thereafter served a copy of the proposed expert witness information on all other parties who have appeared in the action.

IT IS ORDERED that the motion be, and hereby is, granted and that the _____ [identify moving party] may augment his/her expert witness information on the condition(s) that _____ [identify moving party] make the expert available immediately for deposition pursuant to *Code of Civil Procedure Sections 2034.410-2034.470* [and, if applicable, state any further conditions imposed on the order, e.g., and on the further condition that Plaintiff John Smith is granted leave to designate an additional expert witness to testify on the issue of standard of care].

IT IS FURTHER ORDERED that:

[EITHER, if court orders monetary sanction]

_____ [Identify party, person, or attorney who unsuccessfully opposed or made the subject motion] and his/her attorney _____ [attorney's name] shall pay forthwith to _____ [identify successful party] the sum of \$ _____ as a sanction authorized by *Code of Civil Procedure Section 2034.630*.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court, _____ [identify party, person, or attorney who unsuccessfully made or opposed the subject motion] and his/her attorney _____ [attorney's name] _____ [acted with substantial justification or specify other circumstances], making imposition of a sanction unjust.

[CONTINUE]

Dated: _____

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2034.610-2034.630

Related Form of Motion:

See 13.37



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1-13 MB Practice Guide: CA Civil Discovery 13.39

13.39 Notice of Motion and Motion to Amend Expert Witness Information; Supporting Declaration.

Notice of Motion and Motion to Amend Expert Witness Information; Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION TO
) AMEND EXPERT WITNESS INFORMATION
) AND FOR IMPOSITION OF MONETARY SANC-
) TION; SUPPORTING DECLARATION OF
) _____ [name]; SUPPORTING
) MEMORANDUM
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Trial Date: _____

To each party who has appeared in this action and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon
thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located
at _____ [court address], _____ [identify moving party, e.g., Defendant Mary Jones]

will, and hereby does, move under *Code of Civil Procedure Section 2034.610(a)(2)* for an order allowing him/her to amend an expert witness declaration. Defendant will further move for an order imposing a monetary sanction against any party who unsuccessfully opposes this motion, and his/her attorney, in the amount of \$ _____ [*specify amount*]. The motion is made on the ground(s) that _____ [*identify moving party*] has decided to offer the _____ [*different or additional*] testimony of _____ [*name of expert*], a previously designated expert, after the date specified for the demand for the exchange of expert witness information, and did not provide information concerning the general substance of his/her [*different or additional*] testimony as a result of _____ [*any lack of reasonable diligence or mistake or inadvertence or surprise or excusable neglect*]. _____ [*Identify moving party*] made this motion promptly after deciding to offer the _____ [*different or additional*] testimony of the witness identified above, and promptly served a copy of the proposed amendment of expert witness information on all other parties who have appeared in the action. Further, _____ [*identify opposing party*] will not be prejudiced in maintaining his/her/their _____ [*action or defense*] on the merits by the proposed amendment. The motion for imposition of a monetary sanction will be made on the ground that _____ [*identify moving party*] made an unsuccessful but reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], the memorandum set forth below, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*describe declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones or other statement as appropriate*].

2. This declaration is made in support of _____'s [*moving party*] motion to amend expert witness information, pursuant to *Code of Civil Procedure Section 2034.610(a)(2)*.

3. On _____ [*date*], _____ [*identify demanding party*] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [*specified date of exchange*].

4. On _____ [*specify date moving party provided original expert witness information*], _____ [*identify moving party*] timely submitted _____ [*specify what party submitted, e.g., a list setting forth the name(s) and address(es) of the person(s) whose expert opinion he/she expected to offer in*].

evidence at trial, together with a declaration stating the general substance of the testimony each expert is expected to give or a statement that he/she did not presently intend to offer the testimony of any expert witness].

5. _____ [Set forth facts showing that failure to include general substance of testimony the expert is now expected to give was due to mistake, inadvertence, surprise, or excusable neglect].

6. _____ [Specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues, e.g., On September 20, 2005, I sent a letter to Plaintiff John Smith's attorney asking that Defendant Mary Jones be allowed to amend her expert witness list to provide that John Lee would testify as to widget manufacturing processes as well as widget design, and stating that a copy of her proposed expert witness information was being served on all parties to the litigation. A copy of the letter is attached as Exhibit A and made a part hereof. To date, I have not received an answer to the letter, and subsequent telephone calls to plaintiff's attorney have not been returned].

7. _____ [Identify moving party] bases his/her request for the imposition of a sanction against _____ [identify opposing party(s)], in the amount of \$ _____, on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the amount of sanction requested].

8. _____ [If the motion is not timely under CCP § 2034.620(d), state facts establishing exceptional circumstances why the court should permit the motion to be made at a time that is not sufficiently in advance to permit the deposition of the expert to whom the motion relates to be taken within the time limit for discovery under CCP § 2024.010 et seq.].

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

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2016.040, 2034.610-2034.620



Timing:

See 13.18

Related Form of Order:

See 13.40

Related Form of Memorandum:

See *California Points and Authorities, Ch. 88, Discovery: Exchange of Expert Witness Information* § 88.12 (Matthew Bender)



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Chapter 13 Exchanging Expert Witness Information
VII. FORMS
C. Changing Expert Witness Information Post-Exchange

1-13 MB Practice Guide: CA Civil Discovery 13.40

13.40 Order Allowing Party to Amend Expert Witness Information.

Order Allowing Party to Amend Expert Witness Information

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party] for an order for leave to amend expert witness information and for the imposition of monetary sanction came on regularly for hearing by the court on _____ [date]. _____ [identify parties who attended hearing] appeared by counsel.

On proof made to the satisfaction of the court that _____ [identify party opposing the motion] will not be prejudiced in maintaining his/her _____ [action or defense] on the merits and that _____ [identify moving party]:

1. Decided to offer the _____ [different or additional] testimony of _____ [name(s)] as _____ [an expert witness or expert witnesses] on _____ [date], and sought leave to amend the expert witness information promptly thereafter;

[EITHER]

2. Would not in the exercise of reasonable diligence have determined to offer the _____ [different or additional] testimony of that expert witness; and,

[OR]

2. Failed to include the general substance of the different or additional testimony as a result of mistake, inadvertence, surprise, or excusable neglect; and

[CONTINUE]

3. Promptly thereafter served a copy of the proposed expert witness information on all other parties who have appeared in the action.

IT IS ORDERED that the motion be, and hereby is, granted and that the _____ [identify moving party] may amend his/her expert witness information on the condition(s) that _____ [identify moving party] make the expert available immediately for a deposition pursuant to *Code of Civil Procedure Sections 2034.410-2034.470* [and, if applicable, state any further conditions imposed on the order, e.g., and on the further condition that Plaintiff John Smith is granted leave to designate an additional expert witness to testify on the issue of standard of care].

IT IS FURTHER ORDERED that:

[EITHER, if court orders monetary sanction]

_____ [Identify party, person, or attorney who unsuccessfully opposed or made the subject motion] and his/her attorney _____ [attorney's name] shall pay forthwith to _____ [identify successful party] the sum of \$_____ as a sanction authorized by *Code of Civil Procedure Section 2034.730*.

[OR, if not imposing sanctions]

On further proof made to the satisfaction of the court, _____ [identify party, person, or attorney who unsuccessfully made or opposed the subject motion] and his/her attorney _____ [attorney's name] _____ [acted with substantial justification or specify other circumstances], making imposition of a sanction unjust.

[CONTINUE]

Dated: _____

Judge of the Superior Court [judge's signature]

NOTES.

Authority:

CCP § 2034.620



Timing:

See 13.18

Requirements for Augmented Information:

See 13.18

Related Form of Motion:

See 13.39



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Chapter 13 Exchanging Expert Witness Information
VII. FORMS
C. Changing Expert Witness Information Post-Exchange

1-13 MB Practice Guide: CA Civil Discovery 13.41

13.41 Notice of Motion and Motion to Submit Tardy Expert Witness Information; Supporting Declaration.

Notice of Motion and Motion to Submit Tardy Expert Witness Information; Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION TO SUB-
_____ [name],	)	MIT TARDY EXPERT WITNESS INFORMATION
Defendant.	)	AND FOR IMPOSITION OF MONETARY SANC-
	)	TION; SUPPORTING DECLARATION OF
	)	_____ [name]; SUPPORTING
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Trial Date: _____

To each party who has appeared in this action and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [court address], _____ [identify moving party, e.g., Defendant Mary Jones]

will, and hereby does, move under *Code of Civil Procedure Section 2034.710* for an order allowing him/her to submit expert witness information even though the time specified in the demand for the exchange has lapsed. Defendant will further move for an order imposing a monetary sanction against any party who unsuccessfully opposes this motion, and his/her attorney, in the amount of \$_____.

The motion is made on the grounds that _____[*identify moving party*] failed to submit the expert information on or before the date of exchange specified in the demand as a result of mistake, inadvertence, surprise, or excusable neglect, is making this motion promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and promptly served a copy of the proposed expert witness information on all other parties who have appeared in the action. Further,

_____ [identify opposing party(s)] will not be prejudiced in maintaining his/her/their [action or defense] on the merits by the [augmentation or amendment] proposed hereby. The motion for imposition of a monetary sanction will be made on the ground that _____[*identify moving party*] made an unsuccessful but reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*], the memorandum set forth below, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[*moving party's designation and name*]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [describe declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones or other statement as appropriate].

2. This declaration is made in support of _____'s [*moving party*] motion to submit tardy expert witness information, pursuant to *Code of Civil Procedure Section 2034.710*.

3. On _____ [date], _____ [identify demanding party] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [specified date of exchange].

4. _____ [Identify moving party] failed to submit expert witness information on or before that date because _____ [set forth facts showing that failure to include name of expert witness or substance of testimony, or to timely provide expert witness information, was due to mistake, inadvertence, surprise, or excusable neglect].

5. After discovering the missed date on _____ [date], _____ [moving party] promptly served a copy of proposed expert witness information on _____ [date].

6. On _____ [date(s) moving party met and conferred with opposing counsel], _____ [specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues, e.g., Defendant Mary Jones sent a letter to Plaintiff John Smith's attorney asking that she be allowed to submit her expert witness information one week late because of the fire in her office and subsequent hospitalization described above, and stating that a copy of her expert witness list, together with the expert witness's declaration made pursuant to *Code of Civil Procedure Section 2034.260(c)*, had been served on all parties to the litigation. A copy of the letter is attached as Exhibit A and made a part hereof. To date, defendant has not received an answer to her letter, and subsequent telephone calls to plaintiff's attorney have not been returned].

7. _____ [Identify moving party] bases his/her request for the imposition of a sanction against _____ [identify opposing party(s)], in the amount of \$ _____, on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the amount of sanction requested].

8. _____ [If the motion is not timely under CCP § 2034.710(b) , state facts establishing exceptional circumstances why the court should permit the motion to be made at a time that is not sufficiently in advance to permit the deposition of the expert to whom the motion relates to be taken within the time limit for discovery under CCP § 2024.010 et seq.].

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

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2016.040, 2034.710



Timing:

See 13.19

Related Form of Order:

See 13.42

Related Form of Memorandum:

See *California Points and Authorities, Ch. 88, Discovery: Exchange of Expert Witness Information § 88.13 (Matthew Bender)*



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Chapter 13 Exchanging Expert Witness Information
VII. FORMS
C. Changing Expert Witness Information Post-Exchange

1-13 MB Practice Guide: CA Civil Discovery 13.42

13.42 Order Allowing Party to Submit Tardy Expert Witness Information.

Order Allowing Party to Submit Tardy Expert Witness Information

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party] for an order for leave to submit tardy expert witness information and for the imposition of monetary sanction came on regularly for hearing by the court on _____ [date]. _____ [identify parties who attended hearing] appeared by counsel.

On proof made to the satisfaction of the court that _____ [identify party opposing the motion] will not be prejudiced in maintaining his/her _____ [action or defense] on the merits and that _____ [identify moving party]:

1. Failed to submit the expert witness information in the original exchange as a result of mistake, inadvertence, surprise, excusable neglect;

2. Promptly sought leave to submit the information after learning of the mistake, inadvertence, surprise, or excusable neglect; and,

3. Promptly thereafter served a copy of the proposed expert witness information on all other parties who have appeared in the action.

IT IS ORDERED that the motion be, and hereby is, granted and that the _____[*identify moving party*] may submit tardy expert witness information on the condition(s) that _____[*identify moving party*] make the expert available immediately for a deposition pursuant to *Code of Civil Procedure* sections 2034.410-2034.470 [and, if applicable, state any further conditions imposed on the order, e.g., and on the further condition that Plaintiff John Smith is granted leave to designate an additional expert witness to testify on the issue of standard of care].

IT IS FURTHER ORDERED that:

[*EITHER, if court orders monetary sanction*]

_____ [*identify party, person, or attorney who unsuccessfully opposed or made the subject motion*] and his/her attorney _____ [*attorney's name*] shall pay forthwith to _____ [*identify successful party*] the sum of \$ _____ as a sanction authorized by *Code of Civil Procedure* Section 2034.730.

[*OR, if not imposing sanctions*]

On further proof made to the satisfaction of the court, _____ [*identify party, person, or attorney who unsuccessfully made or opposed the subject motion*] and his/her attorney _____ [*attorney's name*] _____ [*acted with substantial justification or specify other circumstances*], making imposition of a sanction unjust.

[*CONTINUE*]

Dated: _____

_____ [*judge's signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2034.720-2034.730



Timing:

See 13.19

Requirements for Tardy Information:

See 13.18

Related Form of Motion:

See *13.41*



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Chapter 13 Exchanging Expert Witness Information
VII. FORMS
D. Deposing Expert Witnesses

1-13 MB Practice Guide: CA Civil Discovery 13.43

13.43 Notice of Motion, Motion and Supporting Declaration for Order Setting Compensation of Expert.

Notice of Motion, Motion and Supporting Declaration for Order Setting Compensation of Expert

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [name],	)	DER SETTING COMPENSATION OF EXPERT
Defendant.	)	AND IMPOSING MONETARY SANCTIONS; SUP-
	)	PORTING DECLARATION OF
	)	_____ [name]; SUPPORTING
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To: _____ [identify party whose expert is being deposed] and _____ [expert's name]:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located

at _____ [court address], _____ [identify moving party, e.g., Defendant Mary Jones] will, and hereby does, move for an order setting the compensation of _____ [expert's name], for providing deposition testimony at a deposition scheduled for _____ [deposition date], and will further move this court for an order requiring _____ [identify every party or attorney against whom sanctions are sought] to pay a monetary sanction in the amount of \$ _____ to _____ [identify moving party] pursuant to *Code of Civil Procedure Section 2034.470*. The motion will be made on the grounds that the _____ [hourly or daily] fee of \$ _____ demanded by that expert for providing deposition testimony is unreasonable. The motion for the imposition of a monetary sanction will be made on the ground that _____ [identify moving party] made an unsuccessful but reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, the declaration(s) of _____ [declarant name(s)], the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant Mary Jones or other statement as appropriate].

2. This declaration is made in support of _____'s [identify moving party] motion for an order setting the compensation of _____ [expert's name], for providing deposition testimony, pursuant to *Code of Civil Procedure Section 2034.470*.

3. On _____ [date designating party's expert witness list received], _____ [identify moving party] received an expert witness list from _____ [identify designating party] in response to a demand made for the exchange of expert witness information in this matter.

4. The expert witness declaration of _____ [designating party's attorney's name], which was included with the aforementioned list, contains a statement that _____'s [expert's name] _____ [hourly or daily] fee for providing deposition testimony is \$ _____. _____ [Identify moving party] wishes to take the deposition of _____ [expert's name], but deems his/her fee to be unreasonable.

5. _____ [Set forth facts showing that the fee requested by the expert is unreasonable, e.g., In the past

year, I have retained seven experts with knowledge, skill, experience, training, and education similar to that of Sam Smith. The highest fee charged by any of them was 25 percent (25%) lower, and their average fee was 32 percent (32%) lower, than the fee requested by Sam Smith].

6. On _____ [date moving party conferred with designating counsel], _____ [specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g., Defendant Mary Jones sent a letter to Plaintiff's attorney requesting that the expert's fee be adjusted to a more reasonable rate. A copy of the letter is attached as Exhibit A and made a part hereof. To date, Defendant has not received an answer to her letter, and plaintiff's subsequent telephone calls to defendant's attorney have not been returned].

7. _____ [identify moving party] bases his/her request for the imposition of a sanction against _____ [identify opposing party(s)], in the amount of \$ _____, on _____ [itemize and explain, in as many paragraphs as necessary, the basis of the computation of the amount of sanction requested].

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

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's designation and name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2016.040, 2023.010-2023.040, 2034.470

Documents to be submitted in support of/opposition to motion:

See 13.27[5]

Related Form of Order:

See 13.44

Related Form of Memorandum:

See *California Points and Authorities*, Ch. 88, *Discovery: Exchange of Expert Witness Information* § 88.11 (Matthew Bender)



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Chapter 13 Exchanging Expert Witness Information
VII. FORMS
D. Deposing Expert Witnesses

1-13 MB Practice Guide: CA Civil Discovery 13.44

13.44 Order Setting Compensation of Expert.

Order Setting Compensation of Expert

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [identify moving party] for an order setting the compensation of _____ [name], the expert designated by _____ [identify designating party], came on regularly for hearing by the court on _____ [hearing date]. _____ [Identify all parties who appeared by counsel] _____ appeared by counsel, _____ [counsel's names], respectively.

[EITHER]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion is denied.

[OR]

The court, having considered the declaration(s) and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, determines that the fee demanded by _____ [expert's name] for providing deposition testimony as an expert witness is unreasonable.

IT IS THEREFORE ORDERED that the motion be, and hereby is, granted and that the sum of \$ _____ [specify sum] is a reasonable _____ [hourly or daily] rate of compensation for _____ [expert's name], and is the rate which _____ [specify moving party] shall pay for the taking of _____'s [expert's name] deposition.

[AND EITHER, if imposing sanctions]

IT IS FURTHER ORDERED that _____ [identify unsuccessful opposing party, person, or attorney] has not shown that he/she acted with substantial justification or that other circumstances make imposition of a sanction unjust, and shall pay forthwith to _____ [specify successful party] the sum of \$ _____ as a sanction pursuant to *Code of Civil Procedure Sections 2023.030(a) and 2034.470(g)*.

[OR, if not ordering sanctions]

On further proof made to the satisfaction of the court that _____ [specify unsuccessful opposing party, person, or attorney] _____ [acted with substantial justification or specify other circumstances], making imposition of a sanction unjust.

Dated: _____

_____ [judge's signature]

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 2023.010-2023.040, 2034.470

Related Form of Motion:

See 13.43



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Chapter 14 Preservation of Evidence

1-14 MB Practice Guide: CA Civil Discovery 14.syn

§ 14.syn Synopsis to Chapter 14: Preservation of Evidence

14.01 Scope.

14.02 Objective and Strategy.

14.03 CHECKLIST: Preserving Evidence Before Commencement of Action.

14.03[1] Petitioner's Checklist.

14.03[2] Opposing Party's Checklist.

14.04 Options and Strategies for Petitioner.

14.05 Grounds for Using CCP § 2035.010 et seq. Procedure.

14.05[1] Use to Prevent Failure or Delay of Justice.

14.05[2] Petitioner Cannot Currently Bring or Cause Action to Be Brought.

14.05[3] Anticipated Action Must Be Cognizable in California State Court.

14.05[4] May Perpetuate Testimony of Any Person or Organization.

14.05[5] Procedure May Not Be Used for General Investigative Purposes.

14.06 Discovery Methods Available Are Deposition, Inspection of Tangible Things, and Physical and Mental Examinations.

14.07 Obtain by Verified Petition for Leave to Conduct Discovery.

14.07[1] Petition Is Required; Elements of Petition Are Listed in CCP § 2035.030(b).

14.07[2] Supporting Memorandum Is Required.

14.07[3] File Petition in Superior Court; Venue.

14.07[4] Give Notice to Each Expected Adverse Party.

14.07[5] Serve Notice and Petition in Manner of Service of Summons.

14.07[6] Service by Publication Is Available If Unable to Serve Otherwise.

14.07[6][a] Court Orders Service by Publication If Petitioner Unable to Serve Using Due Diligence.

14.07[6][b] Court Appoints Attorney for Nonappearing Party Served by Publication.

14.08 Court's Order.

14.08[1] Judge May Authorize All or Part of Requested Discovery.

14.08[2] Contents of Order.

14.09 Use of Deposition to Perpetuate Testimony.

14.09[1] Allowed in California Court Action on Same Subject Matter.

14.09[2] Allowed Against Any Named Expected Adverse Party or Successor.

14.09[3] Allowed in Same Manner As Oral Deposition.

14.09[4] Deposition May Have Been Taken Under CCP § 2035.010 et seq. or Law of Another Jurisdiction.

14.10 Opposing Party Should Consider Preparing Counterpetition for Protective Order.

14.11 CHECKLIST: Preserving Evidence During Action.

14.11[1] Checklist for Party Seeking Evidence.

14.11[2] Checklist for Party From Whom Discovery Sought.

14.12 Options and Strategies to Discourage Spoliation of Evidence During Action.

14.13 After Commencement of Action, Take Steps to Prevent Destruction of Evidence Not in Your Possession.

14.13[1] Parties to Action Have Duty to Preserve Evidence.

14.13[2] Meet and Confer With Opposing Counsel to Obtain Stipulation and Order Regarding Evidence Preservation.

14.13[3] Ex Parte Application for Injunction May Be Made to Preserve Evidence.

14.14 Sanctions and Other Remedies Are Available Against Party and Counsel for Intentional Spoliation of Evidence.

14.14[1] Party May Move for Sanctions for Misuse of the Discovery Process.

14.14[2] Party May Seek Evidentiary Inference at Trial Regarding Destroyed Evidence.

14.14[3] Party May Seek Criminal Penalties for Willful Destruction of Evidence.

14.14[4] Disciplinary Sanctions Are Available Against Attorney Involved in Spoliation.

14.15 Monetary Sanctions May Be Available for Negligent Spoliation of Evidence.

14.16 Limited Range of Sanctions Are Available Against Third Parties.

14.17 Preventing Spoliation by Your Client.

14.18 CHECKLIST: Preserving Evidence Pending Appeal.

14.18[1] Petitioner's Checklist.

14.18[2] Opposing Party's Checklist.

14.19 Options and Strategies for Moving Party.

14.20 Grounds for Using CCP § 2036.010 et seq. Procedure.

14.21 Discovery Methods Available Are Deposition, Inspection of Tangible Thing, and Physical and Mental Examinations.

14.22 Bring Motion in Trial Court That Entered Judgment.

14.23 Required Contents of Motion for Leave to Conduct Discovery.

14.24 Prepare Supporting Memorandum.

14.25 Court's Order.

14.25[1] Judge May Authorize All or Part of Requested Discovery.

14.25[2] Contents of Order.

14.26 Use of Deposition to Perpetuate Testimony.

14.27 Opposing Party Should Consider Preparing Cross Motion for Protective Order.

14.28 Petition to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced.

14.29 Notice of Petition.

14.30 Order Authorizing Perpetuation of Testimony or Preservation of Evidence Before Commencement of Action.

14.31 Notice of Motion and Supporting Declaration.

14.32 Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal.



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Chapter 14 Preservation of Evidence
I. STRATEGY

1-14 MB Practice Guide: CA Civil Discovery 14.01

14.01 Scope.

This chapter covers:

- Objectives and strategies for preserving evidence [*see* 14.02].
- Procedures for preserving evidence and perpetuating testimony before commencement of an action [*see* 14.03 -14.10; Forms: *see* 14.28 -14.30].
- Procedures and strategies for opposing the preservation of evidence and perpetuation of testimony before commencement of an action [*see* 14.03[2], 14.10].
- Procedures and strategies for preserving evidence after commencement of action [*see* 14.11 -14.13, 14.17].
- Procedures and strategies regarding sanctions for the spoliation of evidence while action is pending [*see* 14.14 -14.16].
- Procedures for preserving evidence and perpetuating testimony while appeal is pending and a new trial or retrial is anticipated, or when the time for taking an appeal has not expired [*see* 14.18 -14.25; Forms: *see* 14.31, 14.32].
- Procedures and strategies for opposing the preservation of evidence and perpetuation of testimony while appeal is pending and a new trial or retrial is anticipated, or when the time for taking an appeal has not expired [*see* 14.18[2], 14.27].
- Preventing spoliation by your client [*see* 14.17].
- Use of deposition to perpetuate testimony [*see* 14.26].

Core Statutes:

CCP §§ 2035.010 et seq., 2036.010 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryElectronic
DiscoveryPreservation



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I. STRATEGY

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14.02 Objective and Strategy.

Use *CCP § 2035.010 et seq.* to perpetuate testimony or preserve evidence for use if you anticipate that your client will be a party to a future civil action, which relates to the testimony or evidence, that you cannot presently bring or cause to be brought [*CCP §§ 2035.010(a), 2035.030(b)*]. This procedure is not appropriate for purely investigative or discovery purposes [*CCP § 2035.010(b)*].

CCP § 2036.010 et seq. allows a party to perpetuate testimony or preserve evidence [*CCP § 2036.010*]:

- Pending an appeal, or
- After judgment if the time for taking an appeal has not yet expired.



Strategic Point:

It is important at the outset for counsel to identify evidence that may be lost or destroyed not only by a potential opponent but also by a third party.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 199, Discovery: Preservation of Evidence (Matthew Bender).

California Points and Authorities, Ch. 89, Discovery: Preservation of Evidence (Matthew Bender).

DeMeo, California Deposition & Discovery Practice, Ch. 65, Perpetuation of Testimony and Preservation of Evidence (Matthew Bender).

Spoliation of evidence in federal cases, see Moore's Federal Practice, § 37.120 (Matthew Bender 3d ed.).

Spoliation of electronic evidence in federal practice, see Moore's Federal Practice Ch. 37A, Discovery of Computer-Based Information (Matthew Bender 3d ed.).



Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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II. PRESERVING EVIDENCE BEFORE COMMENCEMENT OF ACTION

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14.03 CHECKLIST: Preserving Evidence Before Commencement of Action.

14.03[1] Petitioner's Checklist.

- ☐ Determine whether grounds for bringing petition to preserve evidence exist:
- ☐ Discovery requested must prevent failure or delay of justice.
 - ☐ Client expects to be party to a cognizable action in California court.
 - ☐ Client cannot presently bring that action or cause it to be brought.
 - ☐ Client wishes to:
 - ☐ Perpetuate the client's own testimony or the testimony of another person, or
 - ☐ Preserve evidence for use if the action is in fact brought.
 - ☐ Client is not going on a "fishing expedition" to determine existence of possible causes of action or defenses or to identify possible parties to future action.

Authority:

CCP § 2035.010(b)

Discussion:

See 14.05

☐ Determine type of discovery available:

- ☐ Oral or written depositions.
- ☐ Inspection of documents, things and/or places.
- ☐ Physical or mental examinations.

