THE CALIFORNIA DISCOVERY MANUAL 2026

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INTRODUCTION

The California Discovery Manual began life as the "Judge Pro Tem Discovery Manual" for the San Francisco Superior Court, articulating standard language for points of law regularly arising within discovery disputes. The Judge Pro Tems in San Francisco would often deploy this language as part of their analysis in tentative decisions and in their ultimate orders.

Stress-tested for a decade, *The California Discovery Manual* is now offered here, for practitioners seeking clarity regarding the most oft-disputed issues arising in discovery motions. New to this edition, the *Manual* offers Practice Notes from the perspective of the Master Strategist, with insight into the complex ways in which the rules interact, a judicial perspective on what makes a compelling argument, and offering practical guidance on how to optimize outcomes.

How to Use. The Discovery Manual is designed to allow the practitioner to cut and paste oft-cited and widely applicable points of law as a way to initially frame up and argue most—but perhaps not all—discovery motions.

Citation. In an effort to bring some uniformity between the state and federal system, and to simplify the lives of practitioners who otherwise would have to learn and master two different styles, citation format here follows the *Bluebook*. *See* Cal. R. Ct. 1.200 ("Citations to cases and other authorities in all documents filed in the courts must be in the style established by either the *California Style Manual* or *The Bluebook: A Uniform System of Citation* . . . ."); *see also Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.*, 236 Cal. App. 4th 243, 254 (2015) (citing to the *Bluebook* as authoritative); *cf.* Curtis E.A. Karnow, *Revising*

the California Style Manual, SF ATTORNEY, Winter 2012, at 42, https://works.bepress.com/curtis_karnow/15/download/ (criticizing the "California Style Manual . . . because it creates unnecessary obstruction in the reading of an opinion").

Current Law. The editors have made every effort to ensure the law in the *Manual* is current as of the date of publication. But errors are inevitable. Practitioners should always sheppardize or key cite all authority. Any errors should be reported to Douglas Robbins at Tong Robbins LLP.

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1. STANDARD TENTATIVE LANGUAGE

PRACTICE NOTE RE STANDARD TENTATIVE LANGUAGE

In the vast majority of California jurisdictions, judges will issue written tentative decisions the day before a motion is to be heard. Standard Tentative Language is the sort of general dictates that we would expect to see within most of these tentative decisions and perhaps in an ultimate order. The generic language here offers insight into the various issues that a judge will need to resolve and that a practitioner should be prepared to address in briefing and at hearing.

1.1. Grant or Deny Motion (Order Language)

[Party's] Motion to [name of motion] is [GRANTED/DENIED] [GRANTED IN PART AND DENIED IN PART] [GRANTED AS UNOPPOSED]. [Party's] request for monetary sanctions as against [party and/or attorney] is [GRANTED/DENIED] [GRANTED AS UNOPPOSED] [DENIED AS UNSOUGHT] in the amount of [$XXX.XX]. All other sanctions, if any, are DENIED.

1.2. Prevailing Party to Propose Order (Order Language)

As the prevailing party, [Party] shall prepare a form of the order recapitulating this tentative ruling, [other details, if any], and shall bring a copy of the proposed order to the hearing, if any. In the absence of a hearing, the prevailing party shall timely comply with Cal. R. Ct. 3.1312.

1.3. Uncontested Tentatives (Order Language)

In the event that [Party] fails to timely contest this Tentative Ruling, then no hearing shall occur. Instead, the prevailing party is ordered to submit a Proposed Order in MS Word

format in compliance with Cal. R. Ct. 3.1312, recapitulating this Tentative, noting that [Party] failed to contest the Tentative, and [other details, if any]. In the event a hearing does occur, prevailing party shall bring this Proposed Order to the hearing.

1.4. Stipulating to the Authority of the Judge Pro Tem in Los Angeles

In Los Angeles County, the court shall provide notice to parties prior to hearing that a judge pro tem shall hear the matter. L.A.L.R. 2.816(b). Parties may stipulate to the authority of the judge pro tem by failing to object after notice or by signing a written stipulation. *Id*. Rule 2.816(d). The parties may also stipulate to their own, designated, judge pro tem to adjudicate disputes. *Id*. Rule 2.831.

1.5. Stipulating to the Authority of the Judge Pro Tem in San Francisco

In San Francisco County, in the event no party timely contests the judge pro tem's Tentative Ruling, then the "tentative ruling will become the ruling of the court" and all Parties are deemed to have stipulated to the authority of the judge pro tem to hear the motion. Cal. R. Ct. 3.1308(a). Similarly, "[a] party who fails to appear at the hearing is deemed to submit to the tentative ruling" and likewise to the authority of the judge pro tem to hear the motion. L.R.S.F. 8.3(C).

2. INITIAL DISCLOSURES

For actions filed on or after January 1, 2024, parties are required, upon demand, to make initial disclosures, similar

to the disclosures required under Rule 26 of the Federal Rules of Civil Procedure.

2.1. Categories of Initial Disclosures

"Within 60 days of a demand by any party to the action, each party that has appeared in the action, including the party that made the demand, shall provide to the other parties an initial disclosure that includes . . . [the] names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects of that information, . . . [a] copy, or a description by category and location, of all documents, electronically stored information, and tangible things, . . . [and a]ny contractual agreement and any insurance policy under which an insurance company may be liable to satisfy, . . . [or] which a person, as defined in Section 175 of the Evidence Code, may be liable to satisfy." Cal. Civ. Proc. Code § 2016.090(a)(1)(A)-(D).