Authority:

CCP § 2035.020

Discussion:

See 14.06

☐ Prepare verified petition and notice of petition:

☐ Required elements of petition:

☐ Petitioner's expectation to be a party to an action cognizable in a California state court.

☐ The petitioner's current inability either to bring that action or to cause it to be brought.

☐ The subject matter of the expected action.

☐ The petitioner's involvement in the expected action.

☐ The particular discovery methods that the petitioner wants to use.

☐ The facts that the petitioner wants to establish through the proposed discovery.

☐ The reasons why the petitioner wants to perpetuate or preserve these facts before the action has commenced.

☐ The name or description of any known persons or entities whom the petitioner expects to be adverse parties.

☐ The name and address of the persons or entities from whom discovery is sought.

☐ The substance of the information expected to be elicited from the persons or entities from whom discovery is sought.

- ☐ A request that the court enter an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.
- ☐ Draft memorandum in support of petition.
- ☐ Prepare proposed order.
- ☐ Serve petition and accompanying papers.
- ☐ On each natural person or organization named in the petition as an expected adverse party.
- ☐ In same manner as service of summons.
-  **Timing:**
At least 20 days before the date set in the notice for the hearing.
- Authority:**
CCP §§ 2035.030, 2035.040, 2035.050; Cal Rules Ct, Rules 3.1103(a), 3.1113(a)
- Discussion:**
See 14.07
- Forms:**
See 14.28, 14.29
- ☐ If after due diligence, the petitioner is unable to cause service on any expected adverse party, apply for an order of service by publication.
- Authority:**
CCP § 2035.040(d)
- Discussion:**
See 14.07[6]
- ☐ File the original copy of the verified petition and any accompanying papers with:
- ☐ The clerk of the superior court in a county in which any of the persons named in the petition as adverse parties to the anticipated action reside.
- ☐ If none of the parties resides in California, file in the county in which the action may be filed.
- Authority:**
CCP § 2035.030(a)

Discussion:*See 14.07[3]*

- ☐ Calendar hearing and response dates.
- ☐ Hearing and post-hearing matters:
 - ☐ Appear at the hearing and present argument if necessary.
 - ☐ If the court grants the petition, submit proposed order for judge's signature, and file original signed order.

Discussion:*See 14.08*

- ☐ Conduct discovery authorized by order in accordance with the provisions governing the method or methods of discovery authorized.

Authority:*CCP §§ 2035.020, 2035.050***Discussion:***See 14.06***14.03[2] Opposing Party's Checklist.**

- ☐ Calendar response and hearing date.
- ☐ Determine grounds for opposing petition to preserve evidence:
 - ☐ Petitioner does not reasonably expect to be party to action in California state court.
 - ☐ Petitioner can presently bring or cause action to be brought.
 - ☐ Discovery is not needed to prevent a failure or delay of justice.
 - ☐ Petitioner is trying to use procedure to ascertain existence of a cause of action or a defense.
 - ☐ Petitioner is trying to use procedure to identify potential parties to an action not yet filed.

Authority:*CCP §§ 2035.010, 2035.030*

Discussion:

See 14.05

☐ Determine whether opposition to the petition may be filed based on absence of required elements.

☐ Does petition contain:

☐ Petitioner's expectation to be a party to an action cognizable in a California state court.

☐ The petitioner's current inability either to bring that action or to cause it to be brought.

☐ The subject matter of the expected action.

☐ The petitioner's involvement in the expected action.

☐ The particular discovery methods that the petitioner wants to use.

☐ The facts that the petitioner wants to establish through the proposed discovery.

☐ The reasons why the petitioner wants to perpetuate or preserve these facts before the action has commenced.

☐ The name or description of any known persons or entities whom the petitioner expects to be adverse parties.

☐ The name and address of the persons or entities from whom discovery is sought.

☐ The substance of the information expected to be elicited from the persons or entities from whom discovery is sought.

☐ A request that the court enter an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.

☐ Is petition verified.

Authority:

CCP § 2035.030

Discussion:

See 14.07

☐ Prepare opposition:

- ☐ Draft memorandum of opposing petition.
- ☐ Draft opposing declarations and affidavits.
- ☐ Prepare proof of service of opposing papers.

Discussion:

See 14.05 -14.07

☐ Consider preparing counterpetition for protective order.**Authority:**

CCP §§ 2025.420, 2031.060, 2032.510

Discussion:

See 14.10

☐ Follow standard noticed motion procedure, serving and filing:

- ☐ Opposing papers.
- ☐ Counterpetition, if any.

☐ If discovery is granted, consider procedures available under general provisions governing discovery method authorized by order, *e.g.*, protective orders.**Authority:**

CCP §§ 2025.420, 2031.060, 2032.510

Discussion:

See 14.06

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.16

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryElectronic
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14.04 Options and Strategies for Petitioner.

Consider using *CCP § 2035.010 et seq.* procedure to depose a potential party or witness who is elderly, critically ill, or whom you suspect may leave the jurisdiction, or when there is only a single witness to a material fact. Also consider using the procedure when there are important documents in tangible or electronic form that might be intentionally destroyed by adverse party or destroyed in the normal course of business (i.e., in accordance with an organization's document retention and destruction policy).

Use *CCP § 2035.010 et seq.* to force an uncooperative insurance company to disclose its insured's policy limits [*Superior Ins. Co. v. Superior Court* (1951) 37 C2d 749, 751-755, 235 P2d 833 (upholding order for perpetuation of testimony regarding liability insurance under previous law); *Griffith v. State Farm Mut. Auto. Ins. Co.* (1991) 230 CA3d 59, 69, 281 CR 165 (insurance company is under no obligation to provide policy limit information informally; claimant may obtain information by discovery after filing personal injury action or by proceeding to perpetuate testimony); see *CCP § 2017.210* (discovery of insurance coverage)].



Warning:

If your client is a potential defendant, and the anticipated litigation is not certain, weigh the importance of evidence against the danger of stirring a potential plaintiff into action. Consider whether the risk is outweighed by the need to ensure that the evidence exists if litigation is filed. Moreover, by preserving the evidence, you may actually discourage the potential plaintiff from moving forward.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.05 Grounds for Using CCP § 2035.010 et seq. Procedure.

14.05[1] Use to Prevent Failure or Delay of Justice. The court may grant an order authorizing all or part of the discovery if it determines that the discovery requested may prevent a failure or delay of justice [CCP § 2035.050(a)].

14.05[2] Petitioner Cannot Currently Bring or Cause Action to Be Brought. The petition must specify why the client is unable to bring the expected action or cause it to be brought [CCP § 2035.030(b)(2)].

Example:

If it is possible for the client to bring an action for relief by declaratory judgment [CCP §§ 1060-1062.5], this required allegation may not be included in the petition.



Strategic Point:

There is no case law guidance on what level of inability to bring action is required. For example, if you are the potential plaintiff and need the deposition of an elderly or unwell witness and you could in fact bring an action, would the inability requirement be met on the basis that negotiations are in progress or that you are not ready to file because you need more information so that when you do file you can move promptly, as required by fast track procedures? While not certain, a court might be receptive to allowing the discovery in these situations, given that allowing the discovery could avoid some premature and potentially unnecessary filings.



Trap:

The filing of a petition to preserve evidence does not constitute the filing of a "suit" for statute of limitations purposes under the Tort Claims Act, *Gov Code § 945.6(a)(1)* [*Orr v. City of Stockton* (2007) 150 CA4th 622, 636, 58 CR3d 662] .

14.05[3] Anticipated Action Must Be Cognizable in California State Court. The action must be cognizable in a California state court [CCP § 2035.010(a)].

14.05[4] May Perpetuate Testimony of Any Person or Organization. The testimony to be perpetuated may be that of the party seeking perpetuation or of another natural person or organization [CCP § 2035.010(a)].

14.05[5] Procedure May Not Be Used for General Investigative Purposes. The CCP § 2035.010 *et seq.* procedure is not available to ascertain the possible existence of a cause of action or a defense or to identify persons who might be made parties to an action not yet filed [CCP § 2035.010(b); see *Edwards v. Centex Real Estate Corp.* (1997) 53 CA4th 15, 34 n9, 61 CR2d 518 (action against builder and engineer involving damage to concrete foundations; in reversing order granting motion *in limine* to exclude pre-litigation statements, court noted that for "obvious practical reasons, the usefulness of [former CCP § 2035 (now CCP § 2035.010 *et seq.*)] as a tool for prelitigation investigatory discovery is severely limited"); *Campbell Chain Co. v. County of Alameda* (1970) 12 CA3d 248, 257 (applying former CCP § 2017; use of depositions should be denied if there is no opportunity to use the perpetuated testimony in an actual legal action; use properly denied when introduction of depositions was not permissible in anticipated board of equalization proceeding)].

Distinguish:

The procedure may be used to obtain information on liability insurance policy limits [*Superior Ins. Co. v. Superior Court* (1951) 37 C2d 749, 751-754, 235 P2d 833 (upholding order for perpetuation of testimony regarding liability insurance, decided under prior law); *Griffith v. State Farm Mut. Auto. Ins. Co.* (1991) 230 CA3d 59, 69, 281 CR 165 (insurance company is under no obligation to provide policy limit information informally; may obtain information by discovery after filing personal injury action or by proceeding to perpetuate testimony, not by action for declaratory relief or breach of contract); see CCP § 2017.210 (discovery of insurance coverage)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.06 Discovery Methods Available Are Deposition, Inspection of Tangible Things, and Physical and Mental Examinations.

If the petitioner makes a proper showing, the court may issue an order authorizing any or all of the following discovery methods [CCP § 2035.020]:

- Oral and written depositions.
- Inspections of documents, things, and places.
- Physical and mental examinations.

Discovery by any of these methods must be conducted in accordance with those provisions of CCP §§ 2016.010-2036.050, which govern each discovery method [CCP § 2035.050(c)].

Use of the discovery methods authorized under CCP § 2035.010 *et seq.* is subject to the general scope of discovery delimited by CCP § 2017.010 *et seq.* and the general restrictions of CCP § 2019.010 *et seq.*, which authorizes a court to issue an order regulating the manner, timing, and sequence of discovery [CCP § 2035.010(a)].



Cross References:

Discussion/forms relating to depositions, inspections, and examinations, see Ch. 6, Oral Depositions in California; Ch. 7, Oral Depositions Outside of California; Ch. 8, Depositions on Written Questions; Ch. 10, Inspection of Documents, Tangible Things, and Land; and Ch. 11, Physical and Mental Examinations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.07 Obtain by Verified Petition for Leave to Conduct Discovery.

14.07[1] Petition Is Required; Elements of Petition Are Listed in CCP § 2035.030(b). You must file a verified petition to perpetuate testimony or preserve evidence [CCP § 2035.030(a)].

The petition must be titled in the name of the party seeking preservation or perpetuation of testimony. The petition must show the following required elements [CCP § 2035.030(b)]:

- Petitioner's expectation to be a party to an action cognizable in a California state court.
- The petitioner's current inability either to bring that action or to cause it to be brought.
- The subject matter of the expected action.
- The petitioner's involvement in the expected action.
- The particular discovery methods that the petitioner wants to use.
- The facts that the petitioner wants to establish through the proposed discovery.
- The reasons why the petitioner wants to perpetuate or preserve these facts before the action has commenced, for example, a statement of why counsel believes the evidence may be lost or destroyed.
- The name or description of any known persons or entities whom the petitioner expects to be adverse parties.
- The name and address of the persons or entities from whom discovery is sought.
- The substance of the information expected to be elicited from the persons or entities from whom discovery is sought.

- A request that the court enter an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.

Cross References:

Form for petition, see 14.28.

Discussion of methods of discovery; see 14.06.

14.07[2] Supporting Memorandum Is Required. A supporting memorandum is required [*Cal Rules Ct, Rules 3.1103(a)* (law and motion rules apply to discovery), 3.1113(a) (supporting memorandum required)] because the notice of petition is equivalent to a notice of motion [*CCP §§ 1003* (application for order is motion), 1064 (definitions of motions and orders in civil actions apply to similar acts in special proceedings)].

Cross Reference:

Form of memorandum supporting motion, see *California Points and Authorities, Ch. 89, Discovery: Preservation of Evidence, § 89.10 (Matthew Bender)*.

14.07[3] File Petition in Superior Court; Venue. File the petition in the superior court in the county of the residence of at least one expected adverse party [*CCP § 2035.030(a)*].

If no expected adverse party is a California resident, file the petition in the superior court of a county where the action or proceeding may be filed [*CCP § 2035.030(a)*].

14.07[4] Give Notice to Each Expected Adverse Party. The petitioner must give notice to each person or organization named in the petition as an expected adverse party. The notice must state that the petitioner will apply to the court at a specified time and date for the order requested in the petition [*CCP § 2035.040(a)*].



Strategic Point:

Local practice will determine the specific court or department that will hear the matter. Check with the court to determine where to file and how to schedule the hearing.

Cross Reference:

Form for notice of petition, see 14.29.

14.07[5] Serve Notice and Petition in Manner of Service of Summons. Service of the notice of the petition must be made in the same manner provided for the service of a summons [*CCP § 2035.040(a)*; see *CCP §§ 413.10-417.40* (manner of service)].



Timing:

The notice and a copy of the petition must be served at least 20 days before the date of the hearing [*CCP § 2035.040(c)*].

Cross Reference:

Discussion/forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

14.07[6] Service by Publication Is Available If Unable to Serve Otherwise.

14.07[6][a] Court Orders Service by Publication If Petitioner Unable to Serve Using Due Diligence. If the petitioner is unable to cause service to be made after exercising due diligence, the court will make an order for service by publication [CCP § 2035.040(d); see CCP § 415.50 (manner of service by publication)].

**Warning:**

If any expected adverse party did not receive adequate notice and was not represented at the deposition, the court may exclude the deposition in the later action [CCP §§ 2025.620, 2035.060].

**Trap--New Notice of Petition:**

If service by publication is requested for one or more of the anticipated adverse parties, petitioner may need to prepare a new notice of petition to ensure that the hearing date is at least 20 days after completion of service by publication [see 14.07[5]]. Service by publication is deemed complete when notice is published the requisite number of times over the specified period of time as provided in Gov Code § 6064 [CCP § 415.50]. It may thus be necessary to serve the papers again, with the new date of hearing, on any other expected adverse party who was already served with the original notice.

**Cross References:**

Service of summons by publication, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

Discussion of potential inability to use deposition testimony against expected adverse party who did not receive adequate notice, see 14.09[3].

14.07[6][b] Court Appoints Attorney for Nonappearing Party Served by Publication. The court must appoint an attorney to represent any expected adverse party who was served by publication and who does not appear at the hearing [CCP § 2035.040(e)].

The court-appointed attorney will represent the adverse party for all purposes, including cross-examination of any person whose testimony is taken by deposition [CCP § 2035.040(e)].

**Warning:**

The court will order the petitioner to pay the reasonable fees and expenses of any court-appointed attorney [CCP § 2035.040(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.08 Court's Order.

14.08[1] Judge May Authorize All or Part of Requested Discovery. The court must issue an order authorizing all or a part of the discovery requested if it determines that the discovery may prevent a failure or delay of justice [*CCP* § 2035.050(a)].



Cross Reference:

Form of proposed order, see 14.30.

14.08[2] Contents of Order. The order must identify [*CCP* § 2035.050(b)]:

- Any witness whose deposition may be taken,
- Any documents, things, or places that may be inspected, and
- Any person whose physical or mental condition may be examined.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.09 Use of Deposition to Perpetuate Testimony.

14.09[1] Allowed in California Court Action on Same Subject Matter. A deposition to perpetuate testimony taken in one action may be used in any other action brought in a California court involving the same subject matter [CCP § 2035.060].



Warning:

The party deposed may argue that he or she should not be subject to a later deposition, once the litigation has been filed. Thus, counsel should determine whether they are fully prepared to proceed with the deposition. Counsel may also specifically limit the scope of the deposition, with a request that a later deposition be allowed if litigation does go forward.

14.09[2] Allowed Against Any Named Expected Adverse Party or Successor. The deposition may be used against any party, or his or her successor in interest, named in the petition as an expected adverse party [CCP § 2035.060].

14.09[3] Allowed in Same Manner As Oral Deposition. Use of the deposition must be in accordance with CCP § 2025.620, governing oral depositions [see CCP § 2035.060]. Thus, a deposition to perpetuate testimony may be used at trial:

- Only when it is otherwise admissible under the rules of evidence; and
- Only against parties who were present or represented at, or received proper notice of, the deposition.

Example:

Notice under former CCP § 2035(e) (now CCP § 2035.040) was inadequate as to a defendant nurse when the notice was given to the nurse in care of the attorneys of two defendant hospitals, neither of which were the nurse's employer. The nurse did not appear personally or through representation at the hearing on the petition or at the deposition. Thus, the testimony perpetuated at the deposition was properly excluded as to the nurse [*N.N.V. v. American Assn. of Blood Banks* (1999) 75 CA4th 1358,

1395-1396, 89 CR2d 885].



Cross Reference:

See *Ch. 6, Oral Depositions in California, 6.52 et seq.*

14.09[4] Deposition May Have Been Taken Under CCP § 2035.010 et seq. or Law of Another Jurisdiction.

The provisions on the use of a deposition perpetuating testimony apply to depositions taken under *CCP § 2035.010 et seq.* or under comparable provisions of the laws of another state, the federal courts, or a foreign nation [*CCP § 2035.060*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.10 Opposing Party Should Consider Preparing Counterpetition for Protective Order.

Opposing party should consider preparing a counterpetition for a protective order. The counterpetition should be patterned after the noticed motions for protective orders authorized under the Discovery Act in relation to the discovery sought in the petition [see CCP §§ 2025.420, 2031.060, 2032.510].



Strategic Point:

A protective order would be used to limit the discovery, as opposed to objecting to have any discovery at all. An opposing party may consider filing a motion in opposition to discovery and request alternative relief limiting the scope of discovery if the motion is denied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryProtective Orders



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14.11 CHECKLIST: Preserving Evidence During Action.

14.11[1] Checklist for Party Seeking Evidence.

- ☐ Determine whether important evidence might be destroyed before being produced.
- ☐ Consider meeting and conferring with opposing party to obtain stipulation and court order to preserve all or specific evidence.
 - ☐ Request to meet and confer may be sufficient to create duty not to destroy evidence.
 - ☐ Stipulation may create contract subject to damages for breach.

Authority:

CCP § 2023.010; see Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 ; Coprich v. Superior Court (2000) 80 CA4th 1081, 1092, 95 CR2d 884

Discussion:

See 14.13[2]

- ☐ Consider ex parte application for TRO or injunction or order if suspicious that opposing party may destroy, alter or conceal evidence.

Authority:

Cal Rules Ct, Rules 3.1200-3.1207; Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385

Discussion:

See 14.13[3]

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.33

- ☐ Propound discovery requests as soon as possible to create almost absolute duty to preserve evidence.

Authority:

CCP § 2023.010; see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511

Discussion:

See 14.13[1]

- ☐ If you believe evidence has been intentionally destroyed or altered by party:

☐ Move for sanctions, including monetary, contempt, issue, evidentiary or terminating sanctions.

Make request for harsher or lesser sanctions in the alternative. Moving papers must include:

- ☐ Notice of Motion.
- ☐ Supporting Declaration.
- ☐ Supporting Memorandum.
- ☐ Proposed Order.
- ☐ Proof of Service.

Authority:

CCP § 2023.040

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.03

Discussion:

See 14.14[1]

- ☐ Request evidentiary inference at trial that destroyed evidence was unfavorable to destroying party's interests.

Authority:

Evid Code § 413

Discussion:

See 14.14[2]

- ☐ Seek criminal sanctions for intentional destruction of evidence.

Authority:

Pen Code § 135

Discussion:

See 14.14[3]

- ☐ When appropriate, seek disciplinary sanctions against attorney.

Authority:

B&P Code §§ 6106, 6077; Cal Rules Prof Conduct, Rule 5-220

Discussion:

See 14.14[4]

- ☐ If you believe evidence has been negligently destroyed or altered by party, move for sanctions.

Authority:

CCP § 2023.010 et seq.; see Kohan v. Cohan (1991) 229 CA3d 967, 971, 280 CR 474

Discussion:

See 14.15

- ☐ If evidence has been intentionally destroyed by third party:

☐ Move for monetary or contempt sanctions if third party has been served with *CCP § 2020.020* subpoena.

☐ Seek criminal sanctions for intentional destruction of evidence.

☐ Seek disciplinary sanctions if attorney is involved.

Authority:

B&P Code §§ 6106, 6077; CCP §§ 2023.030, 2020.240; Pen Code § 135; Cal Rules Prof Conduct, Rule 5-220

Discussion:

See 14.16

☐ If spoliator is sufficiently connected to a litigation party, seek evidence or issue preclusion or terminating sanctions against party.

Authority:

CCP §§ 2025.450, 2025.480; Temple Cmty. Hosp. v. Superior Court (1999) 20 C4th 464, 476-477, 84 CR2d 852, 976 P2d 223

Discussion:

See 14.16

☐ If evidence has been negligently destroyed by third party served with *CCP* § 2020.020 subpoena, seek monetary discovery sanctions.

Authority:*CCP* § 2023.030(a); see *Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474**Discussion:**

See 14.15, 14.16

14.11[2] Checklist for Party From Whom Discovery Sought.

☐ Do not destroy, alter or conceal any evidence that might be discoverable in pending or existing litigation.

Discussion:

See 14.17

☐ If business is involved:

☐ Ensure document retention policy exists and employees adhere to it.

☐ If litigation is foreseeable or underway, suspend provisions for destruction of documents.

Discussion:

See 14.17

☐ Cooperate in any meet and confer discussions regarding preservation of evidence and consider entering into stipulation and order that sets parameters for preservation of evidence.

☐ Consider moving for protective order if opposing party attempts to put constraints on your operations that would be disruptive or costly to your business.

Discussion:

See 14.17

Standard Procedure Checklist:See *Ch. 4, Law and Motion Procedure*, 4.03**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryElectronic
DiscoveryPreservationEvidenceRelevanceSpoliation



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14.12 Options and Strategies to Discourage Spoliation of Evidence During Action.

After litigation has begun, destroying evidence in anticipation of or in response to a discovery request is a misuse of the discovery process within the meaning of *CCP § 2023.010* subjecting the offending party to potentially severe sanctions [*CCP § 2023.010 et seq.*; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 (exploring broad range of sanctions available under *CCP § 2023.010 et seq.* to deter the spoliation of evidence)]. Therefore, once a complaint is filed, a party should both implement procedures to prevent its own relevant documents and physical evidence from being destroyed and to prevent the opposing party from destroying relevant evidence that might be sought through discovery. In addition, steps should be taken to prevent the spoliation of evidence that might be in the possession of third parties.

Both counsel and client have a duty to preserve evidence. To avoid a spoliation claim, counsel should immediately take steps to obtain all relevant physical or electronic evidence from his or her client. Counsel should also instruct an organizational client to circulate an internal memorandum informing employees of the categories of potentially relevant evidence and telling them to refrain from destroying or deleting evidence that may fall within those categories.

Counsel should also as early as possible inform opposing counsel, either informally by letter or by serving a discovery request, of the categories of documents his or her client will be seeking during discovery to put the opposing party on notice, which will in turn make it easier to get strong sanctions if the opposing party destroys any evidence.

Early efforts should be made to obtain a stipulation and order regarding the preservation of evidence, especially if it is on the parties' computer systems or part of either party's ongoing operations. If you believe the opposing party may act quickly to destroy damaging evidence, consider seeking a temporary restraining order, injunction, or preservation order *ex parte*.



Cross Reference:

See Ch. 5, Discovery of Electronic Information.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceSpoliation



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14.13 After Commencement of Action, Take Steps to Prevent Destruction of Evidence Not in Your Possession.

14.13[1] Parties to Action Have Duty to Preserve Evidence. A party to a lawsuit that destroys, alters, or conceals evidence that is or may be the subject of a discovery request has engaged in a misuse of the discovery process in violation of *CCP § 2023.010* [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511 ; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 495, 89 CR2d 353 (affirming order resulting in terminating sanctions for forging contract and destroying evidence by use of computers in violation of stipulation not to use the computers pending examination by expert); *see CCP § 2023.010(d)* (failing to respond or submit to an authorized method of discovery), (f) (making evasive response to discovery)].

CCP § 2023.010 creates a duty to preserve evidence and describes a broad range of sanctions available for a breach of that duty [*CCP § 2023.030*].

 Cross References:

Discussion of available sanctions, *see 14.14[1]*.

Discussion of discovery sanctions in general and forms, *see Ch. 3, Sanctions*.



Strategic Point:

Although sanctions are available for the destruction of documents in anticipation of a discovery request, early service of a document request strengthens your argument for sanctions if requested documents are found to have been destroyed after service of the request.

14.13[2] Meet and Confer With Opposing Counsel to Obtain Stipulation and Order Regarding Evidence Preservation. Agreements with opposing counsel regarding the preservation of evidence, especially when memorialized in a stipulation and court order, sufficiently preserve a party's rights to seek spoliation sanctions if the opposing party violates the stipulation [*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 CA4th 486, 495, 89 CR2d 353].

In addition, if the opposing party violates the stipulation, you may have a cause of action for breach of a contractual duty to preserve evidence [*Coprish v. Superior Court (2000) 80 CA4th 1081, 1092, 95 CR2d 884*]. The moving party has the burden of proving what damages resulted from the breach, which may be difficult to establish [*Coprish v. Superior Court (2000) 80 CA4th 1081, 1092, 95 CR2d 884*].

Distinguish:

In federal actions, the parties are *required* to meet and confer early in the litigation to discuss any issues relating to preserving discoverable information [*FRCP 26(f)* (as amended effective Dec. 1, 2006)].



Strategic Point:

Preservation orders should be sufficiently specific to give the parties adequate notice regarding what should be preserved. If an order is too general, it may be difficult to enforce or may lead to inadvertent violations.

14.13[3] Ex Parte Application for Injunction May Be Made to Preserve Evidence. A party with knowledge that potentially discoverable evidence is likely to be destroyed or concealed may make an ex parte application for a preliminary injunction to prevent the destruction of the evidence [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385* (application seeking to "freeze" use of electronically stored data granted); see *Cal Rules Ct, Rules 3.1200-3.1207*]. The purpose of the injunction is to preserve the status quo until after the discovery takes place [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418, 130 CR2d 385*].

The moving party in such a case has no adequate remedy at law because the Discovery Act does not provide a mechanism for issuing a protective order to preserve evidence pending production during discovery [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418-1419, 130 CR2d 385*].

Distinguish:

The usual test for determining whether to issue a preliminary injunction includes the factor of whether the moving party is likely to prevail on the merits of the lawsuit. In this context, the test is whether the discovering party is able to show that the evidence sought is discoverable. The second factor, irreparable harm, is established by a showing of an irretrievable loss of evidence [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1420-1421, 130 CR2d 385*].

Example:

After filing a complaint against ex-employees for misappropriation of trade secrets and other claims, and serving a request for production of a computer and electronic storage media on which the misappropriated data were stored, the employer filed an ex parte application seeking an order freezing any use by defendants of the computer and media so that it would be available for discovery, claiming that even defendants' innocent use of the computer or media could destroy the evidence. Because defendants admitted that the computer and media contained data copied from plaintiff's computers, the court ruled that plaintiff satisfied the two factors considered in determining whether to issue a preliminary injunction: (1) the moving party's likelihood of prevailing on the merits, and (2) the relative harm to the parties. The first factor was established because the computer and storage media contained evidence that plaintiff had a right to discover. The second factor was established because plaintiff could irretrievably lose discoverable evidence while defendants would only be slightly inconvenienced until plaintiff could copy the data, and the cost to defendants of reviewing the data for privileged or irrelevant matter would be borne by plaintiff, subject to reallocation by the court [*Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 CA4th 1414, 1418-1421, 130 CR2d 385*].

**Strategic Point:**

Unless there is a real threat of spoliation, it is more efficient to try to obtain a stipulation because of the high showing of personal knowledge of irreparable harm or immediate danger required before an ex parte application will be granted [see *Cal Rules Ct, Rule 3.1202(c)*].

**Cross Reference:**

Discussion of/forms for injunctive relief, see Matthew Bender[(R)] Practice Guide, California Pretrial Civil Procedure, Ch. 18, TROs and Preliminary Injunctions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMisconduct



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14.14 Sanctions and Other Remedies Are Available Against Party and Counsel for Intentional Spoliation of Evidence.

14.14[1] Party May Move for Sanctions for Misuse of the Discovery Process. Although there no longer is a tort cause of action under California law for spoliation of evidence [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511], the Discovery Act authorizes, on noticed motion, the imposition of sanctions against a party who alters or destroys evidence for misuse of the discovery process [CCP §§ 2023.030, 2023.040; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 12, 74 CR2d 248, 954 P2d 511]. The sanctions available under CCP § 2023.030 include:

- Monetary sanctions [CCP § 2023.030(a)].
- Contempt sanctions [CCP § 2023.030(e)].
- Issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing specified claims or defenses [CCP § 2023.030(b)].
- Evidence sanctions prohibiting the offending party from introducing designated matters into evidence [CCP § 2023.030(c)].
- Terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party [CCP § 2023.010(d)].

Any monetary sanction awarded should be in an amount sufficient to cover all of the costs incurred by the aggrieved party, including attorney fees [CCP § 2023.030(a); *Sherman v. Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 1155-1156, 79 CR2d 641 (court ordered offending party to pay plaintiff's attorney fees for the entire new trial when party's concealment of key documents was not discovered until after trial)].



Cross References:

Discussion of types of sanctions available for discovery misuse, see *Ch. 3, Sanctions, 3.10*.

Discussion of motion seeking sanctions, see *Ch. 3, Sanctions, 3.11*.

Discussion regarding opposing motion for sanctions, see *Ch. 3, Sanctions, 3.13, 3.14*.

Form of motion and declaration, see *Ch. 3, Sanctions, 3.19*.

Form of Order Awarding Sanctions, see *Ch. 3, Sanctions, 3.21*.

14.14[2] Party May Seek Evidentiary Inference at Trial Regarding Destroyed Evidence. When key evidence has been destroyed, a party can ask that the jury be instructed with the evidentiary inference set forth in *Evid Code § 413* that evidence which a party has destroyed or rendered unavailable was unfavorable to that party [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 11-12, 74 CR2d 248, 954 P2d 511].

Example:

In a personal injury action brought by an injured passenger against an auto manufacturer, the auto manufacturer failed to disclose the existence of responsive documents, forcing the requesting party to depose numerous witnesses and creating delays until the discovery cutoff passed, at which point the manufacturer declared it would produce no more witnesses or documents. Finding that the manufacturer acted intentionally and in bad faith, the court instructed the jury that the manufacturer had attempted to conceal evidence and that the jury could consider that fact in determining what inferences to draw from the evidence [*Karlsson v. Ford Motor Co.* (2006) 140 CA4th 1202, 1224-1226, 45 CR3d 265] .

14.14[3] Party May Seek Criminal Penalties for Willful Destruction of Evidence. A person who willfully destroys or conceals evidence knowing that it is about to be produced in evidence in a trial or other legal proceeding is guilty of a misdemeanor [*Pen Code § 135*; see *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 13, 74 CR2d 248, 954 P2d 511].

14.14[4] Disciplinary Sanctions Are Available Against Attorney Involved in Spoliation. Attorneys are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence [*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 C4th 1, 13, 74 CR2d 248, 954 P2d 511 ; see *B&P Code §§ 6077* (attorneys subject to discipline for breach of Rules of Professional Conduct), 6106 (act involving moral turpitude, dishonesty or corruption); *Cal Rules Prof Conduct, Rule 5-220* (attorney not to suppress any evidence attorney or client has legal obligation to reveal or produce)].



Warning:

The intentional destruction of evidence by your client may raise suspicions that you participated as well, potentially subjecting you to State Bar investigation. This risk should provide extra incentive to take affirmative steps to preserve and safeguard evidence.



Cross Reference:

Discussion of ethical obligations, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.270 et seq., Duty to Represent Client Competently and Zealously* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliation



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14.15 Monetary Sanctions May Be Available for Negligent Spoliation of Evidence.

CCP § 2023.010 does not include the term "willful" in its list of acts constituting misuse of the discovery process or in its list of available sanctions. Accordingly, some courts have awarded monetary sanctions under *CCP § 2023.030(a)* for discovery misuse that was not willful [*Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 CA4th 256, 260, 24 CR2d 501 ; *Kohan v. Cohan* (1991) 229 CA3d 967, 971, 280 CR 474].

However, other courts have said that the misuse must be "willful" to impose *CCP § 2023.030* sanctions [*Vallbona v. Springer* (1996) 43 CA4th 1525, 1545, 51 CR2d 311].

Distinguish:

The court in *Vallbona* was considering the imposition of the more serious terminating, issue, and evidence sanctions, not monetary sanctions. Therefore, a party seeking only monetary sanctions may be able to distinguish *Vallbona* and obtain an award for negligent spoliation.



Cross Reference:

Discussion of willfulness requirement for discovery misuse, see *Ch. 3, Sanctions, 3.07*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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14.16 Limited Range of Sanctions Are Available Against Third Parties.

Most of the sanctions available under *CCP* § 2023.010 *et seq.* are only available against a party to the lawsuit and cannot be utilized against third party spoilers [see *Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 476-477, 84 CR2d 852, 976 P2d 223]. The sanctions that are available against a third party are [*Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 476-477, 84 CR2d 852, 976 P2d 223 ; *Coprish v. Superior Court* (2000) 80 CA4th 1081, 1088 n2, 95 CR2d 884]:

- Monetary or contempt sanctions for violation of a subpoena [*CCP* §§ 2023.030(a), (e), 2020.240].
- Criminal sanctions for intentional destruction of evidence [*Pen Code* § 135].
- Disciplinary sanctions against an attorney [*B&P Code* §§ 6077, 6106; *Cal Rules Prof Conduct*, Rule 5-220].
- Terminating, issue, or evidence sanctions against a party if the third party spoiler is sufficiently connected to the party [*CCP* §§ 2025.450, 2025.480; *Temple Cmty. Hosp. v. Superior Court* (1999) 20 C4th 464, 476-477, 84 CR2d 852, 976 P2d 223].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconduct



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14.17 Preventing Spoliation by Your Client.

As soon as you are involved in an action (or when litigation is imminent), you should take control of marshaling all evidence in your client's possession that might be sought in discovery.



Warning:

The standard for discovery is not just whether a document or thing is relevant but also whether the document appears reasonably calculated to lead to the discovery of admissible evidence [CCP § 2017.010]. In addition, CCP § 2031.010 *et seq.* document requests require a party to produce documents not only in its possession or custody but also under its control [CCP § 2031.010(b)]. Moreover, a "diligent search and a reasonable inquiry" is required to comply with a document request [CCP § 2031.230]. Therefore, you should cast a wide net in securing evidence from your client and any persons or entities under its control.



Strategic Point:

For an organizational client, you should prepare a list of categories of documents that may be discoverable and have your client circulate it to its employees. One of the most time-consuming exercises can be learning who maintains the documents or stores the information. You should have the employees sign and return the list whether they have responsive documents or not. This will provide support for the fact that you performed a diligent search.



Warning:

Organizations should have a document retention policy that calls for the periodic and systematic destruction of records. Once litigation is foreseeable or underway, you should advise your client in writing to suspend the provisions of its retention policy for destruction of any potentially discoverable documents.

You should meet with opposing counsel to attempt to agree to a stipulation and order to set the parameters for preserving evidence.

 Cross Reference:

Discussion of stipulation and order, see *14.13[2]*.

You should compile original documents and copies of electronically-stored data in your office or a document repository under your control to the extent feasible to prevent the destruction or alteration of evidence.

Consider seeking a protective order if opposing counsel makes unreasonable demands regarding evidence preservation that would interfere with the operation of your client's business.

 Cross References:

Discussion of preserving electronic evidence, see Ch. 5, *Discovery of Electronic Information*.

Discussion of protective orders, see *Ch. 1, Strategy and Planning, 1.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral Overview



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14.18 CHECKLIST: Preserving Evidence Pending Appeal.

14.18[1] Petitioner's Checklist.

☐ Determine whether grounds exist to initiate proceedings to perpetuate testimony or preserve evidence pending appeal:

Timing:

☐ Has an appeal has been taken from judgment of any California court, or

☐ Is there still time for taking an appeal.

Authority:

CCP § 2036.010

Discussion:

See 14.20

☐ Determine discovery method(s) to be utilized:

☐ Oral or written depositions.

☐ Inspection of documents, things and/or places.

☐ Physical or mental examinations.

Authority:*CCP § 2036.020***Discussion:***See 14.21*☐ Draft notice of motion and supporting declaration to preserve evidence pending appeal.☐ Required elements of motion and supporting declaration:☐ The names and addresses of the persons or organizations from whom the discovery is sought.☐ The discovery methods for which authorization is being sought.☐ The reasons why the party wants to perpetuate testimony or preserve evidence.☐ Sufficient facts to show that the perpetuation of testimony or preservation of evidence is proper to avoid a failure or delay of justice if there are any further proceedings in the action in that court.**Authority:***CCP §§ 2036.030(b), 2036.040(a)***Discussion:***See 14.23***Form:***See 14.31*☐ Prepare supporting memorandum.**Authority:***Cal Rules Ct, Rules 3.1103(a), 3.1113(a)***Discussion:***See 14.24*☐ Prepare proposed order.☐ Prepare proof of service.☐ Serve papers, and file in court that entered judgment from which appeal is taken.☐ Calendar response and hearing dates.

**Timing:**

Same notice as required for method of discovery sought.

Authority:

CCP § 2036.030

Discussion:

See 14.20 -14.22

Form:

See 14.31 (Notice of Motion and Supporting Declaration)

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure, 4.03*

- ☐ If court grants motion, submit prepared order for judge's signature and file original signed order.

Authority:

CCP § 2036.040

Discussion:

See 14.25

Form:

See 14.32 (Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal)

- ☐ Conduct discovery authorized by order in accordance with provisions governing method or methods of discovery authorized.

Authority:

CCP §§ 2036.010, 2036.020

Discussion:

See 14.21

14.18[2] Opposing Party's Checklist.

- ☐ Calendar response and hearing dates.
- ☐ Determine grounds for opposing proceedings to perpetuate testimony or preserve evidence:
- ☐ An appeal has not been taken from judgment of any California court, and
 - ☐ Time for taking an appeal has expired.
 - ☐ Make argument that discovery will not prevent or delay justice if further proceedings are brought.

Authority:

CCP §§ 2036.010, 2036.030

Discussion:

See 14.20

- ☐ Prepare opposition:
 - ☐ Draft memorandum opposing motion,
 - ☐ Draft opposing declarations or affidavits, and
 - ☐ Prepare proof of service of opposing papers.

Discussion:

See 14.20, 14.23

- ☐ Consider preparing cross motion for protective order.

Authority:

CCP §§ 2025.420, 2031.060, 2032.510(d)

Discussion:

See 14.27

- ☐ Serve and file opposing papers and cross motion (if appropriate).
 - ☐ Follow standard noticed motion procedure.

Authority:

CCP § 2036.030(a)

Discussion:

See 14.23

Standard Procedure Checklist:

See *Ch. 4, Law and Motion Procedure*, 4.16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.19 Options and Strategies for Moving Party.

If, for example, a court dismisses a complaint after a demurrer to the complaint has been sustained without leave to amend, and the plaintiff appeals, a significant amount of time may elapse before the appeal is decided, and the case is potentially revived. In this situation, it may be desirable to engage in some time-sensitive discovery.

It may be prudent, for example:

- To perpetuate the testimony of an elderly or ailing party or witness or of the sole witness to a material fact,
- To examine documents before they are destroyed,
- To inspect a place before it changes in some aspect relevant to the case, or
- To have a physical or mental examination of a party close to the time of the event underlying the action.



Strategic Point:

A defendant who has prevailed on a demurrer might consider whether engaging in this type of discovery might appear to undermine its faith in its victory. If the court has sustained a demurrer against a plaintiff, it likely would require a rather extraordinary showing to allow further discovery.

If facts are newly discovered pending appeal, it may be appropriate to perpetuate testimony.

Example:

Defendant gas company, found liable for negligence relating to the explosion of a building in San Francisco, appealed the denial of its motion for new trial. The motion had been partly based on newly discovered evidence that a prisoner on death row in Idaho had blown up the building in an attempt to kill one of the occupants. Pending appeal the defendant sought to obtain the prisoner's deposition if the case were remanded for new trial. Even without the express authorization of the current statute for

perpetuation of testimony pending appeal, the California Supreme Court held that the general statutes on depositions authorized the superior court to issue a commission for the deposition, noting both that the prisoner was the only witness on a material point and that his pending execution was an even stronger case than age or illness [*San Francisco Gas & Elec. Co. v. Superior Court* (1908) 155 C 30, 99 P 359].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral Overview



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14.20 Grounds for Using CCP § 2036.010 et seq. Procedure.

CCP § 2036.010 et seq. allows perpetuation of testimony or preservation of evidence for use in any further proceedings in that court if [*CCP § 2036.010*]:

- Either party has appealed a judgment of any California state court, or
- The time for taking an appeal has not expired.

The ground for perpetuating testimony or preserving evidence is to prevent a failure or delay of justice in the event further proceedings occur [*CCP § 2036.040(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.21 Discovery Methods Available Are Deposition, Inspection of Tangible Thing, and Physical and Mental Examinations.

If the moving party makes the proper showing, the court must issue an order authorizing any or all of the following discovery methods [*CCP* § 2036.020]:

- Oral and written depositions.
- Inspections of documents, things, and places.
- Physical and mental examinations.

Discovery by any of these methods must be conducted in accordance with the provisions of the Civil Discovery Act of 1986 that govern the specific method authorized [*CCP* § 2036.040(c)].



Strategic Point:

Attach a copy of the order of authorization to any deposition notice or demand for production so that the recipient will be aware of the obligation to respond.



Cross References:

Discussion/forms relating to discovery methods available under *CCP* § 2036.010 *et seq.*, see Ch. 6, Oral Depositions in California; Ch. 8, Depositions on Written Questions; Ch. 11, Physical and Mental Examinations.

Discussion/forms relating to scope and regulation of discovery under *CCP* §§ 2017.010 and 2019.010, see Ch. 1, Strategy and Planning, and Ch. 2, Scope of Discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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Chapter 14 Preservation of Evidence
IV. PRESERVING EVIDENCE PENDING APPEAL

1-14 MB Practice Guide: CA Civil Discovery 14.22

14.22 Bring Motion in Trial Court That Entered Judgment.

A party wishing to obtain discovery pending appeal must obtain leave of the court that entered the judgment subject to the appeal [CCP § 2036.030(a)]. The motion must be made on the same notice to and service of parties as is required for discovery sought in an action pending in that court [CCP § 2036.030(a)].



Cross Reference:

Standard noticed motion procedure, see *Ch. 4, Law and Motion Procedure, 4.03*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral Overview



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14.23 Required Contents of Motion for Leave to Conduct Discovery.

The motion for leave to conduct discovery pending appeal must include [*CCP* § 2036.030(b)]:

- The names and addresses of the persons or organizations from whom the discovery is sought.
- The discovery methods for which authorization is being sought.
- The reasons why the party wants to perpetuate testimony or preserve evidence.

The motion should also state sufficient facts to show that the perpetuation of testimony or preservation of evidence is proper to avoid a failure or delay of justice if there are any further proceedings in the action in that court [*CCP* § 2036.040(a)].

➡ **Cross Reference:**

Form of notice of motion and supporting declaration, see 14.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral Overview



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14.24 Prepare Supporting Memorandum.

A supporting memorandum must be served and filed with the form of notice of motion and motion [*Cal Rules Ct, Rules 3.1103(a), 3.1113(a)*].

➡ Cross Reference:

Form of memorandum supporting perpetuation before trial, which may be modified for use under *CCP § 2036.010 et seq.* for perpetuation pending appeal, see *California Points and Authorities, Ch. 89, Discovery: Preservation of Evidence, § 89.10 (Matthew Bender)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral Overview



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14.25 Court's Order.

14.25[1] Judge May Authorize All or Part of Requested Discovery. The court must issue an order authorizing all or part of the discovery requested if it determines that the discovery may prevent a failure or delay of justice in any future proceedings in the action [*CCP § 2036.040(a)*].

14.25[2] Contents of Order. The order must identify [*CCP § 2036.040(b)*]:

- Any witnesses whose deposition may be taken,
- Any documents, things, or places that may be inspected, and
- Any person whose physical or mental condition may be examined.



Cross Reference:

Proposed order, see 14.32.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral Overview



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14.26 Use of Deposition to Perpetuate Testimony.

A deposition to perpetuate testimony taken pursuant to *CCP* § 2036.010 *et seq.* may be used in any later proceeding in accordance with the provisions of *CCP* § 2025.620, which governs the use of oral depositions [*CCP* § 2036.050].

Cross Reference:

Discussion of use of deposition at trial under *CCP* § 2025.620, see *Ch. 6, Oral Depositions in California*, 6.52 *et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony



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14.27 Opposing Party Should Consider Preparing Cross Motion for Protective Order.

Consider preparing a cross motion for a protective order. The cross motion should be patterned after the noticed motions for protective orders authorized under the Discovery Act in relation to the discovery sought in the petition [see CCP §§ 2025.420, 2031.060, 2032.510(d)].



Strategic Point:

A protective order would be used to limit the discovery, as opposed to objecting to have any discovery at all. An opposing party may consider filing a motion in opposition to discovery and request alternative relief limiting the scope of discovery if the motion is denied.



Cross References:

Discussion/forms, see *Ch. 6, Oral Depositions in California*, 6.28 (discussion), 6.72 (form); *Ch. 10, Inspection of Documents, Tangible Things, and Land*, 10.24 (discussion), 10.38 (form); *Ch. 11, Physical and Mental Examinations*, 11.07 (discussion), 11.46 (form).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective Orders



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Chapter 14 Preservation of Evidence

V. FORMS

A. Preserving Evidence Before Commencement of Action

1-14 MB Practice Guide: CA Civil Discovery 14.28

14.28 Petition to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

PETITION OF _____ [name],	)	
Petitioner,	)	No. _____
to _____ [Perpetuate the	)	PETITION TO _____
Testimony of _____ (name(s))	)	[PERPETUATE TESTIMONY and/or PRESERVE
and/or Preserve Evidence].	)	EVIDENCE]
	)	

Petitioner, _____ [name], alleges:

1. Petitioner expects to be a _____ [plaintiff or defendant or party litigant] in an action cognizable in a court of the State of California, namely an action _____ [state nature and character of action sufficiently to show that it is capable of being heard and determined in a California court]. Petitioner's expectation is based on _____ [set forth facts showing why petitioner expects the action to be brought].
2. Petitioner is presently unable to _____ [bring the action or cause the action to be brought] because _____ [specify].
3. The subject matter of the expected action is _____ [specify].

4. Petitioner's interest in the expected action is _____[specify].

5. Petitioner expects the following _____[persons *and/or* entities] to be adverse parties in the anticipated action: _____[give names or descriptions and addresses of adverse parties so far as known].

6. Petitioner desires to employ _____[specify one or more methods authorized by Code of Civil Procedure Section 2035.020, e.g., oral depositions and a physical examination] to preserve evidence in the event that an action is subsequently filed.

7. Petitioner seeks leave to preserve evidence by means of the proposed discovery because _____[state reason or reasons why the perpetuation of testimony or preservation of evidence may prevent a failure or delay of justice].

[Use the following paragraphs, as appropriate, to state the name and address of each person or entity from whom discovery is sought, the discovery method to be used for each, and the substance of the information to be elicited from each].

[EITHER]

8. Petitioner desires to examine _____[name and address of party to be examined] by _____[oral or written] deposition. Petitioner expects to elicit from _____[name of deponent] the following information: _____[give substance of information].

[AND/OR]

9. Petitioner desires to subject _____[name and address of party to be examined] to a _____[physical *and/or* mental] examination conducted by _____[name and profession of examiner]. Petitioner expects to discover the following information as a result of the examination: _____[give substance of information].

[AND/OR]

10. Petitioner desires to inspect _____[identify documents or things or places to be inspected], which is/are in the possession, custody, or control of _____[name and address of person from whom discovery is sought]. Petitioner expects to discover the following information as a result of the inspection: _____[give substance of information].

[CONTINUE]

WHEREFORE, petitioner prays for an order authorizing the petitioner to _____[specify, e.g., take the oral deposition of Jane Smith for the purpose of perpetuating his/her testimony, as described in Paragraph 9], pursuant to Code of Civil Procedure Section 2035.010 et seq.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Petitioner

VERIFICATION

I, _____ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and knew the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP § 2035.010 et seq.

Contents of Petition:

See 14.07[1]

Procedure:

See 14.07[2] -[6]

Related Form of Notice:

See 14.29

Related Form of Order:

See 14.30

Related Form of Memorandum:

See California Points and Authorities, Ch. 89, Discovery: Preservation of Evidence, § 89.10 (Matthew Bender)



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Chapter 14 Preservation of Evidence

V. FORMS

A. Preserving Evidence Before Commencement of Action

1-14 MB Practice Guide: CA Civil Discovery 14.29

14.29 Notice of Petition.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	No. _____
PETITION OF _____ [name],	)	NOTICE OF PETITION FOR ORDER AUTHORIZ-
Petitioner,	)	ING _____ [PERPETUATION OF
to _____ [Perpetuate the	)	TESTIMONY <i>and/or</i> PRESERVATION OF EVID-
Testimony of _____ (name)	)	ENCE]
<i>and/or</i> Preserve Evidence].	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____

To: _____ [persons named in petition as expected adverse parties]:

NOTICE IS HEREBY GIVEN that on _____ [date], and _____ [time], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [address], _____ [city], petitioner will, and hereby does, apply to the court for an order authorizing him/her to _____ [specify order sought, e.g., take the deposition of Mary Jones on oral examination for the purpose of perpetuating her testimony], and for all other proper orders, as requested in the attached petition to _____ [perpetuate testimony *and/or* preserve evidence].

Petitioner will apply for this order on the ground that the requested _____ [perpetuation or testimony *and/or* preservation of evidence] may prevent a failure or delay of justice, as more fully appears in the attached petition to _____ [perpetuate testimony *and/or* preserve evidence].

This application will be based on this notice, and on the attached petition to _____ [perpetuate testimony *and/or* preserve evidence] and memorandum in support of motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Petitioner

NOTES.

Authority:

CCP § 2035.040

Notice Requirement:

See 14.07[4] -[6]

Related Form of Petition:

See 14.28

Related Form of Order:

See 14.30



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Chapter 14 Preservation of Evidence

V. FORMS

A. Preserving Evidence Before Commencement of Action

1-14 MB Practice Guide: CA Civil Discovery 14.30

14.30 Order Authorizing Perpetuation of Testimony or Preservation of Evidence Before Commencement of Action.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

PETITION OF _____ [name],	)	
Petitioner,	)	
to _____ [Perpetuate the	)	No. _____
Testimony of _____ (name(s))	)	ORDER AUTHORIZING _____
and/or Preserve Evidence].	)	[specify discovery authorized, e.g., DEPOSITIONS
	)	TO PERPETUATE TESTIMONY]
	)	

The petition of _____ [name, e.g., Plaintiff John Smith] for an order authorizing him/her to _____ [specify order(s) sought, e.g., take the deposition of Mary Jones] came on regularly for hearing on _____ [date]. Petitioner appeared by counsel _____ [name]; _____ [name(s) of each expected adverse parties] appeared by his/her/their counsel, _____ [name(s)] [, respectively]. [_____ (Name of any expected adverse party who was served by publication) appeared by _____ (name), counsel appointed for him/her by this court.]

Proof having been made to the satisfaction of the court that the _____ [perpetuation of the testimony of _____ (name(s)) and/or preservation of evidence] may prevent a failure or delay of justice:

IT IS HEREBY ORDERED:

1. That petitioner is authorized and granted leave to _____ [*specify discovery authorized, e.g., take the deposition of Mary Jones on oral examination concerning the automobile accident in which she was involved with Petitioner John Smith at the intersection of Main and Broadway in Farallon City, California, on the afternoon of July 10, 2005.*]

[2. _____ (*Specify such order as may be just concerning furnishing copies of transcripts or other documents, e.g., That petitioner furnish, at his/her expense, copies of the transcript(s) of deposition(s) to each of the expected adverse parties named above.*)]

[3. *Specify such order as may be just concerning payment of the taxable costs relating to the discovery method authorized that would be allowable to the prevailing party after the trial of an action.*]

[4. *Specify such order as may be just requiring petitioner to pay reasonable fees and expenses to court-appointed attorney representing expected adverse party who was served with the petition and failed to appear.*]

[5. *Specify any other orders made by the court, e.g., protective orders.*]

(Repeat for each additional discovery authorized)].

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 2035.050

Contents of Order:

See 14.08

Related Form of Petition:

See 14.28

Related Form of Notice of Petition:

See 14.29



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Chapter 14 Preservation of Evidence

V. FORMS

B. Preservation of Evidence Pending Appeal

1-14 MB Practice Guide: CA Civil Discovery 14.31

14.31 Notice of Motion and Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff
vs.
_____, [name],
Defendant

)
) NO. _____
) NOTICE OF MOTION AND MOTION FOR OR-
) DER AUTHORIZING _____
) [PERPETUATION OF TESTIMONY *and/or* PRE-
) SERVATION OF EVIDENCE] PENDING APPEAL,
) SUPPORTING DECLARATION OF
) _____ [name], and SUPPORTING
) MEMORANDUM
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [identify party, e.g., Defendant Mary Jones] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon

thereafter as the matter may be heard, in [_____] (Department or Division) _____ of] this court, located at _____ [address], _____ [city], _____ [identify party, e.g., Plaintiff John Smith] will, and hereby does, move the court for an order granting him/her leave to _____ [specify discovery requested, e.g., take the deposition of Mary Jones on oral examination] for the purpose, in the event of further proceedings in this court, of _____ [specify, e.g., perpetuating his testimony] pending the appeal that _____ [has been or may be] taken from the judgment in this action and for all other proper orders. The motion will be made on the ground that the _____ [perpetuation of the requested testimony and/or preservation of the evidence] is proper to avoid a failure or delay or justice.

The motion will be based on this notice of motion, on the declaration(s) of _____ [name(s)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[moving party's status and name]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Plaintiff Jane Smith].

2. On _____ [date], a judgment was rendered in the above-entitled court _____ [specify, e.g., dismissing Plaintiff John Smith's complaint after the court sustained Defendant Mary Jones's demurrer without leave to amend].

3. _____ [An appeal has been taken by _____ (party, e.g., Plaintiff John Smith) from the judgment rendered by this court in the above-entitled action or The time for taking an appeal from the judgment rendered by this court in the above-entitled action has not expired, and it is anticipated that _____ (party, e.g., Plaintiff John Smith) will appeal from the judgment].

[EITHER]

4. _____ [Moving party, e.g., Plaintiff John Smith] wishes to examine _____ [name], whose address is _____ [specify], and expects to elicit from his/her testimony _____ [specify substance of expected testimony].

[AND/OR]

5. _____ [Moving party, e.g., Plaintiff John Smith] wishes to preserve evidence by _____ [specify discovery method requested, e.g., having Mary Jones whose address is 1234 Maple Avenue, Farallon City, California, and who is the defendant and cross complainant, physically examined by a physician specializing in head injuries]. _____ [Moving party, e.g., Plaintiff John Smith] expects to establish from this _____ [specify discovery method requested e.g., examination] the following facts: _____ [specify facts expected to be established].

[6. Repeat preceding paragraph for each witness moving party desires to examine or each piece of evidence moving party desires to preserve].

7. _____ [Moving party, e.g., Plaintiff John Smith] desires to _____ [perpetuate the testimony of _____ (name(s) of witness(es)) and/or preserve the evidence specified] because _____ [set forth facts showing reasons for perpetuation of the testimony or preservation of the evidence establishing that the perpetuation or preservation is proper to avoid a failure or delay of justice].

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

_____ [date]

_____ [signature]

_____ [typed name]

MEMORANDUM IN SUPPORT OF MOTION

[Add memorandum supporting motion.]

NOTES.

Authority:

CCP §§ 2036.030

Availability of Procedure:

See 14.20

Procedure:

See 14.22 -14.24

Related Form of Order:

See 14.32

Related Form of Memorandum:

See California Points and Authorities, Ch. 89, Discovery: Preservation of Evidence, § 89.10 (Matthew Bender)



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Chapter 14 Preservation of Evidence
V. FORMS
B. Preservation of Evidence Pending Appeal

1-14 MB Practice Guide: CA Civil Discovery 14.32

14.32 Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	
vs.	)	NO. _____
_____ [name],	)	ORDER AUTHORIZING _____
Defendant	)	[PERPETUATION OF TESTIMONY <i>or</i> PRESER-
	)	VATION OF EVIDENCE] PENDING APPEAL
	)	

The motion of _____ [moving party, *e.g.*, Plaintiff John Smith] for an order
_____ [specify, *e.g.*, authorizing him/her to take the deposition of Mary Jones on oral examination] for
the purpose of _____ [perpetuating testimony *and/or* preserving evidence] for use in the event of
further proceedings in this court, came on regularly for hearing on _____ [date]. Plaintiff
_____ [name] appeared by counsel _____ [name]; Defendant
_____ [name] appeared by counsel _____ [name].

On proof being made to the satisfaction of the court that the _____ [specify, *e.g.*, perpetuation of the
testimony of Mary Jones] is proper to avoid a failure or delay of justice,

IT IS HEREBY ORDERED that the motion be and hereby is granted and that _____ [moving party,

e.g., Plaintiff John Smith] is authorized to _____ [*specify, e.g.*, take the deposition of Mary Jones on oral examination concerning the circumstances of medical treatment Jane Smith received on August 20, 2005].

[IT IS FURTHER ORDERED that _____ [*specify any further order of the court issued in accordance with the provisions governing the discovery method(s) authorized*]].

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 2036.040

Contents of Order:

See 14.25

Related Form of Motion:

See 14.31



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Chapter 15 Review of Discovery Orders

1-15 MB Practice Guide: CA Civil Discovery 15.syn

§ 15.syn Synopsis to Chapter 15: Review of Discovery Orders

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15.12[8][b] Recoverable Costs.

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15.12[9][c] Oral Argument.

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15.14 Petition for Writ of Prohibition to Restrain Enforcement of Discovery Order.

15.15 Certificate of Interested Entities or Persons (Cal. Judicial Council Form APP-008)



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Chapter 15 Review of Discovery Orders
I. STRATEGY

1-15 MB Practice Guide: CA Civil Discovery 15.01

15.01 Scope.

This chapter covers review of discovery orders by writ of mandate or prohibition, including:

- Objectives and strategies for review of discovery orders by writ [*see 15.02, 15.04*].
- Grounds for writ [*see 15.05*] and standards of review [*see 15.06*].
- Preparation of record and procedure and format of petition [*see 15.03, 15.07-15.11*; Form: *see 15.13*].
- Procedure after petition is filed [*see 15.03, 15.12*], including opposition to petition [*see 15.12[1]*; Form: *see 15.14*].

Core Statutes:

CCP §§ 1084-1087 (writ of mandate), 1102-1105 (writ of prohibition), 1088-1097, 1107-1109
(procedure applicable to both types of writs)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil
ProcedureRemediesWritsCommon Law WritsProhibition



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Chapter 15 Review of Discovery Orders
I. STRATEGY

1-15 MB Practice Guide: CA Civil Discovery 15.02

15.02 Objective and Strategy.

In most instances, discovery orders are reviewable only on appeal from the final judgment. A few exceptions allow review by peremptory writ or by immediate appeal:

- A writ of mandate may be sought to overturn an improper denial of discovery [*Johnson v. Superior Court (2000) 80 CA4th 1050, 1060, 95 CR2d 864*]. To prevail, the petitioner must show an abuse of discretion by the trial court [*Johnson v. Superior Court (2000) 80 CA4th 1050, 1060, 95 CR2d 864*].
- A writ of prohibition may be sought to overturn an improper grant of discovery [*Sav-On Drugs, Inc. v. Superior Court (1975) 15 C3d 1, 5, 123 CR 283, 538 P2d 739*]. To prevail, the petitioner must show that a substantial interest of the petitioner will be impaired by the discovery [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 C3d 161, 171, 84 CR 718, 465 P2d 854*].
- Immediate appeal is available with respect to some discovery orders not related to the merits of the action [see, e.g., *Gregori v. Bank of Am. (1989) 207 CA3d 291, 310, 254 CR 853* (discovery related to motion to disqualify opposing counsel)].
- Sanction orders in excess of \$5,000 may be appealed immediately [CCP § 904.1(a)(11), (12)].
- Sanction orders of \$5,000 or less may be reviewed on appeal from the final judgment or on a petition for an extraordinary writ [CCP § 904.1(b)].



Warning:

If discovery would invade the attorney-client privilege or the privacy rights of a third person, it may be necessary to pursue writ review. This is particularly so if the party may be exposed to liability from those whose rights have been damaged if the party does not undertake all steps to prevent the discovery.

Always request a stay when privacy or privilege issues are involved. If the trial judge does not stay the order, request a stay on the face of the petition.

**Strategic Point:**

Preserving a discovery issue and raising it on appeal provides little protection for the parties, particularly if discovery is being compelled. On the other hand, in attempting to obtain discovery that is denied, it would be difficult to provide an appropriate offer of proof to preserve the issue on appeal.

Nonetheless, bear in mind that writ review of discovery rulings are, for the most part, rare. Balance the time, cost and likelihood of success in pursuing a writ. On balance, the issue or issues should be of extreme importance and pose significant prejudice before proceeding with a writ. It is virtually impossible for writs to be accepted when dealing with issues of relevancy and scope. Generally, only those issues that embrace privacy or privilege will attract the appellate court's attention.

In an unlimited civil case, the court of appeal or the Supreme Court may grant a writ of mandate or prohibition [see *CCP* §§ 1085(a) (mandate), 1103(a) (prohibition); *Cal Rules Ct*, Rule 8.486(a)(1) (petition for writ must generally be filed in court of appeal, not Supreme Court)].

In a limited civil case, the appellate division of the superior court may grant a writ of mandate or prohibition [*CCP* §§ 1085(b) (mandate), 1103(b) (prohibition)].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 200, Discovery, Review of Discovery Orders; Ch. 358, Mandate and Prohibition (Matthew Bender).

California Points and Authorities, Ch. 89A, Discovery: Review of Discovery Orders (Matthew Bender).

DeMeo, California Deposition and Discovery Practice, Ch. 9, Review of Discovery Orders (Matthew Bender).

**Cross Reference:**

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition



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Chapter 15 Review of Discovery Orders
II. SEEKING AND OPPOSING REVIEW OF DISCOVERY ORDERS BY WRIT

1-15 MB Practice Guide: CA Civil Discovery 15.03

15.03 CHECKLIST: Seeking and Opposing Review of Discovery Orders by Writ.

15.03[1] Petitioner's Checklist.

☐ Determine whether writ relief is available:

☐ Is issue of first impression involved?

☐ Is issue of privilege or other protection from disclosure involved?

Discussion:

See 15.04[2]

☐ Determine type of writ to seek:

☐ Mandate to review order denying discovery.

☐ Prohibition to review order granting discovery.

Discussion:

See 15.04[3]

☐ Consider grounds for writ.

Prerequisite:

The petitioner may *not* raise objections that were not raised in the trial court [see 15.07].

Discussion:

See 15.05, 15.06

- ☐ Request a copy of the record, including the relevant discovery order, all relevant documents and exhibits and a transcript of the hearing of the discovery proceeding at issue.

Authority:

Cal Rules Ct, Rule 8.486(b)

Discussion:

See 15.08

- ☐ Prepare the writ petition, supporting memorandum, certificate of interested entities or persons and supporting documents.

Authority:

CCP §§ 1087 (mandate), 1104 (prohibition); Cal Rules Ct, Rules 8.486(a), (b), (c), 8.488

Discussion:

See 15.09

Forms:

See 15.13 (mandate), 15.14 (prohibition), 15.15 (certificate)

- ☐ Serve the petition on the respondent court and the real party in interest.

File the petition within 60 days of the discovery order, along with:

- ☐ Supporting memorandum,
- ☐ Supporting documents, and
- ☐ Proof of service.

Prerequisite:

Service of a petition for an alternative writ must generally be made before the petition is filed, but the court may grant the alternative writ without prior service on a showing of good cause. Petition for peremptory writ in first instance must be served prior to filing.

Authority:

CCP § 1107, Cal Rules Ct, Rule 8.486(a), (b), (c), (e)

Discussion:

See 15.10, 15.11[1], [2], [3], [4]

- ☐ Review any preliminary opposition filed by the respondent or real party in interest.
- ☐ The preliminary opposition must be served and filed within 10 days after the petition is filed.

- ☐ The petitioner may serve and file a reply within 10 days after the preliminary opposition is filed.

Authority:

CCP § 1107; Cal Rules Ct, Rule 8.487(a)(1)-(3)

Discussion:

See 15.12[1]

- ☐ If the appellate court issues an alternative writ, serve the writ on the respondent court and the real party in interest (along with the petition if not already served).

Authority:

CCP § 1107

Discussion:

See 15.11[2]

- ☐ Review any return (answer or demurrer) to alternative writ filed by the respondent court and/or the real party in interest.

The return must be served and filed within 30 days after the court issues the alternative writ or order to show cause, unless the court orders otherwise.

- ☐ Petitioner may serve and file a reply within 15 days after the return is filed, unless the court orders otherwise.

Authority:

CCP § 1089; Cal Rules Ct, Rule 8.487(h)(2), (3)

Discussion:

See 15.12[4]

- ☐ Review any opposition to petition for peremptory writ in first instance.

☐ Respondent or real party in interest must serve and file an opposition within 30 days after court notifies parties that it is considering issuing a peremptory writ in the first instance, unless court orders otherwise.

☐ Petitioner may serve and file a reply within 15 days after opposition is filed, unless court orders otherwise.

Authority:

CCP §§ 1088, 1105, 1107; Cal Rules Ct, Rule 8.487(h)(2), (3)

Discussion:

See 15.12[6]

- ☐ Prepare for hearing on petition (for peremptory writ).

Authority:

CCP §§ 1088, 1094

Discussion:

See 15.12[5], [6]

- ☐ If appellate court issues a peremptory writ, serve writ on respondent court and real party in interest.

Authority:

CCP § 1089

Discussion:

See 15.12[7]

- ☐ If petitioner is awarded costs, file and serve memorandum of costs.

The memorandum of costs must be filed and served no later than 40 days after the clerk sends notice of the remittitur.

Authority:

Cal Rules Ct, Rules 8.278(c)(1), 8.493(b)

Discussion:

See 15.12[8]

- ☐ If appellate court gives notice that it is considering imposing sanctions, file and serve an opposition.

The opposition must be filed and served within 10 days after the court sends the notice.

Authority:

Cal Rules Ct, Rule 8.492

Discussion:

See 15.12[9]

15.03[2] Opposing Party's Checklist

- ☐ If served with petition for alternative writ or petition for peremptory writ, prepare, file and serve preliminary opposition containing:

- ☐ Certificate of Interested Entities or Persons
- ☐ Supporting memorandum;
- ☐ Statement of material facts not included in petition; and

☐ Proof of service of memorandum and statement.

Must be served and filed 10 days after filing of petition.

Authority:

CCP § 1107; Cal Rules Ct, Rules 8.487(a), 8.488

Discussion:

See 15.12[1]

Forms:

See 15.15 (certificate of interested entities or persons)

☐ If served with alternative writ or order to show cause issued by court, prepare, file and serve;

☐ Verified answer to petition; or

☐ Demurrer to petition accompanied by supporting memorandum and certificate of interested entities or persons; and/or

☐ Proof of service.

Unless court sets different date, answer or demurrer must be filed and served within 30 days after the court issues the alternative writ or order to show cause.

Authority:

Cal Rules Ct, Rule 8.487(h)(1), (2), 8.488(b)

Discussion:

See 15.12[1], [2], [4]

If court notifies parties that it is considering issuing a peremptory writ in the first instance, prepare, file, and serve an opposition within 30 days.

Authority:

Cal Rules Ct, Rule 8.487(h)(1), (2)

Discussion:

See 15.12[6]

☐ Prepare for hearing on petition or order to show cause.

Discussion:

See 15.12[5], [6]

☐ If petition is denied, file and serve memorandum of costs.

Memorandum of costs must be filed and served no later than 40 days after clerk sends notice of the remittitur.

Authority:

Cal Rules Ct, Rules 8.278(c)(1), 8.493(b)

Discussion:

See 15.12[8]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral Overview



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Chapter 15 Review of Discovery Orders

II. SEEKING AND OPPOSING REVIEW OF DISCOVERY ORDERS BY WRIT

1-15 MB Practice Guide: CA Civil Discovery 15.04

15.04 Options and Strategies for Petitioner.

15.04[1] Review of Discovery Orders by Appeal Is Limited. Discovery orders generally are not separately appealable but only reviewable on appeal from the final judgment in the action [*Southern Pac. Co. v. Oppenheimer* (1960) 54 C2d 784, 786, 8 CR 657, 356 P2d 441]. However, the merits of a discovery order may not be subject to thorough review because appellate courts are reluctant to overturn a judgment after a full trial based on a procedural error, unless a miscarriage of justice results [*Wooldridge v. Mounts* (1962) 199 CA2d 620, 18 CR 806]. Moreover, as a practical matter, after a final judgment is rendered, it will be difficult to reverse the harm caused by an erroneous discovery order.

Exceptions:

The following types of orders are appealable:

- A discovery order unrelated to the merits of the case [see, e.g., *Gregori v. Bank of Am.* (1989) 207 CA3d 291, 310, 254 CR 853 (discovery related to motion to disqualify opposing counsel)].
- Sanctions orders in excess of \$5,000 [CCP § 904.1(a)(11), (12)].
- A postjudgment discovery order that raises issues different from those arising from an appeal of the judgment and affects the judgment or relates to its enforcement [see CCP §§ 904.1(a)(2), 904.2(b); *Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 651-656, 25 CR2d 109, 863 P2d 179].

Example:

An order denying attorney's fees under CCP § 2033.420 (sanction for unwarranted failure to admit discovery request) is appealable because it raises issues different from those arising from the judgment, and the order affects the judgment or relates to its enforcement because it determines the parties' rights and liabilities arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment [*Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 651-656, 25 CR2d 109, 863 P2d 179 (decided under former CCP § 2033)].

15.04[2] Discovery Orders Are Reviewable by Writ.

15.04[2][a] Writ Is Not Issued As Matter of Course. A writ of mandate or prohibition is a proper remedy to review a discovery order, but is not favored. An aggrieved party must usually wait to seek review of a discovery order on appeal from the final judgment [see *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 C3d 1, 5, 123 CR 283, 538 P2d 739 (writ of prohibition issued as to one interrogatory when compelling answer would violate privilege, but denied as to others where issue was relevance); *Johnson v. Superior Court* (2000) 80 CA4th 1050, 1060, 95 CR2d 864 (writ of mandate issued to overturn denial of motion to compel; novel issue involved)].

Writ review of discovery orders is limited to situations in which [*Johnson v. Superior Court* (2000) 80 CA4th 1050, 1061, 95 CR2d 864]:

- The issues presented are of first impression and of general importance to the trial courts and the legal profession [see 15.04[2][b]];
- An order compelling discovery violates a privilege [see 15.04[2][c]]; or
- The order denying discovery prevents a party from having a fair opportunity to litigate his or her case [see 15.05[1]].

**Strategic Point--Petitioner:**

Writs are rarely granted unless they relate to a privilege or third party privacy issue. To enhance the potential for a petition to succeed, the fact that it involves an issue of privilege or privacy should jump out from the very beginning of the petition.

15.04[2][b] Issue of First Impression. A writ may be issued to review a question of first impression that is of general importance to the trial courts and to the legal profession, and when general guidelines can be provided for future cases [*Vinson v. Superior Court* (1987) 43 C3d 833, 838, 239 CR 292, 740 P2d 404 ; *Fuller v. Superior Court* (2001) 87 CA4th 299, 304, 104 CR2d 525].

Examples:

Writ review was appropriate to consider the following issues of first impression:

- Whether web site publishers may be compelled to disclose the source of alleged trade secrets appearing on their web sites [*O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1439, 44 CR3d 72] .
- Whether the demanding party or the responding party should pay the cost of recovering usable information from the responding party's computer backup tapes in order to respond to a request for production of documents [*Toshiba America Electronics Components v. Superior Court* (2004) 124 CA4th 762, 765, 21 CR3d 532] .
- Whether a defendant in related criminal and civil actions may obtain a stay of discovery in the civil action until the criminal action is resolved [*Fuller v. Superior Court* (2001) 87 CA4th 299, 304-306, 104 CR2d 525 (not clearly identifying issue of first impression; stay until statute of limitations runs on criminal action, discussing procedures to protect parties' and court's interests); *Avant! Corp. v. Superior Court* (2000) 79 CA4th 876, 881, 94 CR2d 505 (no stay for corporate party)].
- Whether a trial court has the power to grant a witness use and derivative use immunity to facilitate

discovery by a party [*Daly v. Superior Court* (1977) 19 C3d 132, 140, 137 CR 14, 560 P2d 1193 (allowed, under certain conditions)].

- Whether a third-party recipient of confidential information from a physician may assert the physician-patient privilege [*Rudnick v. Superior Court* (1974) 11 C3d 924, 928, 114 CR 603, 523 P2d 643 (may do so only if disclosure to third party was reasonably necessary to accomplish purpose for which patient consulted physician)].

15.04[2][c] Violation of Privilege. A writ may be issued if the discovery order allegedly violates a party's privilege or other protection against disclosure (e.g., the constitutional right to privacy), because appellate review is meaningless after privileged information is disclosed [see *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 CA4th 347, 355-356, 99 CR2d 627 (violation of privacy); *National Football League Props., Inc. v. Superior Court* (1998) 65 CA4th 100, 107, 75 CR2d 893, *aff'd on other grounds, sub nom. Oakland Raiders v. National Football League*, 93 CA4th 572 (2001) (violation of privilege)].

Example:

An order compelling disclosure of an allegedly privileged videotape [see *Hiott v. Superior Court* (1993) 16 CA4th 712, 716, 20 CR2d 157], or an order compelling discovery of a confidential customer list [see *Hofmann Corp. v. Superior Court* (1985) 172 CA3d 357, 362-363 n2, 218 CR 355] may be reviewed by writ.



Warning:

Violation of a privilege is the one case in which writ review should always be considered, for two reasons. First, failure to seek writ review arguably constitutes a waiver. Second, the attorney may have a duty to the client to take all reasonable steps to preserve the privilege at issue in the face of an erroneous ruling.



Cross References:

See 15.05[2][b], [c].

Discussion, see Ch. 2, Scope of Discovery.

15.04[3] The Petitioner Must Determine The Appropriate Type of Writ. Mandate is the appropriate remedy for an improper denial of a discovery motion [see *CCP § 1085* (mandate to compel trial court to act); *Burke v. Superior Court* (1969) 71 C2d 276, 277-278 n1, 78 CR 481, 455 P2d 409]. Prohibition is the remedy for an improper grant of a discovery motion [see *CCP § 1102* (prohibition to restrain trial court from acting); *Bailey v. Superior Court* (1977) 19 C3d 970, 978, 140 CR 669, 568 P2d 394].

Examples--Writ of Mandate:

A writ of mandate is the proper remedy to review a trial court's order:

- Denying the petitioner's motion to compel further responses [see *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1396-1397, 115 CR2d 137].

- Denying the petitioner's motion to stay discovery pending the disposition of a related criminal case against the petitioner [see *Fuller v. Superior Court* (2001) 87 CA4th 299, 304-306, 104 CR2d 525 ; *Avant! Corp. v. Superior Court* (2000) 79 CA4th 876, 881, 94 CR2d 505].

- Denying the petitioner's motion to quash a subpoena duces tecum requiring the petitioner to produce

allegedly privileged documents [see *White v. Superior Court* (2002) 102 CA4th Supp 1, 3-4, 126 CR2d 207].

- Denying the petitioner's motion to compel a nonparty to comply with a deposition subpoena and request for production of documents [see *Johnson v. Superior Court* (2000) 80 CA4th 1050, 1060, 95 CR2d 864].

Examples--Writ of Prohibition:

A writ of prohibition is the proper remedy to review a trial court's order:

- Compelling the petitioner to answer interrogatories that seek disclosure of tax return information [see *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 C3d 1, 7, 123 CR 283, 538 P2d 739].

- Compelling production and inspection of psychotherapist records concerning the petitioner when the petitioner's mental condition is not at issue, and the psychotherapist-patient privilege applies [see *Roberts v. Superior Court* (1973) 9 C3d 330, 336-337, 107 CR 309, 508 P2d 309].

- Compelling production of documents in violation of the petitioner's constitutional right of privacy [see *El Dorado Savings & Loan Ass'n v. Superior Court* (1987) 190 CA3d 342, 344-345, 235 CR 303].

15.04[4] The Petitioner May Plead in the Alternative As to the Type of Writ. When counsel is in doubt as to the type of writ to seek, it is proper to pray in the alternative for a writ of prohibition or mandate. If the allegations and requests for relief in the petition are broad enough to encompass the appropriate remedy, the appellate court may grant that remedy [see *Powell v. Superior Court* (1957) 48 C2d 704, 705, 312 P2d 698 (petitioner mistakenly sought prohibition, but appellate court was able to grant mandate because petition warranted mandate)].

Courts will sometimes use mandate to prohibit actions of trial courts [*Morris Stulsaft Foundation v. Superior Court of San Francisco* (1966) 245 CA2d 409, 415, 54 CR 12]. This use has the effect of changing the test for a writ of prohibition from excess of jurisdiction to abuse of discretion. Therefore, a discovery order may be prohibited not only when it is wholly invalid but also when it constitutes an abuse of discretion [see *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 CA3d 579, 113 CR 561, 569].



Cross Reference:

See 15.09[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition



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Chapter 15 Review of Discovery Orders

II. SEEKING AND OPPOSING REVIEW OF DISCOVERY ORDERS BY WRIT

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15.05 Grounds for Writ.

15.05[1] Improper Denial of Discovery.

15.05[1][a] Abuse of Discretion Standard Applies, but Right to Discovery Is Upheld If Possible. Review of discovery orders is governed by the abuse of discretion standard [*Johnson v. Superior Court (2000) 80 CA4th 1050, 1061, 95 CR2d 864*].

The trial court's determination will be set aside only when it has been demonstrated that there was no legal justification for the order granting or denying the discovery in question [*Johnson v. Superior Court (2000) 80 CA4th 1050, 1061, 95 CR2d 864*].

However, appellate courts reviewing orders granting or denying discovery should not use the argument that the trial court is allowed to exercise its discretion to defeat the liberal policies of the discovery statute and deny discovery [*Emerson Elec. Co. v. Superior Court (1997) 16 C4th 1101, 1107, 68 CR2d 883, 946 P2d 841* ; *Forthmann v. Boyer (2002) 97 CA4th 977, 987, 118 CR2d 715*].

Examples:

Reviewing courts have construed the discovery statutes broadly, to uphold the right to discovery whenever possible. For example:

- A trial court erred in denying discovery on the basis that the requesting party already has extensive other evidence of the same fact. A party is entitled to discover any nonprivileged information, whether or not this information is cumulative [see *TBG Ins. Servs. Corp. v. Superior Court (2002) 96 CA4th 443, 448, 117 CR2d 155*].

- A trial court abused its discretion by denying a motion to compel further responses from a corporate defendant, when petitioners had sought to depose defendant's employees having the most knowledge concerning issues in the case and had requested production of supporting documentation, and the defendant had responded by designating as deponents employees who were not knowledgeable about the

facts in issue and who provided little documentation. The trial court's action was an abuse of discretion because, under former *CCP* § 2025(d)(6) (now *CCP* § 2025.230), the defendant had the burden of producing the right witnesses and of providing them with knowledge of the information sought. Defendant's loss of personnel due to its filing for bankruptcy did not excuse its failure to comply with the statute. The trial court should have ordered the defendant to bring its witnesses back to the depositions with the documents requested and with proof that the witnesses had undertaken some effort to familiarize themselves with the facts in issue [see *Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1395-1397, 115 CR2d 137].



Strategic Point--Petitioner:

In showing abuse of discretion, argue that the trial court, instead of denying the requested discovery outright, should have determined whether some alternative or qualified form of discovery might be provided. In numerous cases, appellate courts have found a trial court's blanket denial of discovery, without considering alternatives, to be an abuse of discretion.

Example:

When a trial court denied plaintiff's motion to compel further responses to interrogatories because plaintiff failed to satisfy the former *CCP* § 2030(l) (now *CCP* § 2030.300(b)) requirement of a reasonable and good faith attempt at informal resolution, the appellate court, although agreeing that plaintiff's attempt was inadequate, held that the trial court erred in summarily denying the motion to compel. The trial court should have considered whether it would have been appropriate to require specific additional efforts before turning to the merits of the discovery dispute or to assess monetary sanctions. The appellate court directed the trial court to vacate its order and to set a hearing on whether outright denial of the requested discovery, or some lesser sanction would be appropriate [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 428-434, 79 CR2d 62].



Cross Reference:

Discussion, see Ch. 2, Scope of Discovery.

15.05[1][b] Writ May Issue to Allow Discovery Denied on Ground Information Sought Would Not Be Admissible Evidence. A writ of mandate may be sought to compel discovery that was denied on the basis that the information sought to be discovered would be inadmissible at trial because the proper standard is whether the information is reasonably calculated to lead to the discovery of admissible evidence, even if the information, itself, is not admissible [see *CCP* § 2017.010]. Discovery may not be denied merely because the information sought is inadmissible hearsay or constitutes an inadmissible opinion or conclusion [*Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 392, 15 CR 90, 364 P2d 266].

Examples:

- A defendant was entitled to discover the terms of a settlement agreement between the plaintiff and its insurer, even though the agreement was inadmissible, because discovery of the agreement's terms could reasonably lead to discovery of admissible evidence, e.g., the extent of the plaintiff's injury, the plaintiff's motive in bringing the action, or the bias or credibility of witnesses [*Norton v. Superior Court* (1994) 24 CA4th 1750, 1761-1762, 30 CR2d 217].
- A party may also discover the opposing party's contentions relating to issues of fact or law in the case, because they are relevant to the subject matter and may reasonably lead to the discovery of

admissible evidence, even though they are not, themselves, admissible [*West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 416-417, 15 CR 119, 364 P2d 295 (contentions may be discovered through interrogatories or requests for admission, but not through oral deposition)].

15.05[1][c] Writ May Issue to Allow Discovery Denied on Ground Evidence Is Irrelevant. A writ of mandate may be sought to compel discovery that was denied on the basis that the information sought is irrelevant. Before discovery may be denied on the basis of relevance, the trial court must make specific findings as to why the information sought is not relevant to the subject matter *and* is not calculated to lead to the discovery of admissible evidence [see CCP § 2017.010; *Lipton v. Superior Court* (1996) 48 CA4th 1599, 1615-1619, 56 CR2d 341].

Relevance to the subject matter is determined by *potential* as well as actual issues in the case [*Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 CA3d 1, 10, 145 CR 316]. Information is relevant to the subject matter if it might reasonably assist in evaluating the case, preparing for trial, or facilitating settlement [*Stewart v. Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1013, 105 CR2d 115]. In ruling on a discovery motion, the trial court cannot determine whether the information will, in fact, be relevant and admissible at trial. It can only attempt to foresee whether it is *possible* that the information *could* be relevant or admissible at trial [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1397, 115 CR2d 137].



Cross Reference:

Writs on relevancy, see 15.05[2][e].

15.05[1][d] Writ May Issue to Allow Discovery Erroneously Denied on Ground Material Is Privileged. A writ of mandate may be sought to compel discovery that was denied on the basis that the information sought is privileged. A claim of privilege must be authorized by statute [see *Evid Code* § 911]. When the party seeking discovery describes the information sought with specificity and states good cause for its production, the party claiming the information is privileged has the burden of establishing that the information is protected by a statutory privilege [*Department of Motor Vehicles v. Superior Court* (2002) 100 CA4th 363, 370, 122 CR2d 504 ; see 15.05[2][b]].

A writ of mandate may be sought to compel discovery of alleged privileged material when the holder of the privilege has waived it.

Examples:

A privilege is waived if:

- The holder voluntarily discloses a significant part of the communication or consents to such a disclosure by another person [*Evid Code* §§ 912(a), 954 (lawyer-client), 980 (husband-wife), 994 (physician-patient), 1014 (psychotherapist-patient), 1033-1034 (clergy member-penitent), 1035.8 (sexual assault counselor-victim); see *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 C4th 201, 214, 91 CR2d 716, 990 P2d 591 (work product protection)].
- The holder fails to claim it in its initial response to the discovery request [*Evid Code* § 912(a); *Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 273-274, 69 CR2d 112].
- The plaintiff in a civil action waives the protection of the privilege against self-incrimination as to factual issues in the action [*Fremont Indem. Co. v. Superior Court* (1982) 137 CA3d 554, 560, 187 CR 137 ; see *Hartbrodt v. Burke* (1996) 42 CA4th 168, 174-175, 49 CR2d 562 (plaintiff not entitled to refuse on self-incrimination grounds to produce tape recording of conversation between plaintiff and defendant)].

Courts may find an implied waiver of privilege when the party claiming the privilege has placed the privileged communication in issue. "Fundamental fairness" may require that discovery be allowed for the litigation to proceed [see *Mitchell v. Superior Court* (1984) 37 C3d 591, 603-604, 208 CR 886, 691 P2d 642].

15.05[2] Improper Grant of Discovery.

15.05[2][a] Test Is Impairment of Substantial Interests If Discovery Is Allowed. To be entitled to a writ, the petitioner must show that its substantial interests will be impaired if the requested discovery is allowed [*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C3d 161, 171, 84 CR 718, 465 P2d 854 ; *Forthmann v. Boyer* (2002) 97 CA4th 977, 987, 118 CR2d 715]. Usually, this means that the petitioner must show a violation of privilege or of the right of privacy under *Cal Const*, art I, § 1 [see *Roberts v. Superior Court* (1973) 9 C3d 330, 336, 107 CR 309, 508 P2d 309].

Distinguish:

Appellate courts pay particular deference to trial court orders granting discovery. A petitioner has a heavier burden when seeking review of an order granting discovery than when seeking review of an order denying discovery [see *Forthmann v. Boyer* (2002) 97 CA4th 977, 987, 118 CR2d 715 ("liberal policies of discovery rules will generally counsel against overturning a trial court's decision *granting* discovery and militate in favor of overturning a decision to *deny* discovery")].

Exception:

The general rule that an appellate court should rarely interfere with an order granting discovery is not applicable in cases where *CCP* § 2033.010 *et seq.* requests for admissions have been deemed admitted because requests for admissions are more analogous to summary adjudication procedures than to normal discovery [*Hansen v. Superior Court* (1983) 149 CA3d 823, 827, 197 CR 175 (decided under former *CCP* § 2033)].



Cross Reference:

Discussion, see Ch. 2, Scope of Discovery.

15.05[2][b] Writ May Issue to Prevent Disclosure of Privileged Matter Sought. A writ is particularly needed if the discovery order violates a privilege of the petitioner, because the petitioner must either disclose the privileged information or be subject to a contempt charge for refusing to obey the order.

Examples:

A writ of prohibition may be sought to compel the trial court to vacate an order compelling the petitioner to disclose:

- Documents protected by the attorney-client privilege and/or the attorney's work product doctrine [see *National Football League Props., Inc. v. Superior Court* (1998) 65 CA4th 100, 106-108, 75 CR2d 893 , *aff'd on other grounds, sub nom. Oakland Raiders v. National Football League*, 93 CA4th 572 (2001)] .

- Tax returns [see *Schnabel v. Superior Court* (1993) 5 C4th 704, 721, 21 CR2d 200, 854 P2d 1117 (but only subject to a "qualified" privilege)] or other privileged financial records [see *Thomas B. v. Superior Court* (1985) 175 CA3d 255, 260, 220 CR 577].

- Confidential customer lists [see *Hofmann Corp. v. Superior Court* (1985) 172 CA3d 357, 362-363 n2, 218 CR 355].

- Information protected by the psychotherapist-patient privilege [see *Davis v. Superior Court* (1992) 7 CA4th 1008, 1012-1013, 9 CR2d 331].

- Police investigative files [*see Evid Code § 1040(b)*] (information acquired in confidence by public employees is privileged if its disclosure would be against public interest); *County of Orange v. Superior Court (Wu)* (2000) 79 CA4th 759, 765, 94 CR2d 261 (evidence gathered as part of ongoing criminal investigation is privileged if need for confidentiality outweighs benefits of disclosure)].

- Trade secrets [*see Evid Code § 1060*; *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 CA4th 1384, 1390, 9 CR2d 709 (court may compel disclosure only if necessary to prevent fraud or injustice)].

- Bank suspicious activity reports [*see 12 CFR § 21.11(k)*; *Union Bank of Cal. v. Superior Court* (2005) 130 CA4th 378, 391, 388, (suspicious activity reports and information that would disclose whether a suspicious activity report has been prepared or filed with federal government are protected from disclosure)].

Strategic Point:



If a statutory privilege applies, the information is absolutely protected from disclosure (unless the privilege has been waived). The trial court may not balance the privilege against the need for the information [*see Rittenhouse v. Superior Court* (1991) 235 CA3d 1584, 1590, 1 CR2d 595].

Strategic Point--Waiver of Privilege:



Even if the petitioner has waived a privilege [*see 15.05[1][d]*], the information sought may still be protected under the petitioner's constitutional right to privacy. For example, although a patient's disclosure of the existence of a psychotherapist-patient relationship or the purpose of the psychiatric treatment may waive the psychotherapist-patient privilege, it does not waive the patient's constitutional right to privacy regarding psychiatric records [*San Diego Trolley, Inc. v. Superior Court* (2001) 87 CA4th 1083, 1092, 105 CR2d 476].

15.05[2][c] Writ May Issue to Prevent Violation of Privacy Rights If Privacy Right Is Stronger Than Public Interest in Just Results in Litigation. A trial court abuses its discretion to resolve discovery disputes if it fails to balance the claimed constitutional privacy interest against the public interest in obtaining just results in litigation [*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 CA4th 347, 357-358, 99 CR2d 627 ; *Davis v. Superior Court* (1992) 7 CA4th 1008, 1016, 9 CR2d 331 (if personal injury plaintiff does not claim mental or emotional distress, plaintiff's right to privacy in postinjury psychotherapeutic records outweighs any need for discovery of these records)].

To allow discovery when constitutional privacy rights are involved, the information sought must be directly relevant to an issue in the action; the prospect that the inquiry might lead to admissible evidence is not sufficient [*Ombudsman Services of Northern California v. Superior Court* (2007) 154 CA4th 1233, 1250-1251, 65 CR3d 456 ; *Harris v. Superior Court* (1992) 3 CA4th 661, 665, 4 CR2d 564]. The party seeking discovery must show a compelling need for the information and that the information cannot reasonably be obtained from nonconfidential sources or through less intrusive means [*see Harding Lawson Assocs. v. Superior Court* (1992) 10 CA4th 7, 10, 12 CR2d 538].

If the need for the information is relatively slight, and the potential damage resulting from further disclosure is great, discovery should be denied [*see Planned Parenthood Golden Gate v. Superior Court* (2000) 83 CA4th 347, 358-359, 99 CR2d 627].

The more sensitive the information (e.g., medical records, personnel records, personal financial information, customer lists, or trade secrets), the greater the need that must be shown for discovery [*see Heda v. Superior Court* (1990) 225

CA3d 525, 527, 275 CR 136 ; *Hofmann Corp. v. Superior Court* (1985) 172 CA3d 357, 362, 218 CR 355].

Any order compelling discovery should be narrowly drawn to minimize the invasion of privacy [see *Britt v. Superior Court* (1978) 20 C3d 844, 858-864, 143 CR 695, 574 P2d 766 (order requiring unlimited disclosure of lifetime medical histories was overbroad); *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 CA3d 342, 346, 235 CR 303 (order for production of nonparty's entire personnel file was overbroad)]. On request, the court should consider appropriate protective orders [*Schnabel v. Superior Court* (1993) 5 C4th 704, 714, 21 CR2d 200, 854 P2d 1117].

A party to the action may assert a nonparty's privacy rights [*Wood v. Superior Court* (1985) 166 CA3d 1138, 1143, 212 CR 811].

15.05[2][d] Writ May Issue to Prevent Discovery by Method Not Authorized by Statute. The only permissible discovery methods are those provided by the Discovery Act. The courts do not have inherent authority to authorize other methods of discovery. [*Holm v. Superior Court* (1986) 187 CA3d 1241, 1247, 232 CR 432 (writ of mandate issued directing trial court to vacate order authorizing exhumation of corpse because procedure not authorized by statute)].

15.05[2][e] Writ Will Generally Not Issue to Prevent Discovery on Relevancy Grounds. A court will generally not issue a writ if the objection to the grant of discovery is that the information sought is not relevant.

Exception:

A writ may issue on relevancy grounds if the petitioner shows that the information sought cannot, as a reasonable possibility, lead to the discovery of admissible evidence or be helpful in preparing for trial [*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C3d 161, 170 n11, 173, 84 CR 718, 465 P2d 854 ; see 15.05[1][c]].



Cross Reference:

Discussion on relevance, see 15.05[1][c].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of Discretion



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15.06 Standard of Review and Trial Court Discretion.

15.06[1] Abuse of Discretion Standard Applies. Discovery orders applying the law to the facts are reviewed under the deferential abuse of discretion standard [*Department of Motor Vehicles v. Superior Court* (2002) 100 CA4th 363, 369, 122 CR2d 504 (denying petition)]. Under this standard, a trial court's determination will be set aside only when it is shown that there was no legal justification for the order granting or denying discovery [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1397, 115 CR2d 137 (granting petition to overturn denial of motion to compel)]. However, when a trial court denies a discovery motion on the ground of relevance based on an analysis of the substantive law governing the case, the appeal may raise a pure question of law [*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 CA4th 952, 971, 83 CR3d 190] .

As long as the trial court's decision is a reasonable exercise of its discretion, the appellate court cannot substitute its own discretion merely because it disagrees with the trial court's decision [*Avant! Corp. v. Superior Court* (2000) 79 CA4th 876, 881-882, 94 CR2d 505 (denying petition)].

The appellate court reviews the trial court's factual determinations in discovery matters under the substantial evidence rule. Thus, the court should defer to the trial court's factual determinations if the evidence is in conflict, whether the trial court's ruling is based on oral testimony or declarations [*Hiott v. Superior Court* (1993) 16 CA4th 712, 716-717, 20 CR2d 157 (denying petition)].

Thus, appellate review may be a two step process. First, was the court's determination of facts supported by substantial evidence, and, if so, in light of those facts were the court's orders an abuse of discretion [see *Obregon v. Superior Court* (1998) 67 CA4th 424, 432, 79 CR2d 62 (denying writ as to determination regarding attempt at informal resolution, but granting as to denial of motion to compel and remanding for determination of appropriate remedy for insufficient efforts at resolution)].

Judge's Perspective:

In most circumstances, writ review of discovery orders involve the "*abuse of discretion*" standard. In that regard, counsel generally explain to the reviewing court why the trial judge abused his or her discretion. However, counsel need to be mindful of the fact that in many instances the trial judge does read the writ and strident and harsh language aimed at the trial judge may not be the most wise course to follow.

Remember, most discovery writs are summarily denied. Hence, be courteous and charitable in your comments regarding the trial judge.

15.06[2] Guidelines for Exercise of Discretion. Management of discovery generally lies within the trial court's discretion [*Maldonado v. Superior Court* (2002) 94 CA4th 1390, 1396, 115 CR2d 137]. The Supreme Court in *Greyhound Corp. v. Superior Court of Merced County* (1961) 56 C2d 355, 380-385, 15 CR 90, 364 P2d 266 , established guidelines for the exercise of this discretion. It stated that the trial court should:

- Construe disputed facts liberally in favor of discovery.
- Reject objections, such as hearsay, that apply only at trial.
- Permit "fishing expeditions" unless the particular discovery method is improper (e.g., if it insufficiently identifies the nature of the requested information, attempts to impose solely on the other party the cost of furnishing information that is equally available to both parties, or places a greater burden on the adversary than is warranted by the probable value of the information.)
- Approve only those portions of the request that appear to be of sufficient importance to override the considerations of burden on the other party.
- Require the requesting party to pay the costs if a disclosure request imposes an undue burden on the other party.
- Avoid extending limitations on discovery, such as privileges, beyond the limitations set forth in the statutes.
- Impose only partial limitations, whenever possible, instead of denying discovery entirely.
- Articulate for the record the reasoning behind each decision to enable an appellate court to determine whether there was an abuse of discretion.

The Supreme Court has noted that its conclusions in *Greyhound*, a case decided before the Discovery Act, apply to the provisions of that Act, which retain the expansive scope of discovery [*Emerson Elec. Co. v. Superior Court* (1997) 16 C4th 1101, 1108, 68 CR2d 883, 946 P2d 841].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral Overview



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15.07 New Objections May Not Be Made.

The petitioner may not make objections to the discovery order in the writ proceeding that were not made in the trial court [*West Pico Furniture Co. v. Superior Court* (1961) 56 C2d 407, 413-414, 15 CR 119, 364 P2d 295].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil
ProcedureRemediesWritsCommon Law WritsProhibition



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15.08 Furnishing Trial Court Record.

15.08[1] What Must Be Furnished. The petitioner must furnish a sufficient record of the proceedings in the trial court to enable the appellate court to evaluate the trial court's exercise of discretion. The record must include [*see Cal Rules Ct, Rule 8.486(c)(1), (3); Lemelle v. Superior Court (1978) 77 CA3d 148, 156-157, 143 CR 450 ; Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 CA3d 462, 474, 140 CR 215*]:

- The trial court's discovery order;
- Copies of all documents and exhibits submitted in the trial court supporting and opposing the petitioner's position;
- Copies of any other documents or portions of documents submitted in the trial court that are necessary for a complete understanding of the case and the trial court's discovery order; and
- A transcript of the hearing or, if a transcript is unavailable, a declaration by counsel, or the petitioner if the petitioner is unrepresented, explaining why a transcript is unavailable and fairly summarizing the proceedings, or a declaration by counsel stating that the transcript has been ordered and the date it is expected to be filed.

If there are exigent circumstances, the petition may be filed without a copy of the record. In such a case, a declaration by counsel, or the petitioner if the petitioner is unrepresented, must accompany the petition, and explain the urgency and circumstances why the documents are unavailable, and fairly summarize their substance [*Cal Rules Ct, Rule 8.486(b)(2)*]. If more than one appeal is taken from the same judgment or related order, only one appellate record need be prepared, which must be filed within the time allowed for filing the record in the latest appeal [*Cal Rules Ct, Rule 8.408*].



Strategic Point:

In practice, counsel often does not have a copy of the transcript at the time the writ petition is filed. For

omitted documents, such as a transcript or other documents which cannot be obtained at that time, the petition should provide an explanation, for example, that the transcript is unavailable but has been ordered and will be delivered to the court when received.

► **Cross Reference:**

Discussion of the procedure for submitting supporting documents, see 15.09[8].

15.08[2] Consequences of Failure to Furnish Record. The appellate court may summarily deny the petition if the petitioner does not submit the required record and explanation, or does not present sufficient facts to excuse the failure to submit them [*Cal Rules Ct, Rule 8.486(b)(4)*]; see *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 462, 32 CR3d 209 (declining to address privilege claims because petitioners did not furnish the court with copies of the disputed documents)].

15.08[3] Filing Record Under Seal. *Cal Rules Ct, Rule 8.46* applies if a party seeks to lodge or file a record under seal or to unseal a record [*Cal Rules Ct, Rule 8.486(d)*].

► **Cross Reference:**

Discussion of the procedures for filing documents under seal and for bringing a motion to unseal documents, see *California Forms of Pleading and Practice, Ch. 44, Appeal: Preparing and Filing the Record*, § 44.100 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAppealsRecords on Appeal



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15.09 Preparing Petition.

15.09[1] Describing Type of Petition.

15.09[1][a] Alternative or Peremptory Writ. The petition may seek [*see CCP § 1087* (mandate), *1104* (prohibition)]:

- An alternative writ or order to show cause;
- A peremptory writ; or
- Both.

If the petition is made to the appellate court without notice to the respondent trial court or to the real party in interest and the petition is granted, an alternative writ or order to show cause must issue [*CCP § 1088*]. If petition is made on due notice and the writ is allowed, a peremptory writ may issue in the first instance [*CCP § 1088*].

Courts will rarely issue peremptory writs "in the first instance." The general procedure is to file a petition for an alternative writ and, if the alternative writ is granted, a hearing is held on the merits of the petition and, if the petition is granted, a peremptory writ is issued [*see Palma v. U.S. Indus. Fasteners, Inc. (1984) 36 C3d 171, 178-180, 203 CR 626, 681 P2d 893*].

A court should issue a peremptory in the first instance without oral argument under *CCP § 1088* only when the petition and opposing papers on file adequately address the issues raised by the petition, no factual dispute exists and the petitioners entitlement to relief is so obvious that no purpose could reasonably be served by further consideration of the issue [*Lewis v. Superior Court (1999) 19 C4th 1232, 1236-1237, 1240-1241, 82 CR2d 85, 970 P2d 872*].



Strategic Point:

Ask for both an alternative writ and a peremptory writ in the petition because the court may issue a

peremptory writ more quickly and without the need for oral argument.

➡ **Cross Reference:**

Strategies for petitioner, see 15.04[4].

15.09[1][b] Mandate. If mandate is sought, the alternative writ must command the trial court, immediately after receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the appellate court, at a time and place then or thereafter specified by court order why it has not done so [CCP § 1087]. The peremptory writ must be in a similar form, but omitting the words requiring the trial court to show cause why it has not done as commanded [CCP § 1087].

➡ **Cross Reference:**

Form for petition, see 15.13.

15.09[1][c] Prohibition. If prohibition is sought, the alternative writ must command the trial court to desist or refrain from further proceedings in the action or matter specified in the writ, until the further order of the appellate court, and to show cause before that court, at a time and place then or thereafter specified by the court, why the trial court should not be absolutely restrained from any further proceedings in the action or matter [CCP § 1104]. The peremptory writ must be in a similar form, but omitting the words requiring the trial court to show cause why it should not be absolutely restrained [CCP § 1104].

To obtain a writ of prohibition, the petitioner must establish that the trial court's order exceeds its jurisdiction [CCP § 1102].

➡ **Cross Reference:**

Form for petition, see 15.14.

15.09[2] Real Party in Interest. The petition must disclose the name of the real party in interest (which is the other party in the action) [Cal Rules Ct, Rule 8.486(a)(2)].

15.09[3] Pending Appeal. If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition must include the notation, "Related Appeal Pending," and the first paragraph must state the title, the superior court docket number, and the appellate court docket number (if any) of the pending appeal [Cal Rules Ct, Rule 8.486(a)(3)(A)].

15.09[4] No Plain, Speedy, and Adequate Remedy. The petition must allege that there is no plain, speedy, and adequate remedy in the ordinary course of law [CCP §§ 1086 (mandate), 1103(a) (prohibition)].

This requirement would be satisfied by alleging that the trial court's discovery order is not separately appealable, but may only be appealed from the final judgment in the action, which is an inadequate remedy if [*Johnson v. Superior Court* (2000) 80 CA4th 1050, 1061, 95 CR2d 864]:

- The order denying discovery prevents a party from having a fair opportunity to litigate his or her case [see 15.05[1]]; or
- An order compelling discovery violates a privilege [see 15.04[1][c]].

15.09[5] Verification. The petition for the writ must be verified [CCP §§ 1086 (mandate), 1103(a) (prohibition); Cal Rules Ct, Rule 8.486(a)(4)].

15.09[6] Cover of Petition. The cover of the petition must be red and must state [*Cal Rules Ct, Rules 8.204(b)(10), 8.40(b), 8.485(a)*]:

- The title of the petition;
- The title, trial court number, and Court of Appeal number of the case;
- The names of the trial court and each participating trial judge;
- The name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief; and
- The name of the party that each attorney on the brief represents.

15.09[7] Supporting Memorandum. The petition must be accompanied by a supporting memorandum [*Cal Rules Ct, Rule 8.486(a)(5)*].

The petition and memorandum, if produced on a computer, must not exceed 14,000 words, including footnotes (approximately 25 pages). The brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief. If produced on a typewriter, the petition and memorandum must not exceed 50 pages [*Cal Rules Ct, Rules 8.204(c)(1), (2), 8.486(a)(6)*].

Cross References:

Forms for memorandum supporting petition for writ of mandate, see *California Points and Authorities, Ch. 89A, Discovery: Review of Discovery Orders, §§ 89A.20 -89A.25* (Matthew Bender).

Forms for memorandum supporting petition for writ of prohibition, see *California Points and Authorities, Ch. 89A, Discovery: Review of Discovery Orders, §§ 89A.30 -89A.35* (Matthew Bender).

15.09[8] Format of Supporting Documents. The documents submitted in support of the petition must [*Cal Rules Ct, Rule 8.486(c)(1)*]:

- Be bound together at the end of the petition or in separate volumes not to exceed 300 pages each, with consecutive pagination throughout;
- Be index-tabbed by number or letter; and
- Begin with a table of contents, listing each document by title and its index-tab number or letter, and for documents with attachments, giving the title and a brief description of each attachment.

If a petition and supporting documents are not in compliance with these requirements, the clerk must nonetheless accept the papers for filing. However, the court may give the petitioner notice requiring the petitioner to bring the petition and documents into compliance within a stated reasonable time of not less than five days, or the petition may be stricken or summarily denied [*Cal Rules Ct, Rule 8.486(c)(2)*].

Only one set of supporting documents is required to be filed, although the court may require additional sets when necessary [*Cal Rules Ct, Rule 8.486(c)(3)*].

Cross Reference:

Discussion of supporting documents, see 15.08[1].

15.09[9] Certificate of Interested Entities or Persons.

15.09[9][a] Requirement of Certificate. A certificate of interested entities or persons must be included in the petition, after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the undisclosed party may file an application for permission to file its certificate under seal separately from the petition [*Cal Rules Ct, Rule 8.488(c)*].

California Judicial Council Form APP-008 is an official form for this certificate. Use of this form is optional [*see Cal Rules of Ct, Rules 1.35, 8.208, 8.488*], but recommended.



Trap:

If an application for permission to file a certificate under seal is filed, the party filing the application should specifically request that the application for permission to file the certificate under seal also be sealed. Otherwise, the application could become part of the public record, which would defeat the purpose of filing the certificate under seal.



Cross Reference:

Form for certificate (Cal. Judicial Council Form APP-008), see 15.15.

15.09[9][b] Failure to File Certificate. If the petitioner fails to file a certificate, the clerk must notify the petitioner by mail that it must file the certificate within 10 days after the clerk's notice is mailed and that if the party fails to comply, the court may strike the petition [*Cal Rules Ct, Rule 8.488(d)*].

15.09[9][c] Contents of Certificate. If the petitioner is an entity, its certificate must list any other entity or person that the petitioner knows has an ownership interest of 10 percent or more in the petitioner [*Cal Rules Ct, Rule 8.208(e)(1)*]. If the petitioner knows of any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the petitioner reasonably believes the justices should consider in determining whether to disqualify themselves, the petitioner's certificate must list that entity or person and identify the nature of the interest of the person or entity [*Cal Rules Ct, Rule 8.208(e)(2)*].

For purposes of determining whether a person or entity must be listed in the certificate, a mutual or common investment fund's ownership of securities or bonds issued by an entity does not constitute a financial interest in that entity [*Cal Rules Ct, Rule 8.208(e)(2)(A)*]. An interest in the outcome of the proceeding does not arise solely because the entity or person is in the same industry, field of business, or regulatory category as the petitioner even if the case might establish a precedent that would affect that industry, field of business, or regulatory category [*Cal Rules Ct, Rule 8.208(e)(2)(B)*]. A party's insurer does not have a financial interest in the outcome of the proceeding solely on the basis of its status as insurer for that party [*Cal Rules Ct, Rule 8.208(e)(2)(C)*].

If the petitioner knows of no entity or person that must be listed, the petitioner must so state in the certificate [*Cal Rules Ct, Rule 8.208(e)(3)*].

15.09[9][d] Supplemental Information. If the petitioner learns of changed or additional information that must be disclosed in the certificate, it must promptly serve and file a supplemental certificate in the reviewing court [*Cal Rules Ct, Rule 8.208(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Common Law Writs Mandamus Civil Procedure Remedies Writs Common Law
Writs Prohibition



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15.10 Time for Filing the Petition.

There is no general statutory time limit for filing a writ petition in a discovery matter. The cases have held that writ petitions must usually be filed within 60 days of the challenged order, but the appellate court has discretion to hear a writ petition beyond the 60-day period [*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 (granting writ of mandate; finding petition to relate to order made 14 days before petition, but also stating that the petition would be heard even if it related to order made over 60 days earlier)].



Strategic Point:

If you determine that writ review should be pursued, do so promptly, particularly if the discovery order compels disclosure of privileged material.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Common Law Writs Mandamus Civil Procedure Remedies Writs Common Law Writs Prohibition



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15.11 Serving the Petition.

15.11[1] Petition for Alternative Writ. Before filing the petition, the petitioner generally must serve a copy of the petition on the respondent trial court and on the real party in interest in accordance with *CCP* §§ 1010-1020 [see *CCP* § 1107].

On a showing of good cause, the appellate court may grant the alternative writ ex parte without prior notice or service of the petition [*CCP* § 1107].



Strategic Point:

In practice, the court of appeal can grant a form of relief that is the equivalent of ex parte relief by staying the proceedings in the trial court. Thus, there is no need to take the risk of seeking relief ex parte when service of the petition by mail will get you the same thing. In practice, writs are acted on quickly. Seeking relief ex parte just gives the court of appeal a good reason to deny the writ for failure to give notice to the opposing party.

15.11[2] Petition for Peremptory Writ. The petitioner must serve a copy of the petition on the respondent trial court and on the real party in interest in accordance with *CCP* §§ 1010-1020 [see *CCP* § 1107]. If an alternative writ has been issued, a copy of the writ must be served with the petition [see *CCP* § 1088].

15.11[3] Supporting Documents. Both the petition and one set of supporting documents must be served on the real party in interest and on the respondent, unless the respondent is the superior court or a judge of that court, in which case only the petition need be served on the respondent [*Cal Rules Ct, Rule 8.486(e)(1), (2)*].

15.11[4] Proof of Service. The petition must be accompanied by proof of service of copies of the petition and supporting memorandum on the respondent and the real party in interest [*CCP* § 1107]. The proof of service must give the telephone number of each attorney served and name each party represented by each attorney [*Cal Rules Ct, Rules 8.25, 8.486(e)(3)*].

15.11[5] Defective Proof of Service. The clerk must file the petition even if its proof of service is defective, but if

the petitioner fails to file a corrected proof of service within five days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction [*Cal Rules Ct, Rule 8.486(e)(5)*]. The court may allow the petition to be filed without proof of service [*Cal Rules Ct, Rule 8.486(e)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Common Law Writs Mandamus Civil Procedure Remedies Writs Common Law Writs Prohibition



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Matthew Bender (R) Practice Guide: California Civil Discovery
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Chapter 15 Review of Discovery Orders

II. SEEKING AND OPPOSING REVIEW OF DISCOVERY ORDERS BY WRIT

1-15 MB Practice Guide: CA Civil Discovery 15.12

15.12 Proceedings After the Petition Is Filed and Served.

15.12[1] Preliminary Opposition and Reply. Within 10 days after the petition is filed, the respondent or real party in interest, separately or jointly, may serve and file a preliminary opposition, which should contain a memorandum opposing the motion and a statement of any material fact not included in the petition [*CCP* § 1107; *Cal Rules Ct*, Rule 8.487(a)].

The preliminary opposition also should include a certificate of interested entities or persons, after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the undisclosed party may file an application for permission to file its certificate under seal separately from the preliminary opposition [*Cal Rules Ct*, Rule 8.488(c)]. If the respondent or the real party in interest fails to file a certificate, the clerk must notify the respondent or the real party by mail that it must file the certificate within 10 days after the clerk's notice is mailed and that if the party fails to comply, the court may strike the preliminary opposition for failure to comply [*Cal Rules Ct*, Rule 8.488(a)(1)].



Trap:

When filing an application to file a document to under seal, take care to insure that no confidential information is disclosed in the application. If the application for permission to file a certificate under seal (or other document under seal) cannot be prepared without revealing the information counsel seeks to keep confidential, the party filing the application should specifically request, at the time the application is filed, that the application for permission to file the certificate under seal also be sealed, and include a sealing order with the application. By doing so, the application will not become part of the public record, and the protected information will remain confidential.



Cross Reference:

Certificate content requirements, see 15.09[9][c].



Timing:

Note that *CCP* § 1107 provides that the preliminary opposition must be filed and served "within five

days after service and filing of the application." Because the date of *service* and the date of *filing* are not necessarily the same, the 2005 amendment to former Rule 56(g) (now see Rule 8.487(a)) attempted to clarify the filing deadline by providing that the preliminary opposition must be served and filed within ten days after the petition is *filed* [see *Cal Rules Ct, Rule 8.487(a)*, Adv. Comm. Comment].

Without requesting opposition or waiting for a reply, the court may grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance [*Cal Rules Ct, Rule 8.487(a)(4)*].

Within 10 days after a preliminary opposition is filed, the petitioner may serve and file a reply [*Cal Rules Ct, Rule 8.487(a)(3)*].

The respondent and the real party in interest are entitled to submit an answer or a demurrer to the petition before a peremptory writ is issued [see 15.12[4]], whether or not they submit opposition to the granting of an alternative writ.



Strategic Point:

When a petition for a peremptory writ is filed in an appellate court, it is the real party in interest, not the respondent court that opposes the petition. Indeed, it is inappropriate for the court to advocate the merits of the ruling on appeal [see *Ng v. Superior Court* (1997) 52 CA4th 1010, 1019-1020, 61 CR2d 49 (noting exceptions allowing advocacy in unusual circumstances)].

Because writs are so rarely granted, the real party in interest rarely files an opposition within the initial 10-day period, but waits to see if the court issues a *Palma* notice.

15.12[2] Date for Hearing on Order to Show Cause Will Be Set When Alternative Writ Is Granted. If the appellate court grants the petition for an alternative writ, the court orders issuance of the writ which commands the respondent either to do the act required to be performed or show cause why it has not done so [*CCP § 1087; Lewis v. Superior Court* (1999) 19 C4th 1232, 1240, 82 CR2d 85, 970 P2d 872]. The court also sets a date for the hearing on the order to show cause, at which time the petition will be considered on its merits after oral argument if the parties so desire [*Lewis v. Superior Court* (1999) 19 C4th 1232, 1240, 82 CR2d 85, 970 P2d 872].

15.12[3] Denial of Alternative Writ Does Not Preclude Seeking a Peremptory Writ. An appellate court's summary denial of an alternative writ is not res judicata, and the petitioner still may seek a peremptory writ [see *Kowis v. Howard* (1992) 3 C4th 888, 899, 12 CR2d 728, 838 P2d 250].

15.12[4] Return by Demurrer or Answer If Alternative Writ Is Granted. If the appellate court issues an alternative writ or order to show cause, the respondent and/or the real party in interest, separately or jointly, may file and serve a return, by demurrer and/or verified answer [*CCP § 1089; Cal Rules Ct, Rule 8.487(h)(1)*]. A respondent or real party in interest who did not file a preliminary opposition must include in its return a certificate of interested entities or persons. If the identity of any party has not been publicly disclosed in the proceedings, the undisclosed party may file an application for permission to file its certificate under seal separately from the return [*Cal Rules Ct, Rule 8.488(c)*].



Trap:

If an application for permission to file a certificate under seal is filed, the party filing the application should specifically request that the application for permission to file the certificate under seal also be sealed. Otherwise, the application could become part of the public record, which would defeat the purpose of filing the certificate under seal.

**Cross Reference:**

Certificate of interested entities or persons, see 15.09[9]; Preliminary opposition, see 15.12[1]

The return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance, unless the court orders otherwise [*Cal Rules Ct, Rule 8.487(h)(2)*]. The petitioner may serve and file a reply within 15 days after the return or opposition is filed, unless the court orders otherwise [*Cal Rules Ct, Rule 8.487(h)(3)*].

The grounds for a demurrer to an alternative writ are that the petition fails to state a claim upon which relief may be granted [*StorMedia v. Superior Court* (1999) 20 C4th 449, 455 n7, 84 CR2d 843, 976 P2d 214].

If the return is made by demurrer only, the appellate court may allow an answer to be filed within such time as it may designate [CCP § 1089]. If the return is made by demurrer only and the appellate court overrules the demurrer, it may issue a peremptory writ without granting leave to answer [*Cal Rules Ct, Rule 8.487(h)(4)*].

**Strategic Point:**

The party responding to the order to show cause should file an answer with a demurrer to avoid the possibility that a demurrer filed alone will be overruled without leave to file an answer.

15.12[5] Hearing on the Merits Is Held After Alternative Writ Issues. When an appellate court issues an alternative writ or order to show cause, the parties are given an opportunity for oral argument [*Lewis v. Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85, 970 P2d 872]. The hearing may be held at any time within the discretion of the court [CCP § 1108].

An appellate court may not hold a factual hearing on the petition [*Mooney v. Pickett* (1971) 4 C3d 669, 683, 94 CR 279, 483 P2d 1231]. If there are any factual issues raised by the answer, the appellate court must refer the question to a trial court for determination or possibly to a referee [*Mash v. Superior Court* (1923) 192 C 258, 259, 219 P 742 (reference to trial court); see CCP § 639 (grounds for court appointment of referee)].

15.12[6] Court Allowed to Grant Petition for Peremptory Writ in the First Instance Without Oral Argument. Before the court grants a peremptory writ in the first instance, either the petitioner or the court must give the other parties notice [CCP § 1088; *Palma v. U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, 681 P2d 893]. After the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or real party in interest has 30 days to serve and file an opposition, unless the court orders otherwise [*Cal Rules Ct, Rule 8.487(h)(1), (2)*]. The written opposition may be considered the "hearing" required by CCP § 1088, and the court may issue the writ without affording the parties an opportunity for oral argument [*Lewis v. Superior Court* (1999) 19 C4th 1232, 1236-1237, 1260-1261, 82 CR2d 85, 970 P2d 872 (interpreting former Rule 56(b))].

15.12[7] If Peremptory Writ Issues, Petitioner Serves Copy on Respondent. The petitioner must serve a conformed copy of the peremptory writ on the respondent (usually the trial court) in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the appellate court [CCP § 1096]. The petitioner should also serve a copy on the real party in interest.

15.12[8] Award of Costs.

15.12[8][a] Prevailing Party Is Entitled to Costs. Unless otherwise ordered by the court, the prevailing party in an original writ proceeding is entitled to costs if the appellate court resolves the proceeding by written opinion after issuing an alternative writ, order to show cause, or peremptory writ in the first instance [*Cal Rules Ct, Rule 8.493(a)(1)(A)*].

In the interests of justice, the appellate court may award or deny costs as it deems proper [*Cal Rules Ct, Rule 8.493(a)(1)(B)*]. It must specify the award or denial of costs in the opinion or order resolving the proceeding [*Cal Rules Ct, Rule 8.493(a)(2)*].

15.12[8][b] Recoverable Costs. Recoverable costs are those costs specified in *Cal Rules Ct, Rule 8.278(d)*, governing civil appeals, and can include the cost of preparing and providing the record [*Cal Rules Ct, Rule 8.493(b)*].



Cross Reference:

Discussion of recoverable costs, see California Forms of Pleading and Practice, Ch. 53, Appeal: Remittitur and Costs on Appeal (Matthew Bender).

15.12[8][c] Procedure for Claiming Costs. A party that claims costs awarded by the appellate court must serve and file in the trial court a verified memorandum of costs under *Cal Rules Ct, Rule 3.1700*, within 40 days after the clerk sends notice of the remittitur [*Cal Rules Ct, Rule 8.278(c)(1)*].

The opposing party may move to strike or tax costs in accordance with *Cal Rules Ct, Rule 3.1700* [*Cal Rules Ct, Rule 8.278(c)(2)*].

After the costs have been taxed, or after the expiration of the time for taxing costs, the costs award may be enforced in the same manner as a money judgment [*Cal Rules Ct, Rule 8.278(c)(3)*].

15.12[9] Sanctions.

15.12[9][a] Court May Impose Sanctions. On motion of a party or its own motion, the appellate court may impose sanctions, including the award or denial of costs, on a party or an attorney for [*Cal Rules Ct, Rule 8.492(a)*]:

- Filing a frivolous petition or filing a petition solely to cause delay; or
- Committing any other unreasonable violation of the Rules of Court.

15.12[9][b] Notice and Opposition. The court must give notice in writing if it is considering imposing sanctions. Within 10 days after the court sends such a notice, a party or attorney may serve and file an opposition, but failure to do so is not deemed consent. An opposition may not be filed unless the court sends such a notice [*Cal Rules Ct, Rule 8.492(b), (c)*].

15.12[9][c] Oral Argument. Unless otherwise ordered, oral argument on the issue of sanctions will be combined with any oral argument on the merits of the petition [*Cal Rules Ct, Rule 8.492(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Writs Common Law Writs Mandamus Civil Procedure Remedies Writs Common Law Writs Prohibition



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III. FORMS

1-15 MB Practice Guide: CA Civil Discovery 15.13

15.13 Petition for Writ of Mandate to Compel Issuance of Discovery Order.

Petition for Writ of Mandate to Compel Issuance of Discovery Order.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [name],	)	
Petitioner,	)	
vs.	)	[CIVIL] NO. _____
THE SUPERIOR COURT OF THE STATE OF	)	PETITION FOR WRIT
CALIFORNIA, COUNTY OF _____	)	OF MANDATE
_____	)	[Related Appeal Pending]
Respondent,	)	
_____ [name],	)	
Real Party in Interest.	)	

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF
THE _____ [number] APPELLATE DISTRICT, DIVISION _____ [number] OF THE
STATE OF CALIFORNIA:

Petitioner alleges:

[1. *If related appeal is pending, allege:* A related appeal is pending in the case entitled _____ [title of case], No. _____ in the Superior Court of _____ County and No. _____]

_____ in the _____ [*specify appellate court and appellate court docket number, if any*].

2. The petitioner is the _____ [*plaintiff or defendant*] in the action entitled _____ [*name*], Plaintiff vs. _____ [*name*], Defendant, Civil Action No. _____, now pending before the respondent court.

3. The respondent is the Superior Court of the State of California, County of _____, in which the above-entitled action is pending.

4. The real party in interest is _____ [*name*] and has an interest that is directly affected by this proceeding in that he/she/it is the _____ [*plaintiff/defendant*] in the above-entitled action.

[*INCLUDE statement that privilege or privacy is involved, if appropriate*]

5. Petitioner seeks review of an order that, if allowed to stand, will violate the _____ [*specify privilege, e.g., attorney-client*] privilege or privacy rights of persons who are not parties to this action)].

[*AND/OR INCLUDE statement that issue of first impression is involved, if appropriate*]

6. The issues presented in this petition are questions of first impression that are of general importance to the trial courts and to the legal profession, and general guidelines may be provided for future cases by resolving the questions in that _____ [*specify what issues will be resolved by the court's decision*].

[*CONTINUE*]

7. _____ [*Allege statutory authority for discovery procedure sought by petitioner, e.g., Section 2030.020(b) of the Code of Civil Procedure provides that a plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, or appearance by, that party, whichever occurs first. Section 2030.210(a) of the Code of Civil Procedure provides that the interrogatories must be responded to separately and fully in writing under oath by an answer, an exercise of the party's option to produce writings, or an objection. Section 2030.260(a) of the Code of Civil Procedure requires the responding party to serve its responses within 30 days after service of the interrogatories*].

8. _____ [*Allege facts of discovery proceeding sought by petitioner, e.g., On _____ [date], the real party in interest was duly and properly served with a summons and complaint in the action described in Paragraph 2 of this petition. On _____ [specify date more than 10 days after service of summons], the petitioner duly and properly served written interrogatories relevant to the subject matter of the action on the real party in interest. A copy of these interrogatories is attached to this petition as Exhibit A and incorporated by reference*].

9. _____ [*Allege facts showing that real party in interest refused to comply with discovery request and lacked reasons to do so, e.g., More than 30 days have elapsed since the service of the written interrogatories on the real party in interest. The real party in interest did not obtain any order extending his/her/its time to answer these interrogatories. The real party in interest failed to serve responses to these interrogatories, although the information sought by them is relevant to the subject matter of the action and is not privileged matter. The real party in interest offered no sufficient reasons for failing to comply with the petitioner's request for answers to the written*

interrogatories].

10. _____ [*Allege facts showing respondent court's actions constituted an abuse of discretion, e.g., Section 2030.290(b), (c) of the Code of Civil Procedure provides in part that when a responding party has failed to serve a timely response to interrogatories, the propounding party may bring a motion to compel a response and a motion for monetary sanctions. On _____ [date], the petitioner, on motion duly made and noticed, moved the respondent for such an order. On _____ [date], the respondent abused its discretion by denying petitioner's motion to compel responses and for sanctions in its entirety despite the failure of real party in interest to make any response whatsoever to petitioner's interrogatories.*]

11. The petitioner is entitled to an order of the respondent court _____ [*allege type of order, e.g., requiring the real party in interest to serve a response to petitioner's interrogatories*] because _____ [*specify reasons, e.g., such an order is expressly prescribed by statute as alleged in Paragraph 7 of this petition*].

12. The petitioner is a person beneficially interested in the issuance of a writ of mandate by virtue of the fact that the petitioner is the plaintiff/defendant in the action described in Paragraph 2 of this petition and _____ [*allege any other interest, e.g., is entitled to responses to its interrogatories as provided in Sections 2030.210(a) and 2030.260(a) of the Code of Civil Procedure*].

13. The petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, because the order denying discovery is not appealable and mandate is an appropriate remedy to attack the improper denial of discovery. _____ [*allege further reasons, e.g., If real party in interest is not required to answer petitioner's interrogatories, petitioner will have to proceed to trial of the action without information that is in the exclusive knowledge of the real party in interest and essential to the proper prosecution of the action*].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding the respondent to _____ [*describe duty to be performed, e.g., issue an order requiring real party in interest to serve a response to petitioner's interrogatories*] or show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That, on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding the respondent to _____ [*describe duty to be performed, e.g., issue an order requiring real party in interest to serve a response to petitioner's interrogatories*];

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge [, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true].

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

Dated: _____

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP §§ 1084-1085, 1086-1087; Cal Rules Ct, Rule 8.486

Contents:

See 15.09

**Timing:**

See 15.10

Service:

See 15.11

Related Forms for Memoranda:

See California Points and Authorities, Ch. 89A, Discovery: Review of Discovery Orders, §§ 89A.20-89A.25 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus



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1-15 MB Practice Guide: CA Civil Discovery 15.14

15.14 Petition for Writ of Prohibition to Restrain Enforcement of Discovery Order.

Petition for Writ of Prohibition to Restrain Enforcement of Discovery Order.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [name],	)	
Petitioner,	)	
vs.	)	[CIVIL] NO. _____
THE SUPERIOR COURT OF THE STATE OF	)	PETITION FOR WRIT
CALIFORNIA, COUNTY OF	)	OF PROHIBITION
_____,	)	[Related Appeal Pending]
Respondent,	)	
_____ [name],	)	
Real Party in Interest.	)	

Petitioner alleges:

[1. *If related appeal is pending, allege:* A related appeal is pending in the case entitled _____ [title of case], No. _____ in the Superior Court of _____ County and No. _____ in the _____ [specify appellate court and appellate court docket number, if any].

2. Petitioner is the _____ [Plaintiff or Defendant] in the action entitled _____ [name], Plaintiff vs. _____ [name], Defendant, Civil Action No. _____, now pending before

the respondent court.

3. Respondent is the Superior Court of the State of California, County of _____, in which the above-entitled action is pending.

4. Real party in interest is _____ [name] and has an interest that is directly affected by this proceeding in that he/she/it is the _____ [Plaintiff or Defendant] in the above-entitled action.

[INCLUDE statement that privilege or privacy is involved, if appropriate]

5. Petitioner seeks review of an order that, if allowed to stand, will violate the _____ [_____] (specify privilege, e.g., attorney-client) privilege or privacy rights of _____ (the petitioner or persons who are not parties to this action)].

[AND/OR INCLUDE statement that issue of first impression is involved, if appropriate]

6. The issues presented in this petition are questions of first impression that are of general importance to the trial courts and to the legal profession, and general guidelines may be provided for future cases by resolving the questions in that _____ [specify what issues will be resolved by the court's decision].

[CONTINUE]

7. On _____ [date], the _____ [petitioner or real party in interest] filed the action described in Paragraph 2 of this petition. A copy of the complaint is attached to this petition as Exhibit A and made a part hereof. The complaint seeks _____ [specify, e.g., to recover damages for personal injuries suffered when the car belonging to the real party in interest struck the car in which the petitioner was riding].

8. On _____ [date], _____ [describe discovery proceeding leading to objection to respondent's order, e.g., the real party in interest served the petitioner with written interrogatories, a copy of which is attached to this petition as Exhibit B and made a part hereof. Interrogatories No. 25-30 inquired whether the petitioner had been treated for any previous illness or undergone institutional confinements during his lifetime and requested a description of the injuries he claims to have suffered in the collision with the real party's vehicle. On February 28, 2005, the petitioner served the real party in interest with written answers under oath to the written interrogatories in which the petitioner answered Interrogatories No. 25-30 by indicating he had been hospitalized for a prior automobile accident and for an overdose of pills. The petitioner further stated that he had received psychiatric treatment from a psychotherapist for a few months].

9. _____ [Allege further facts of discovery proceeding, if necessary, e.g., On receipt of the petitioner's answers, the real party in interest subpoenaed all of the petitioner's medical records in the custody of the various doctors who had treated him, including those of the petitioner's psychotherapist. The psychotherapist refused to surrender her records unless ordered to do so by the court, on the ground that they were privileged].

10. _____ [Describe judicial action taken by respondent on real party's motion, e.g., On March 17, 2005, the respondent, on motion made and noticed by the real party in interest, made and signed an order requiring production of the psychotherapist's records. A copy of the order is attached to this petition as Exhibit C and made a part hereof].

11. _____ [Allege that respondent's action granting discovery exceeded its jurisdiction, e.g., The respondent's action requiring production of the records of the petitioner's psychotherapist exceeded its jurisdiction in that it was a violation of the psychotherapist-patient privilege, as raised by the petitioner in his papers opposing the motion of the real party in interest. A copy of the petitioner's papers is attached to this petition as Exhibit D and made a part hereof. No specific mental condition of the petitioner is at issue in the action and, consequently, bringing the action did not deprive him of the privilege. In addition, the petitioner did not waive the privilege by disclosing that he had received psychiatric treatment, because he did not disclose more than was necessary to avoid application of the patient-litigant exception set forth in *Section 1016 of the Evidence Code*].

[12. If ground for petition is lack of relevancy of information sought, allege that the answers sought by the line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial; allege any other facts, if applicable, showing burden or other injustice by complying with discovery.]

13. _____ [If real party in interest has taken steps to obtain sanctions, allege the steps taken and the sanctions sought, e.g., On April 3, 2005, the real party in interest served the petitioner with a notice of motion, notifying the petitioner that on April 21, 2005, the real party in interest will move the respondent for an order striking the petitioner's complaint in the action described in Paragraph 2 of this petition, for the petitioner's failure to obey the respondent's order requiring production of the records of the petitioner's psychotherapist and ordering the petitioner to pay to the real party in interest all reasonable expenses, including reasonable attorney's fees, incurred by the real party in obtaining the order. A copy of the notice of motion is attached to this petition as Exhibit E and made a part hereof].

14. The petitioner is a person beneficially interested in the issuance of a writ of prohibition because the petitioner is the _____ [plaintiff/defendant] in the action described in Paragraph 2 of this petition and _____ [specify, e.g., production of the records described above would violate the confidentiality of the relationship between the petitioner and his psychotherapist and violate the petitioner's right of privacy].

15. The petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, because the order granting discovery is not appealable and prohibition is an appropriate remedy to attack the improper grant of discovery. _____ [Allege further reasons, e.g., If this court does not grant the relief requested herein, petitioner's right of privacy will be irretrievably invaded].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of prohibition ordering the respondent to refrain from _____ [specify, e.g., further proceeding on real party in interest's April 13, 2005, motion for terminating sanctions, and to show cause before this court at a time specified by court order why it should not be ordered to reverse its March 17, 2005, order granting real party in interest's motion to compel production of the records of petitioner's psychotherapist];

2. That, on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of prohibition absolutely restraining the respondent from _____ [specify, e.g., requiring the production of the records of petitioner's psychotherapist];

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Petitioner

VERIFICATION

I, _____ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge [, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true].

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

Dated: _____

_____ [signature]

_____ [typed name]

NOTES.

Authority:

CCP §§ 1102-1104; Cal Rules Ct, Rule 8.486

Contents:

See 15.09



Timing:

See 15.10

Service:

See 15.11

Related Forms for Memoranda:

See California Points and Authorities, Ch. 89A, Discovery: Review of Discovery Orders, §§ 89A.30-89A.35 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsProhibition



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15.15 Certificate of Interested Entities or Persons (Cal. Judicial Council Form APP-008)

Certificate of Interested Entities or Persons (Cal. Judicial Council Form APP-008)

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

California Judicial Council Form APP-008, pictured above, has been approved for optional use [*see Cal Rules of Ct, Rules 1.35, 8.208, 8.486*]

Contents:

See 15.09[9]

Related Form for Petition:

See 15.13, 15.14



Cross Reference:

For a fillable version of this form in electronic format, see *LexisNexis™ Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition



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Chapter CT Discovery Act Correlation Tables (July 1, 2005)

1-CT MB Practice Guide: CA Civil Discovery CT.syn

§ CT.syn Synopsis to Chapter CT: Discovery Act Correlation Tables (July 1, 2005)

CT.01 Former Civil Discovery Act of 1986 to Civil Discovery Act (July 1, 2005)

CT.02 Civil Discovery Act (July 1, 2005) to Former Civil Discovery Act of 1986



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Chapter CT Discovery Act Correlation Tables (July 1, 2005)

1-CT MB Practice Guide: CA Civil Discovery CT.01

CT.01 Former Civil Discovery Act of 1986 to Civil Discovery Act (July 1, 2005)

[All references are to the California Code of Civil Procedure]

Former Provision	New Provision
2016(a)	2016.010
2016(b)	2016.020
2016(c)	2016.070
2017(a)	2017.010
2017(b)	2017.210
2017(c), 1st P	2017.020(a)
2017(c), 2d P	2017.020(b)
2017(d), 1st P	2017.220(a)
2017(d), 2d P	2017.220(b)
2017(e)(1), 1st snt.	2017.730(a)
2017(e)(1), 2d snt.	2017.730(b)
2017(e)(2)	2017.730(c)
2017(e)(3), 1st & 2d snt.	2017.730(d)
2017(e)(3), 3d snt.	2017.730(e)
2017(e)(4)	2017.720(a)
2017(e)(5), 1st-4th snt.	2017.740(a)
2017(e)(5), 5th-7th snt.	2017.740(b)
2017(e)(6)	2017.710
2017(e)(7)	2017.720(b)
2017(e)(8)	2017.720(c)

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2018(a)	2018.020
2018(b)	2018.030(b)
2018(c)	2018.030(a)
2018(d), 1st & 2d snt.	2018.040
2018(d), 3d snt.	2018.050
2018(d), 4th snt.	2018.060
2018(e), 1st snt.	2018.070(a)-(b)
2018(e), 2d snt.	2018.070(c)
2018(f), 1st P	2018.080
2018(f), 2d P	2018.010
2019(a)	2019.010
2019(b), intro. clause	2019.030(a), intro. clause
2019(b)(1)	2019.030(a)(1)
2019(b)(2)	2019.030(a)(2)
2019(b), next-to-last P	2019.030(b)
2019(b), last P	2019.030(c)
2019(c), 1st snt.	2019.020(a)
2019(c), 2d snt.	2019.020(b)
2019(d)	2019.210
2019(e)	2016.050
2020(a), 1st snt.	2020.010(a)
2020(a), 2d snt.	2020.010(b)
2020(a), 3d snt. (including items (1)-(3))	2020.020
2020(a), last P	2020.030
2020(b), 1st snt.	2020.210(a)
2020(b), 2d snt.	2020.210(b)
2020(c)	2020.310
2020(d)(1), 1st snt.	2020.410(a)-(b)
2020(d)(1), 2d-4th snt.	2020.410(c)
2020(d)(2)	2020.410(d)
2020(d)(3)	2020.420
2020(d)(4), 1st snt.	2020.430(a), (e)
2020(d)(4), 2d snt.	2020.430(b)
2020(d)(4), 3d & 4th snt.	2020.430(c)
2020(d)(4), 5th & 6th snt.	2020.430(d)
2020(d)(5)	2020.440
2020(d)(6)	2020.430(f)
2020(e), 1st snt.	2020.510(a)

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2020(e), 2d snt.	2020.510(b)
2020(e), 2d P	2020.510(c)
2020(f), 1st snt.	2020.220(a)
2020(f), 2d snt.	2020.220(b)
2020(f), 2d P	2020.230(a)
2020(f), 3d P	2020.230(b)
2020(g)	2020.220(c)
2020(h)	2020.240
2021	2016.030
2023(a)(1)-(8) & (9), 1st snt.	2023.010
2023(a)(9), 2d snt.	2023.020
2023(b), intro. clause	2023.030, intro. clause
2023(b)(1)	2023.030(a)
2023(b)(2)	2023.030(b)
2023(b)(3)	2023.030(c)
2023(b)(4)	2023.030(d)
2023(b)(5)	2023.030(e)
2023(c)	2023.040
2024(a), 1st snt.	2024.020(a)
2024(a), 2d snt.	Not continued (redundant). See 2016.060.
2024(a), 3d snt.	2024.010
2024(a), 4th snt.	2024.020(b)
2024(b)	2024.040(a)
2024(c)	2024.040(b)
2024(d)	2024.030
2024(e), 1st P	2024.050(a)
2024(e), 2d P (including items (1)-(4))	2024.050(b)
2024(e), last P	2024.050(c)
2024(f)	2024.060
2024(g)	2016.060
2025(a)	2025.010
2025(b)	2025.210
2025(c), 1st snt.	2025.220(a), intro. clause
2025(c), 2d snt.	2025.220(b)
2025(c), 3d & 4th snt.	2025.240(a)
2025(c), 2d P	2025.240(b)
2025(d), intro. clause	2025.220(a), intro. clause
2025(d)(1)	2025.220(a)(1)

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2025(d)(2)	2025.220(a)(2)
2025(d)(3)	2025.220(a)(3)
2025(d)(4)	2025.220(a)(4)
2025(d)(5)	2025.220(a)(5)
2025(d)(6), 1st P	2025.220(a)(6)
2025(d)(6), 2d P, 1st snt.	2025.230
2025(d)(6), 2d P, 2d snt.	Not continued (redundant). See 2020.310(e), 2020.510(a)(1).
2025(d)(6), 3d P	2025.240(c)
2025(e)(1)	2025.250(a)
2025(e)(2), 1st snt.	2025.250(b)
2025(e)(2), 2d & 3d snt.	2025.250(c)
2025(e)(3), 1st P	2025.260(a)
2025(e)(3), 2d P (including items (A)-(F))	2025.260(b)
2025(e)(3), next-to-last P	2025.260(c)
2025(e)(3), last P	2025.260(d)
2025(f), 1st & 2d snt.	2025.270(a)
2025(f), 3d snt.	2025.270(b)
2025(f), 2d P	2025.270(c)
2025(g), 1st snt.	2025.410(a)
2025(g), 2d & 3d snt.	2025.410(b)
2025(g), 2d P	2025.410(c)
2025(g), 3d P	2025.410(d)
2025(h)(1)	2025.280(a)
2025(h)(2)	2025.280(b)
2025(h)(3), 1st snt.	2025.310(a)
2025(h)(3), 2d & 3d snt.	2025.310(b)
2025(h)(3), 4th snt.	2025.310(c)
2025(i), 1st P	2025.420(a)
2025(i), 2d P (including items (1)-(15))	2025.420(b)
2025(i), next-to-last P	2025.420(c)
2025(i), last P	2025.420(d)
2025(j)(1)	2025.430
2025(j)(2), 1st P	2025.440(a)
2025(j)(2), 2d P	2025.440(b)
2025(j)(3), 1st snt.	2025.450(a)
2025(j)(3), 2d snt.	2025.450(b)
2025(j)(3), 3d & 4th snt.	2025.450(c)

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2025(j)(3), 2d P	2025.450(d)
2025(k), intro. clause	2025.320, intro. clause
2025(k)(1)	2025.320(a)
2025(k)(2)	2025.320(b)
2025(k)(3)	2025.320(c)
2025(k)(4)	2025.320(d)
2025(k)(5)	2025.320(e)
2025(l)(1), 1st snt.	2025.330(a)
2025(l)(1), 2d snt.	2025.330(b)
2025(l)(1), 3d-5th snt.	2025.330(c)
2025(l)(1), 6th snt.	2025.330(d)
2025(l)(2), intro. clause	2025.340, intro. clause
2025(l)(2)(A)	2025.340(a)
2025(l)(2)(B), 1st & 2d snt.	2025.340(b)
2025(l)(2)(B), 3d snt.	2025.340(c)
2025(l)(2)(B), 4th-6th snt.	2025.340(d)
2025(l)(2)(B), 7th & 8th snt.	2025.340(e)
2025(l)(2)(B), 9th & 10th snt.	2025.340(f)
2025(l)(2)(C)	2025.340(g)
2025(l)(2)(D)	2025.340(h)
2025(l)(2)(E)	2025.340(i)
2025(l)(2)(F)	2025.340(j)
2025(l)(2)(G)	2025.340(k)
2025(l)(2)(H)	2025.340(l)
2025(l)(2)(I)	2025.340(m)
2025(l)(3)	2025.330(e)
2025(m)(1)	2025.460(a)
2025(m)(2)	2025.460(b)
2025(m)(3)	2025.460(c)
2025(m)(4)	2025.460(d)
2025(n), 1st & 2d snt.	2025.470
2025(n), 3d & 4th snt.	2025.420(b)(16)
2025(n), 2d P	2025.470
2025(o), 1st snt.	2025.480(a)
2025(o), 2d snt.	2025.480(b)
2025(o), 3d & 4th snt.	2025.480(c)
2025(o), 5th & 6th snt.	2025.480(d)
2025(o), 7th snt.	2025.480(e)

2025(o), 2d P	2025.480(f)
2025(o), 3d P	2025.480(g)
2025(p), 1st snt.	2025.510(a)
2025(p), 2d snt.	2025.510(b)
2025(p), 3d snt.	2025.510(c)
2025(p), 4th snt.	2025.510(d)
2025(p), 5th & 6th snt.	2025.510(e)
2025(p), 7th snt.	2025.510(f)
2025(p), 2d P	2025.510(g)
2025(q)(1), 1st snt.	2025.520(a)
2025(q)(1), 2d snt.	2025.520(b)
2025(q)(1), 2d P, 1st & 2d snt.	2025.520(c)
2025(q)(1), 2d P, 3d snt.	2025.520(d)
2025(q)(1), 3d P, 1st & 2d snt.	2025.520(e)
2025(q)(1), 3d P, 3d snt.	2025.520(f)
2025(q)(1), 3d P, 4th snt.	2025.520(g)
2025(q)(1), 4th P	2025.520(h)
2025(q)(2), 1st snt.	2025.530(a)
2025(q)(2), 2d snt.	2025.530(b)
2025(q)(2), 2d P, 1st snt.	2025.530(c)
2025(q)(2), 2d P, 2d snt.	2025.530(d)
2025(q)(2), 2d P, 3d snt.	2025.530(e)
2025(q)(2), 3d P	2025.530(f)
2025(r)(1)	2025.540(a)
2025(r)(2)	2025.540(b)
2025(s)(1), 1st P	2025.550(a)
2025(s)(1), 2d P	2025.550(b)
2025(s)(2), 1st P	2025.560(a)
2025(s)(2), 2d P	2025.560(b)
2025(s)(2), 3d P	2025.560(c)
2025(t), 1st snt.	2025.610(a)
2025(t), 2d snt.	2025.610(b)
2025(t), 3d snt.	2025.610(c)
2025(t), 4th snt.	2025.610(d)
2025(u), intro. clause	2025.620, intro. clause
2025(u)(1)	2025.620(a)
2025(u)(2)	2025.620(b)
2025(u)(3)	2025.620(c)

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2025(u)(4)	2025.620(d)
2025(u)(5)	2025.620(e)
2025(u)(6)	2025.620(f)
2025(u)(7)	2025.620(g)
2025(v)	2025.320(f)
2025.5(a)	2025.570(a)
2025.5(b), 1st snt.	2025.570(b)
2025.5(b), 2d snt.	2025.570(c)
2025.5(c)	2025.570(d)
2026(a)	2026.010(a)
2026(b)(1)	2026.010(b)
2026(b)(2)	2026.010(c)
2026(c), 1st snt.	2026.010(d)
2026(c), 2d snt.	2026.010(e)
2026(c), 3d-7th snt.	2026.010(f)
2027(a)	2027.010(a)
2027(b)(1)	2027.010(b)
2027(b)(2)	2027.010(c)
2027(c), 1st P	2027.010(d)
2027(c), 2d P	2027.010(e)
2028(a)	2028.010
2028(b)	2028.020
2028(c), 1st P	2028.030(a)
2028(c), 2d P	2028.030(b)
2028(c), 3d P	2028.030(c)
2028(c), 4th P	2028.030(d)
2028(c), 5th P	2028.030(e)
2028(d)(1), 1st & 2d snt.	2028.040(a)
2028(d)(1), 3d-5th snt.	2028.040(b)
2028(d)(1), 2d P	2028.040(c)
2028(d)(2), 1st & 2d snt.	2028.050(a)
2028(d)(2), 3d-5th snt.	2028.050(b)
2028(d)(2), 2d P	2028.050(c)
2028(e), 1st snt.	2028.060(a)
2028(e), 2d snt.	2028.060(b)
2028(f)	2028.070
2028(g)	2028.080
2029	2029.010

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2030(a)	2030.010(a)
2030(b), 1st snt.	2030.020(a)
2030(b), 2d snt.	2030.020(b)
2030(b), 3d snt.	2030.020(c)
2030(c)(1), 1st snt.	2030.030(a)
2030(c)(1), 2d & 3d snt.	2030.030(b)
2030(c)(1), 4th snt.	2030.030(c)
2030(c)(2), 1st P (including items (A)-(C))	2030.040(a)
2030(c)(2), last P	2030.040(b)
2030(c)(3)	2030.050
2030(c)(4), 1st snt.	2030.060(a)
2030(c)(4), 2d snt.	2030.060(b)
2030(c)(4), 3d snt.	2030.060(c)
2030(c)(5), 1st & 2d snt.	2030.060(d)
2030(c)(5), 3d snt.	2030.060(e)
2030(c)(5), 4th snt.	2030.060(f)
2030(c)(6)	2030.010(b)
2030(c)(7)	2030.060(g)
2030(c)(8), 1st snt.	2030.070(a)-(b)
2030(c)(8), 2d snt.	2030.070(c)
2030(d)	2030.080
2030(e), 1st P	2030.090(a)
2030(e), 2d P (including items (1)-(7))	2030.090(b)
2030(e), next-to-last P	2030.090(c)
2030(e), last P	2030.090(d)
2030(f), 1st snt.	2030.210(a)
2030(f), 2d snt.	2030.210(b)
2030(f), 3d snt.	2030.210(c)
2030(f)(1), 1st snt.	2030.220(a)
2030(f)(1), 2d snt.	2030.220(b)
2030(f)(1), 3d snt.	2030.220(c)
2030(f)(2)	2030.230
2030(f)(3), 1st snt.	2030.240(a)
2030(f)(3), 2d-4th snt.	2030.240(b)
2030(g), 1st snt.	2030.250(a)
2030(g), 2d & 3d snt.	2030.250(b)
2030(g), 4th snt.	2030.250(c)
2030(h), 1st & 2d snt.	2030.260(a)

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2030(h), 3d snt.	2030.260(b)
2030(i), 1st snt.	2030.270(a)
2030(i), 2d snt.	2030.270(b)
2030(i), 3d snt.	2030.270(c)
2030(j), 1st snt.	2030.280(a)
2030(j), 2d & 3d snt.	2030.280(b)
2030(k), 1st P	2030.290(a)
2030(k), 2d P, 1st snt.	2030.290(b)
2030(k), 2d P, 2d-4th snt.	2030.290(c)
2030(l), 1st snt.	2030.300(a)
2030(l), 2d snt.	2030.300(b)
2030(l), 2d P	2030.300(c)
2030(l), 3d P	2030.300(d)
2030(l), 4th P	2030.300(e)
2030(m), 1st P	2030.310(a)
2030(m), 2d P, 1st & 2d snt.	2030.310(b)
2030(m), 2d P, 3d snt.	2030.310(c)
2030(m), 3d P	2030.310(d)
2030(n)	2030.410
2031(a), intro. P	2031.010(a)
2031(a)(1)	2031.010(b)
2031(a)(2)	2031.010(c)
2031(a)(3)	2031.010(d)
2031(b), 1st snt.	2031.020(a)
2031(b), 2d snt.	2031.020(b)
2031(b), 3d snt.	2031.020(c)
2031(c), 1st snt.	2031.030(a)
2031(c), 2d snt.	2031.030(b)
2031(c), 3d snt. (including items (1)-(4))	2031.030(c)
2031(d)	2031.040
2031(e), 1st snt.	2031.050(a)-(b)
2031(e), 2d snt.	2031.050(c)
2031(f), 1st P	2031.060(a)
2031(f), 2d P (including items (1)-(6))	2031.060(b)
2031(f), next-to-last P	2031.060(c)
2031(f), last P	2031.060(d)
2031(g), 1st P	2031.210(a)
2031(g), 2d P, 1st snt.	2031.210(b)

2031(g), 2d P, 2d snt.	2031.210(c)
2031(g)(1), 1st P	2031.220
2031(g)(1), 2d P, 1st snt.	2031.280(a)
2031(g)(1), 2d P, 2d snt.	2031.280(b)
2031(g)(2)	2031.230
2031(g)(3), 1st snt.	2031.240(a)
2031(g)(3), 2d-4th snt.	2031.240(b)
2031(h), 1st snt.	2031.250(a)
2031(h), 2d & 3d snt.	2031.250(b)
2031(h), 4th snt.	2031.250(c)
2031(i)	2031.260
2031(j), 1st snt.	2031.270(a)
2031(j), 2d snt.	2031.270(b)
2031(j), 3d snt.	2031.270(c)
2031(k), 1st snt.	2031.290(a)
2031(k), 2d & 3d snt.	2031.290(b)
2031(l), 1st P	2031.300, intro. cl. & (a)
2031(l), 2d P, 1st snt.	2031.300(b)
2031(l), 2d P, 2d-4th snt.	2031.300(c)
2031(m), 1st snt.	2031.310(a)
2031(m), 2d snt.	2031.310(b)
2031(m), 2d P	2031.310(c)
2031(m), 3d P	2031.310(d)
2031(m), 4th P	2031.310(e)
2031(n), 1st P	2031.320(a)
2031(n), 2d P	2031.320(b)
2031(n), 3d P	2031.320(c)
2031.1	2017.310
2031.2	2017.320
2031.5, 1st snt.	2031.510(a)
2031.5, 2d & 3d snt.	2031.510(b)
2032(a)	2032.020(a)
2032(b), 1st snt.	2032.020(b)
2032(b), 2d snt.	2032.020(c)
2032(b), 3d snt.	2032.010(a)
2032(c)(1)	2032.210
2032(c)(2), 1st snt.	2032.220(a)
2032(c)(2), 2d snt.	2032.220(b)

2032(c)(2), 3d snt.	2032.220(c)
2032(c)(3)	2032.220(d)
2032(c)(4)	2032.220(e)
2032(c)(5), 1st snt.	2032.230(a)
2032(c)(5), 2d snt.	2032.230(b)
2032(c)(6), 1st P	2032.240(a)
2032(c)(6), 2d P, 1st snt.	2032.240(b)
2032(c)(6), 2d P, 2d snt.	2032.240(c)
2032(c)(6), 3d P	2032.240(d)
2032(c)(7), 1st P	2032.250(a)
2032(c)(7), 2d P	2032.250(b)
2032(c)(8), 1st snt.	2032.260(a)
2032(c)(8), 2d snt.	2032.260(b)
2032(d), 1st snt.	2032.310(a)
2032(d), 2d & 3d snt.	2032.310(b)
2032(d), 4th snt.	2032.310(c)
2032(d), 2d P, 1st snt.	2032.320(a)
2032(d), 2d P, 2d snt.	2032.320(b)-(c)
2032(d), 2d P, 3d snt.	2032.320(d)
2032(d), 2d P, 4th snt.	2032.320(e)
2032(e)	Not continued (redundant). See 2016.030.
2032(f), 1st P	2032.410
2032(f), 2d P	2032.420
2032(g)(1), 1st snt.	2032.510(a)
2032(g)(1), 2d snt.	2032.510(b)
2032(g)(1), 3d snt.	2032.510(c)
2032(g)(1), 2d P, 1st snt.	2032.510(d)
2032(g)(1), 2d P, 2d snt.	2032.510(e)
2032(g)(1), 3d P	2032.510(f)
2032(g)(1), 4th P	2032.520
2032(g)(2), 1st snt.	2032.530(a)
2032(g)(2), 2d snt.	2032.530(b)
2032(h), 1st snt.	2032.610(a)
2032(h), 2d snt.	2032.610(b)
2032(h), 3d snt.	2032.610(c)
2032(h), 2d P	2032.620(a)
2032(h), 3d P	2032.620(b)
2032(h), 4th P	2032.620(c)

2032(i)	2032.630
2032(j), 1st P	2032.640
2032(j), 2d P	2032.650(a)
2032(j), 3d P	2032.650(b)
2032(j), 4th P	2032.650(c)
2032(k)	2032.010(b)
2033(a)	2033.010
2033(b), 1st snt.	2033.020(a)
2033(b), 2d snt.	2033.020(b)
2033(b), 3d snt.	2033.020(c)
2033(c)(1), 1st snt.	2033.030(a)
2033(c)(1), 2d snt.	2033.030(b)
2033(c)(1), 2d P	2033.030(c)
2033(c)(2), 1st P	2033.040(a)
2033(c)(2), 2d P	2033.040(b)
2033(c)(3)	2033.050
2033(c)(4), 1st snt.	2033.060(a)
2033(c)(4), 2d snt.	2033.060(b)
2033(c)(4), 3d snt.	2033.060(c)
2033(c)(5), 1st & 2d snt.	2033.060(d)
2033(c)(5), 3d snt.	2033.060(e)
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2033(c)(7)	2033.060(h)
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2033(e), 2d P (including items (1)-(5))	2033.080(b)
2033(e), next-to-last P	2033.080(c)
2033(e), last P	2033.080(d)
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2033(f), intro. P, 3d snt.	2033.210(c)
2033(f), intro. P, 4th snt.	2033.210(d)
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2033(f)(1), 3d snt.	2033.220(c)
2033(f)(2), 1st snt.	2033.230(a)
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2033(g), 1st snt.	2033.240(a)
2033(g), 2d & 3d snt.	2033.240(b)
2033(g), 4th snt.	2033.240(c)
2033(h)	2033.250
2033(i), 1st snt.	2033.260(a)
2033(i), 2d snt.	2033.260(b)
2033(i), 3d snt.	2033.260(c)
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2033(k), 2d P, 1st snt.	2033.280(b)
2033(k), 2d P, 2d & 3d snt.	2033.280(c)
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2033(l), 3d P	2033.290(d)
2033(l), 4th P	2033.290(e)
2033(m), 1st snt.	2033.300(a)
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2033.5(b), 1st snt.	2033.730(a)
2033.5(b), 2d snt., 1st clause	2033.730(b)
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2033.5(c)	2033.740(c)
2033.5(d)	2033.720(a)
2033.5(e)	2033.720(b)
2033.5(f)	Not continued (obsolete)
2034(a), intro. clause	2034.210, intro. clause
2034(a)(1)	2034.210(a)
2034(a)(2)	2034.210(b)
2034(a)(3)	2034.210(c)

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2034(a), last P	2034.010
2034(b)	2034.220
2034(c), 1st P	2034.230(a)
2034(c), 2d P	2034.230(b)
2034(d)	2034.240
2034(e), 1st P	2034.250(a)
2034(e), 2d P (including items (1)-(6))	2034.250(b)
2034(e), next-to-last P	2034.250(c)
2034(e), last P	2034.250(d)
2034(f), intro. P	2034.260(a)
2034(f)(1) (including items (A) and (B))	2034.260(b)
2034(f)(2) (including items (A)-(E))	2034.260(c)
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2034(h), 1st snt.	2034.280(a)
2034(h), 2d snt.	2034.280(b)
2034(h), 3d snt.	2034.280(c)
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2034(i)(2), 1st P, 1st snt.	2034.430(a)-(b)
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2034(i)(2), 1st P, 3d snt.	2034.430(d)
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2034(i)(2), 2d P, 1st snt.	2034.450(a)
2034(i)(2), 2d P, 2d snt.	2034.450(b)
2034(i)(2), 2d P, 3d snt.	2034.450(c)
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2034(i)(3), 2d snt.	2034.460(b)
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2034(k), 1st P, 2d & 3d snt.	2034.610(b)

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2034(k), 1st P, 4th snt.	2034.610(c)
2034(k), 1st P, 5th snt.	2034.290(c)
2034(k), 1st P, 6th snt.	2034.620, intro. cl. & (a)-(c)
2034(k), 1st P, 7th snt.	2034.620(d)
2034(k), 2d P	2034.630
2034(l), 1st snt.	2034.710(a)
2034(l), 2d & 3d snt.	2034.710(b)
2034(l), 4th snt.	2034.710(c)
2034(l), 2d P, 1st snt.	2034.720, intro. cl. & (a)-(c)
2034(l), 2d P, 2d snt.	2034.720(d)
2034(l), 3d P	2034.730
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2034(n), 1st snt.	2034.290(a)
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2035(a), 1st snt.	2035.010(a)
2035(a), 2d snt.	2035.010(b)
2035(b)	2035.020
2035(c)	2035.030(a)
2035(d), 1st P (including items (1)-(9))	2035.030(b)
2035(d), last P	2035.030(c)
2035(e), 1st & 2d snt.	2035.040(a)
2035(e), 3d & 4th snt.	2035.040(b)
2035(e), 5th snt.	2035.040(c)
2035(e), 2d P, 1st snt.	2035.040(d)
2035(e), 2d P, 2d & 3d snt.	2035.040(e)
2035(f), 1st snt.	2035.050(a)
2035(f), 2d snt.	2035.050(b)
2035(f), 3d snt.	2035.050(c)
2035(g)	2035.060
2036(a)	2036.010
2036(b)	2036.020
2036(c)	2036.030(a)
2036(d)	2036.030(b)
2036(e), 1st snt.	2036.040(a)
2036(e), 2d snt.	2036.040(b)
2036(e), 3d snt.	2036.040(c)
2036(f)	2036.050



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Chapter CT Discovery Act Correlation Tables (July 1, 2005)

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CT.02 Civil Discovery Act (July 1, 2005) to Former Civil Discovery Act of 1986

[All references are to the California Code of Civil Procedure]

New Provision	Former Provision
2016.010	2016(a)
2016.020	2016(b)
2016.070	2016(c)
2017.010	2017(a)
2017.210	2017(b)
2017.020(a)	2017(c), 1st P
2017.020(b)	2017(c), 2d P
2017.220(a)	2017(d), 1st P
2017.220(b)	2017(d), 2d P
2017.730(a)	2017(e)(1), 1st snt.
2017.730(b)	2017(e)(1), 2d snt.
2017.730(c)	2017(e)(2)
2017.730(d)	2017(e)(3), 1st & 2d snt.
2017.730(e)	2017(e)(3), 3d snt.
2017.720(a)	2017(e)(4)
2017.740(a)	2017(e)(5), 1st-4th snt.
2017.740(b)	2017(e)(5), 5th-7th snt.
2017.710	2017(e)(6)
2017.720(b)	2017(e)(7)
2017.720(c)	2017(e)(8)

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2018.020	2018(a)
2018.030(b)	2018(b)
2018.030(a)	2018(c)
2018.040	2018(d), 1st & 2d snt.
2018.050	2018(d), 3d snt.
2018.060	2018(d), 4th snt.
2018.070(a)-(b)	2018(e), 1st snt.
2018.070(c)	2018(e), 2d snt.
2018.080	2018(f), 1st P
2018.010	2018(f), 2d P
2019.010	2019(a)
2019.030(a), intro. clause	2019(b), intro. clause
2019.030(a)(1)	2019(b)(1)
2019.030(a)(2)	2019(b)(2)
2019.030(b)	2019(b), next-to-last P
2019.030(c)	2019(b), last P
2019.020(a)	2019(c), 1st snt.
2019.020(b)	2019(c), 2d snt.
2019.210	2019(d)
2016.050	2019(e)
2020.010(a)	2020(a), 1st snt.
2020.010(b)	2020(a), 2d snt.
2020.020	2020(a), 3d snt. (including items (1)-(3))
2020.030	2020(a), last P
2020.210(a)	2020(b), 1st snt.
2020.210(b)	2020(b), 2d snt.
2020.310	2020(c)
2020.410(a)-(b)	2020(d)(1), 1st snt.
2020.410(c)	2020(d)(1), 2d-4th snt.
2020.410(d)	2020(d)(2)
2020.420	2020(d)(3)
2020.430(a), (e)	2020(d)(4), 1st snt.
2020.430(b)	2020(d)(4), 2d snt.
2020.430(c)	2020(d)(4), 3d & 4th snt.
2020.430(d)	2020(d)(4), 5th & 6th snt.
2020.440	2020(d)(5)
2020.430(f)	2020(d)(6)
2020.510(a)	2020(e), 1st snt.

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2020.510(b)	2020(e), 2d snt.
2020.510(c)	2020(e), 2d P
2020.220(a)	2020(f), 1st snt.
2020.220(b)	2020(f), 2d snt.
2020.230(a)	2020(f), 2d P
2020.230(b)	2020(f), 3d P
2020.220(c)	2020(g)
2020.240	2020(h)
2016.030	2021
2023.010	2023(a)(1)-(8) & (9), 1st snt.
2023.020	2023(a)(9), 2d snt.
2023.030, intro. clause	2023(b), intro. clause
2023.030(a)	2023(b)(1)
2023.030(b)	2023(b)(2)
2023.030(c)	2023(b)(3)
2023.030(d)	2023(b)(4)
2023.030(e)	2023(b)(5)
2023.040	2023(c)
2024.020(a)	2024(a), 1st snt.
Not continued (redundant). See 2016.060.	2024(a), 2d snt.
2024.010	2024(a), 3d snt.
2024.020(b)	2024(a), 4th snt.
2024.040(a)	2024(b)
2024.040(b)	2024(c)
2024.030	2024(d)
2024.050(a)	2024(e), 1st P
2024.050(b)	2024(e), 2d P (including items (1)-(4))
2024.050(c)	2024(e), last P
2024.060	2024(f)
2016.060	2024(g)
2025.010	2025(a)
2025.210	2025(b)
2025.220(a), intro. clause	2025(c), 1st snt.
2025.220(b)	2025(c), 2d snt.
2025.240(a)	2025(c), 3d & 4th snt.
2025.240(b)	2025(c), 2d P
2025.220(a), intro. clause	2025(d), intro. clause
2025.220(a)(1)	2025(d)(1)

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2025.220(a)(2)	2025(d)(2)
2025.220(a)(3)	2025(d)(3)
2025.220(a)(4)	2025(d)(4)
2025.220(a)(5)	2025(d)(5)
2025(d)(6), 1st P	2025.220(a)(6)
2025.230	2025(d)(6), 2d P, 1st snt.
Not continued (redundant).	
See 2020.310(e), 2020.510(a)(1).	2025(d)(6), 2d P, 2d snt.
2025.240(c)	2025(d)(6), 3d P
2025.250(a)	2025(e)(1)
2025.250(b)	2025(e)(2), 1st snt.
2025.250(c)	2025(e)(2), 2d & 3d snt.
2025.260(a)	2025(e)(3), 1st P
2025.260(b)	2025(e)(3), 2d P (including items (A)-(F))
2025.260(c)	2025(e)(3), next-to-last P
2025.260(d)	2025(e)(3), last P
2025.270(a)	2025(f), 1st & 2d snt.
2025.270(b)	2025(f), 3d snt.
2025.270(c)	2025(f), 2d P
2025.410(a)	2025(g), 1st snt.
2025.410(b)	2025(g), 2d & 3d snt.
2025.410(c)	2025(g), 2d P
2025.410(d)	2025(g), 3d P
2025.280(a)	2025(h)(1)
2025.280(b)	2025(h)(2)
2025.310(a)	2025(h)(3), 1st snt.
2025.310(b)	2025(h)(3), 2d & 3d snt.
2025.310(c)	2025(h)(3), 4th snt.
2025.420(a)	2025(i), 1st P
2025.420(b)	2025(i), 2d P (including items (1)-(15))
2025.420(c)	2025(i), next-to-last P
2025.420(d)	2025(i), last P
2025.430	2025(j)(1)
2025.440(a)	2025(j)(2), 1st P
2025.440(b)	2025(j)(2), 2d P
2025.450(a)	2025(j)(3), 1st snt.
2025.450(b)	2025(j)(3), 2d snt.
2025.450(c)	2025(j)(3), 3d & 4th snt.

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2025.450(d)	2025(j)(3), 2d P
2025.320, intro. clause	2025(k), intro. clause
2025.320(a)	2025(k)(1)
2025.320(b)	2025(k)(2)
2025.320(c)	2025(k)(3)
2025.320(d)	2025(k)(4)
2025.320(e)	2025(k)(5)
2025.330(a)	2025(l)(1), 1st snt.
2025.330(b)	2025(l)(1), 2d snt.
2025.330(c)	2025(l)(1), 3d-5th snt.
2025.330(d)	2025(l)(1), 6th snt.
2025.340, intro. clause	2025(l)(2), intro. clause
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2025.340(b)	2025(l)(2)(B), 1st & 2d snt.
2025.340(c)	2025(l)(2)(B), 3d snt.
2025.340(d)	2025(l)(2)(B), 4th-6th snt.
2025.340(e)	2025(l)(2)(B), 7th & 8th snt.
2025.340(f)	2025(l)(2)(B), 9th & 10th snt.
2025.340(g)	2025(l)(2)(C)
2025.340(h)	2025(l)(2)(D)
2025.340(i)	2025(l)(2)(E)
2025.340(j)	2025(l)(2)(F)
2025.340(k)	2025(l)(2)(G)
2025.340(l)	2025(l)(2)(H)
2025.340(m)	2025(l)(2)(I)
2025.330(e)	2025(l)(3)
2025.460(a)	2025(m)(1)
2025.460(b)	2025(m)(2)
2025.460(c)	2025(m)(3)
2025.460(d)	2025(m)(4)
2025.470	2025(n), 1st & 2d snt.
2025.420(b)(16)	2025(n), 3d & 4th snt.
2025.470	2025(n), 2d P
2025.480(a)	2025(o), 1st snt.
2025.480(b)	2025(o), 2d snt.
2025.480(c)	2025(o), 3d & 4th snt.
2025.480(d)	2025(o), 5th & 6th snt.
2025.480(e)	2025(o), 7th snt.

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2025.480(f)	2025(o), 2d P
2025.480(g)	2025(o), 3d P
2025.510(a)	2025(p), 1st snt.
2025.510(b)	2025(p), 2d snt.
2025.510(c)	2025(p), 3d snt.
2025.510(d)	2025(p), 4th snt.
2025.510(e)	2025(p), 5th & 6th snt.
2025.510(f)	2025(p), 7th snt.
2025.510(g)	2025(p), 2d P
2025.520(a)	2025(q)(1), 1st snt.
2025.520(b)	2025(q)(1), 2d snt.
2025.520(c)	2025(q)(1), 2d P, 1st & 2d snt.
2025.520(d)	2025(q)(1), 2d P, 3d snt.
2025.520(e)	2025(q)(1), 3d P, 1st & 2d snt.
2025.520(f)	2025(q)(1), 3d P, 3d snt.
2025.520(g)	2025(q)(1), 3d P, 4th snt.
2025.520(h)	2025(q)(1), 4th P
2025.530(a)	2025(q)(2), 1st snt.
2025.530(b)	2025(q)(2), 2d snt.
2025.530(c)	2025(q)(2), 2d P, 1st snt.
2025.530(d)	2025(q)(2), 2d P, 2d snt.
2025.530(e)	2025(q)(2), 2d P, 3d snt.
2025.530(f)	2025(q)(2), 3d P
2025.540(a)	2025(r)(1)
2025.540(b)	2025(r)(2)
2025.550(a)	2025(s)(1), 1st P
2025.550(b)	2025(s)(1), 2d P
2025.560(a)	2025(s)(2), 1st P
2025.560(b)	2025(s)(2), 2d P
2025.560(c)	2025(s)(2), 3d P
2025.610(a)	2025(t), 1st snt.
2025.610(b)	2025(t), 2d snt.
2025.610(c)	2025(t), 3d snt.
2025.610(d)	2025(t), 4th snt.
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2025.620(b)	2025(u)(2)
2025.620(c)	2025(u)(3)

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2025.620(d)	2025(u)(4)
2025.620(e)	2025(u)(5)
2025.620(f)	2025(u)(6)
2025.620(g)	2025(u)(7)
2025.320(f)	2025(v)
2025.570(a)	2025.5(a)
2025.570(b)	2025.5(b), 1st snt.
2025.570(c)	2025.5(b), 2d snt.
2025.570(d)	2025.5(c)
2026.010(a)	2026(a)
2026.010(b)	2026(b)(1)
2026.010(c)	2026(b)(2)
2026.010(d)	2026(c), 1st snt.
2026.010(e)	2026(c), 2d snt.
2026.010(f)	2026(c), 3d-7th snt.
2027.010(a)	2027(a)
2027.010(b)	2027(b)(1)
2027.010(c)	2027(b)(2)
2027.010(d)	2027(c), 1st P
2027.010(e)	2027(c), 2d P
2028.010	2028(a)
2028.020	2028(b)
2028.030(a)	2028(c), 1st P
2028.030(b)	2028(c), 2d P
2028.030(c)	2028(c), 3d P
2028.030(d)	2028(c), 4th P
2028.030(e)	2028(c), 5th P
2028.040(a)	2028(d)(1), 1st & 2d snt.
2028.040(b)	2028(d)(1), 3d-5th snt.
2028.040(c)	2028(d)(1), 2d P
2028.050(a)	2028(d)(2), 1st & 2d snt.
2028.050(b)	2028(d)(2), 3d-5th snt.
2028.050(c)	2028(d)(2), 2d P
2028.060(a)	2028(e), 1st snt.
2028.060(b)	2028(e), 2d snt.
2028.070	2028(f)
2028.080	2028(g)
2029.010	2029

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2030.010(a)	2030(a)
2030.020(a)	2030(b), 1st snt.
2030.020(b)	2030(b), 2d snt.
2030.020(c)	2030(b), 3d snt.
2030.030(a)	2030(c)(1), 1st snt.
2030.030(b)	2030(c)(1), 2d & 3d snt.
2030.030(c)	2030(c)(1), 4th snt.
2030.040(a)	2030(c)(2), 1st P (including items (A)-(C))
2030.040(b)	2030(c)(2), last P
2030.050	2030(c)(3)
2030.060(a)	2030(c)(4), 1st snt.
2030.060(b)	2030(c)(4), 2d snt.
2030.060(c)	2030(c)(4), 3d snt.
2030.060(d)	2030(c)(5), 1st & 2d snt.
2030.060(e)	2030(c)(5), 3d snt.
2030.060(f)	2030(c)(5), 4th snt.
2030.010(b)	2030(c)(6)
2030.060(g)	2030(c)(7)
2030.070(a)-(b)	2030(c)(8), 1st snt.
2030.070(c)	2030(c)(8), 2d snt.
2030.080	2030(d)
2030.090(a)	2030(e), 1st P
2030.090(b)	2030(e), 2d P (including items (1)-(7))
2030.090(c)	2030(e), next-to-last P
2030.090(d)	2030(e), last P
2030.210(a)	2030(f), 1st snt.
2030.210(b)	2030(f), 2d snt.
2030.210(c)	2030(f), 3d snt.
2030.220(a)	2030(f)(1), 1st snt.
2030.220(b)	2030(f)(1), 2d snt.
2030.220(c)	2030(f)(1), 3d snt.
2030.230	2030(f)(2)
2030.240(a)	2030(f)(3), 1st snt.
2030.240(b)	2030(f)(3), 2d-4th snt.
2030.250(a)	2030(g), 1st snt.
2030.250(b)	2030(g), 2d & 3d snt.
2030.250(c)	2030(g), 4th snt.
2030.260(a)	2030(h), 1st & 2d snt.

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2030.260(b)	2030(h), 3d snt.
2030.270(a)	2030(i), 1st snt.
2030.270(b)	2030(i), 2d snt.
2030.270(c)	2030(i), 3d snt.
2030.280(a)	2030(j), 1st snt.
2030.280(b)	2030(j), 2d & 3d snt.
2030.290(a)	2030(k), 1st P
2030.290(b)	2030(k), 2d P, 1st snt.
2030.290(c)	2030(k), 2d P, 2d-4th snt.
2030.300(a)	2030(l), 1st snt.
2030.300(b)	2030(l), 2d snt.
2030.300(c)	2030(l), 2d P
2030.300(d)	2030(l), 3d P
2030.300(e)	2030(l), 4th P
2030.310(a)	2030(m), 1st P
2030.310(b)	2030(m), 2d P, 1st & 2d snt.
2030.310(c)	2030(m), 2d P, 3d snt.
2030.310(d)	2030(m), 3d P
2030.410	2030(n)
2031.010(a)	2031(a), intro. P
2031.010(b)	2031(a)(1)
2031.010(c)	2031(a)(2)
2031.010(d)	2031(a)(3)
2031.020(a)	2031(b), 1st snt.
2031.020(b)	2031(b), 2d snt.
2031.020(c)	2031(b), 3d snt.
2031.030(a)	2031(c), 1st snt.
2031.030(b)	2031(c), 2d snt.
2031.030(c)	2031(c), 3d snt. (including items (1)-(4))
2031.040	2031(d)
2031.050(a)-(b)	2031(e), 1st snt.
2031.050(c)	2031(e), 2d snt.
2031.060(a)	2031(f), 1st P
2031.060(b)	2031(f), 2d P (including items (1)-(6))
2031.060(c)	2031(f), next-to-last P
2031.060(d)	2031(f), last P
2031.210(a)	2031(g), 1st P
2031.210(b)	2031(g), 2d P, 1st snt.

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2031.210(c)	2031(g), 2d P, 2d snt.
2031.220	2031(g)(1), 1st P
2031.280(a)	2031(g)(1), 2d P, 1st snt.
2031.280(b)	2031(g)(1), 2d P, 2d snt.
2031.230	2031(g)(2)
2031.240(a)	2031(g)(3), 1st snt.
2031.240(b)	2031(g)(3), 2d-4th snt.
2031.250(a)	2031(h), 1st snt.
2031.250(b)	2031(h), 2d & 3d snt.
2031.250(c)	2031(h), 4th snt.
2031.260	2031(i)
2031.270(a)	2031(j), 1st snt.
2031.270(b)	2031(j), 2d snt.
2031.270(c)	2031(j), 3d snt.
2031.290(a)	2031(k), 1st snt.
2031.290(b)	2031(k), 2d & 3d snt.
2031.300, intro. cl. & (a)	2031(l), 1st P
2031.300(b)	2031(l), 2d P, 1st snt.
2031.300(c)	2031(l), 2d P, 2d-4th snt.
2031.310(a)	2031(m), 1st snt.
2031.310(b)	2031(m), 2d snt.
2031.310(c)	2031(m), 2d P
2031.310(d)	2031(m), 3d P
2031.310(e)	2031(m), 4th P
2031.320(a)	2031(n), 1st P
2031.320(b)	2031(n), 2d P
2031.320(c)	2031(n), 3d P
2017.310	2031.1
2017.320	2031.2
2031.510(a)	2031.5, 1st snt.
2031.510(b)	2031.5, 2d & 3d snt.
2032.020(a)	2032(a)
2032.020(b)	2032(b), 1st snt.
2032.020(c)	2032(b), 2d snt.
2032.010(a)	2032(b), 3d snt.
2032.210	2032(c)(1)
2032.220(a)	2032(c)(2), 1st snt.
2032.220(b)	2032(c)(2), 2d snt.

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2032.220(c)	2032(c)(2), 3d snt.
2032.220(d)	2032(c)(3)
2032.220(e)	2032(c)(4)
2032.230(a)	2032(c)(5), 1st snt.
2032.230(b)	2032(c)(5), 2d snt.
2032.240(a)	2032(c)(6), 1st P
2032.240(b)	2032(c)(6), 2d P, 1st snt.
2032.240(c)	2032(c)(6), 2d P, 2d snt.
2032.240(d)	2032(c)(6), 3d P
2032.250(a)	2032(c)(7), 1st P
2032.250(b)	2032(c)(7), 2d P
2032.260(a)	2032(c)(8), 1st snt.
2032.260(b)	2032(c)(8), 2d snt.
2032.310(a)	2032(d), 1st snt.
2032.310(b)	2032(d), 2d & 3d snt.
2032.310(c)	2032(d), 4th snt.
2032.320(a)	2032(d), 2d P, 1st snt.
2032.320(b)-(c)	2032(d), 2d P, 2d snt.
2032.320(d)	2032(d), 2d P, 3d snt.
2032.320(e)	2032(d), 2d P, 4th snt.
Not continued (redundant). See 2016.030.	2032(e)
2032.410	2032(f), 1st P
2032.420	2032(f), 2d P
2032.510(a)	2032(g)(1), 1st snt.
2032.510(b)	2032(g)(1), 2d snt.
2032.510(c)	2032(g)(1), 3d snt.
2032.510(d)	2032(g)(1), 2d P, 1st snt.
2032.510(e)	2032(g)(1), 2d P, 2d snt.
2032.510(f)	2032(g)(1), 3d P
2032.520	2032(g)(1), 4th P
2032.530(a)	2032(g)(2), 1st snt.
2032.530(b)	2032(g)(2), 2d snt.
2032.610(a)	2032(h), 1st snt.
2032.610(b)	2032(h), 2d snt.
2032.610(c)	2032(h), 3d snt.
2032.620(a)	2032(h), 2d P
2032.620(b)	2032(h), 3d P
2032.620(c)	2032(h), 4th P

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2032.630	2032(i)
2032.640	2032(j), 1st P
2032.650(a)	2032(j), 2d P
2032.650(b)	2032(j), 3d P
2032.650(c)	2032(j), 4th P
2032.010(b)	2032(k)
2033.010	2033(a)
2033.020(a)	2033(b), 1st snt.
2033.020(b)	2033(b), 2d snt.
2033.020(c)	2033(b), 3d snt.
2033.030(a)	2033(c)(1), 1st snt.
2033.030(b)	2033(c)(1), 2d snt.
2033.030(c)	2033(c)(1), 2d P
2033.040(a)	2033(c)(2), 1st P
2033.040(b)	2033(c)(2), 2d P
2033.050	2033(c)(3)
2033.060(a)	2033(c)(4), 1st snt.
2033.060(b)	2033(c)(4), 2d snt.
2033.060(c)	2033(c)(4), 3d snt.
2033.060(d)	2033(c)(5), 1st & 2d snt.
2033.060(e)	2033(c)(5), 3d snt.
2033.060(f)	2033(c)(5), 4th snt.
2033.060(g)	2033(c)(6)
2033.060(h)	2033(c)(7)
2033.070	2033(d)
2033.080(a)	2033(e), 1st P
2033.080(b)	2033(e), 2d P (including items (1)-(5))
2033.080(c)	2033(e), next-to-last P
2033.080(d)	2033(e), last P
2033.210(a)	2033(f), intro. P, 1st snt.
2033.210(b)	2033(f), intro. P, 2d snt.
2033.210(c)	2033(f), intro. P, 3d snt.
2033.210(d)	2033(f), intro. P, 4th snt.
2033.220(a)	2033(f)(1), 1st snt.
2033.220(b)	2033(f)(1), 2d snt.
2033.220(c)	2033(f)(1), 3d snt.
2033.230(a)	2033(f)(2), 1st snt.
2033.230(b)	2033(f)(2), 2d-4th snt.

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2033.240(a)	2033(g), 1st snt.
2033.240(b)	2033(g), 2d & 3d snt.
2033.240(c)	2033(g), 4th snt.
2033.250	2033(h)
2033.260(a)	2033(i), 1st snt.
2033.260(b)	2033(i), 2d snt.
2033.260(c)	2033(i), 3d snt.
2033.260(d)	2033(i), 4th snt.
2033.270(a)	2033(j), 1st snt.
2033.270(b)	2033(j), 2d & 3d snt.
2033.280(a)	2033(k), 1st P
2033.280(b)	2033(k), 2d P, 1st snt.
2033.280(c)	2033(k), 2d P, 2d & 3d snt.
2033.290(a)	2033(l), 1st snt.
2033.290(b)	2033(l), 2d snt.
2033.290(c)	2033(l), 2d P
2033.290(d)	2033(l), 3d P
2033.290(e)	2033(l), 4th P
2033.300(a)	2033(m), 1st snt.
2033.300(b)	2033(m), 2d snt.
2033.300(c)	2033(m), 3d snt.
2033.410(a)	2033(n), 1st snt.
2033.410(b)	2033(n), 2d & 3d snt.
2033.420(a)	2033(o), 1st snt.
2033.420(b)	2033(o), 2d snt.
2033.710	2033.5(a), 1st snt.
2033.740(a)	2033.5(a), 2d snt.
2033.730(a)	2033.5(b), 1st snt.
2033.730(b)	2033.5(b), 2d snt., 1st clause
2033.740(b)	2033.5(b), 2d snt., 2d clause
2033.740(c)	2033.5(c)
2033.720(a)	2033.5(d)
2033.720(b)	2033.5(e)
Not continued (obsolete)	2033.5(f)
2034.210, intro. clause	2034(a), intro. clause
2034.210(a)	2034(a)(1)
2034.210(b)	2034(a)(2)
2034.210(c)	2034(a)(3)

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2034.010	2034(a), last P
2034.220	2034(b)
2034.230(a)	2034(c), 1st P
2034.230(b)	2034(c), 2d P
2034.240	2034(d)
2034.250(a)	2034(e), 1st P
2034.250(b)	2034(e), 2d P (including items (1)-(6))
2034.250(c)	2034(e), next-to-last P
2034.250(d)	2034(e), last P
2034.260(a)	2034(f), intro. P
2034.260(b)	2034(f)(1) (including items (A) and (B))
2034.260(c)	2034(f)(2) (including items (A)-(E))
2034.270	2034(g)
2034.280(a)	2034(h), 1st snt.
2034.280(b)	2034(h), 2d snt.
2034.280(c)	2034(h), 3d snt.
2034.410	2034(i), intro. P
2034.420	2034(i)(1)
2034.430(a)-(b)	2034(i)(2), 1st P, 1st snt.
2034.430(c)	2034(i)(2), 1st P, 2d snt.
2034.430(d)	2034(i)(2), 1st P, 3d snt.
2034.430(e)	2034(i)(2), 1st P, 4th snt.
2034.430(f)	2034(i)(2), 1st P, 5th snt.
2034.450(a)	2034(i)(2), 2d P, 1st snt.
2034.450(b)	2034(i)(2), 2d P, 2d snt.
2034.450(c)	2034(i)(2), 2d P, 3d snt.
2034.440	2034(i)(2), 2d P, 4th snt.
2034.460(a)	2034(i)(3), 1st snt.
2034.460(b)	2034(i)(3), 2d snt.
2034.470(a)	2034(i)(4), 1st P, 1st & 3d snt.
2034.470(b)	2034(i)(4), 1st P, 2d & 4th snt.
2034.470(c)-(d)	2034(i)(4), 2d P, 1st & 2d snt.
2034.470(e)	2034(i)(4), 2d P, 3d snt.
2034.470(f)	2034(i)(4), 3d P
2034.470(g)	2034(i)(4), 4th P
2034.300	2034(j)
2034.610(a)	2034(k), 1st P, 1st snt.
2034.610(b)	2034(k), 1st P, 2d & 3d snt.

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2034.610(c)	2034(k), 1st P, 4th snt.
2034.290(c)	2034(k), 1st P, 5th snt.
2034.620, intro. cl. & (a)-(c)	2034(k), 1st P, 6th snt.
2034.620(d)	2034(k), 1st P, 7th snt.
2034.630	2034(k), 2d P
2034.710(a)	2034(l), 1st snt.
2034.710(b)	2034(l), 2d & 3d snt.
2034.710(c)	2034(l), 4th snt.
2034.720, intro. cl. & (a)-(c)	2034(l), 2d P, 1st snt.
2034.720(d)	2034(l), 2d P, 2d snt.
2034.730	2034(l), 3d P
2034.310	2034(m)
2034.290(a)	2034(n), 1st snt.
2034.290(b)	2034(n), 2d & 3d snt.
2035.010(a)	2035(a), 1st snt.
2035.010(b)	2035(a), 2d snt.
2035.020	2035(b)
2035.030(a)	2035(c)
2035.030(b)	2035(d), 1st P (including items (1)-(9))
2035.030(c)	2035(d), last P
2035.040(a)	2035(e), 1st & 2d snt.
2035.040(b)	2035(e), 3d & 4th snt.
2035.040(c)	2035(e), 5th snt.
2035.040(d)	2035(e), 2d P, 1st snt.
2035.040(e)	2035(e), 2d P, 2d & 3d snt.
2035.050(a)	2035(f), 1st snt.
2035.050(b)	2035(f), 2d snt.
2035.050(c)	2035(f), 3d snt.
2035.060	2035(g)
2036.010	2036(a)
2036.020	2036(b)
2036.030(a)	2036(c)
2036.030(b)	2036(d)
2036.040(a)	2036(e), 1st snt.
2036.040(b)	2036(e), 2d snt.
2036.040(c)	2036(e), 3d snt.
2036.050	2036(f)