2.2. Excluded From Initial Disclosures

These initial disclosures need not be made by parties litigating an "unlawful detainer action . . . , [a] small claims . . . action . . . an action or proceeding under the Family Code . . . the Probate Code . . . or an action in which a party has been granted preference pursuant to Section 36." Cal. Civ. Proc. Code § 2016.090(b)(1)-(5). Also, no initial disclosure need be made by a "party in the action who is not represented by counsel." *Id*. § 2016.090(c).

3. GENERAL PRINCIPLES IN PROPOUNDING DISCO

3.1. May Discover Relevant Info

"[A]ny 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." Cal. Civ. Proc. Code § 2017.010.

Notably this standard requires multiple elements, not just "relevance." A party may discover (1) nonprivileged, (2) relevant information and materials if that information/materials is **either**: (3) admissible; **or** (4) reasonably calculated to lead to admissible evidence. *Id*.

Put another way a party may **not discover**: (1) irrelevant information/materials; (2) matters neither admissible nor reasonably calculated to lead to admissible information/materials; (3) privileged matters. *Id*.

3.2. Balancing Interests

Counterbalancing the broad right to discovery are various protections against undue burden.

3.2.1. Balancing Expense and Intrusiveness

"The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Cal. Civ. Proc. Code § 2017.020(a).

3.2.2. The Unduly Burdensome Test

The Court is authorized to restrict discovery upon a determination (1) that the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive" or (2) that 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." Cal. Civ. Proc. Code § 2019.030(a).

3.2.3. Balancing the Burden for Production of Electronic Documents

In the context of the production of electronic information, the Code imposes a balancing test: "The court shall limit the frequency or extent of discovery of electronically stored information," upon a finding that the "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." Cal. Civ. Proc. Code § 2031.310(g).

PRACTICE NOTES RE PROPORTIONALITY ANALYSIS

Conventional wisdom says that while the federal rules limit discovery to that which is "proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1), the California rules allow virtually any and all discovery that may lead to admissible evidence. But the conventional wisdom is wrong. In fact, the state rules and the federal rules are more aligned than most practitioners appreciate.

Notably, when it comes to "electronic information" the Federal Rule's proportionality standard is almost identical to the state standard. *See* Cal. Civ. Proc. Code § 2031.310(g). And in the modern era, what information does not reside on electronic media; what documents do not start-off or end-up as electronic? Almost none.

Thus, as an initial matter, very little document production is authorized under the Discovery Act unless it overcomes a balancing test, weighing burden versus benefit. Certainly, the Court is authorized to limit discovery based on that principle. *See* Cal. Civ. Proc. Code § 2019.030(a). And under the *Calcor* decision that test is further weighed in favor of less discovery when it is sought from non-parties.

3.2.4. Balancing the Burden for Non-Parties

"[W]hen dealing with an entity which is not . . . a party to the litigation, the court should attempt to structure discovery in a manner which is least burdensome to such an entity." *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216, 222 (1997). In that case, the Court "must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the

discovery against the probative value of the material which might be disclosed if the discovery is ordered." *Id*. at 223.

PRACTICE NOTE RE UNDUE BURDEN OBJECTION

When the respondent makes an "undue burden" objection, and later argues on the motion that the costs of electronic document/data production significantly outweighs the benefit, the Master Strategist will offer declarations from the client (attorney authored declarations are usually not enough), showing how these burdens manifest, in labor, in time, and in dollar expense. In the absence of these facts, the court will be inclined to punish the attorney who simply whines and cries about the generalized "burdens" of discovery.

Yes discovery is burdensome. Yes, it consumes time and treasure. The victor in the balancing test is the one who offers the court *facts* as to how this particular discovery demand is not just burdensome but *unduly burdensome*—i.e. excessively and inappropriately challenging, given the expected benefits.

3.3. Propounding Documents-Only Subpoenas

3.3.1. Notice To Consumer Timing

The notice to consumer must be served on the consumer 5 days before issuance to subpoenaed party. Cal. Civ. Proc. Code § 1985.3(b). Electronic service is permissible. *Id*. § 1985.3(b)(2) (referring to Cal. Civ. Proc. Code § 1013); *see* Cal. Civ. Proc. Code § 1013(g) (authorizing electronic service "pursuant to section 1010.6"); Cal. Civ. Proc. Code 1010.6 (authorizing electronic service). Mail notice to consumer adds 5 more days, Cal. Civ. Proc. Code § 1013(a), while e-service notice to consumer adds 2 more days, Cal. Civ. Proc. Code § 1010.6(a)(3)(B).

3.3.2. Documents-Only Subpoena Timing

If seeking documents, the subpoena must allow 20 days minimum to lapse between date of issuance (the date the subpoena was signed), and date of document production or 15 days minimum between service of the documents-only subpoena and production, whichever is longer. Cal. Civ. Proc. Code § 2020.410(c).

3.4. Depo Notice – General Principles

"A party desiring to take the oral deposition of any person shall give notice in writing" of the address and date of the deposition, the name and identifying information of the deponent, a "specification with reasonable particularity of any materials or category of materials . . . to be produced" and other details set out in the Code. Cal. Civ. Proc. Code § 2025.220(a).

4. GENERAL PRINCIPLES IN RESPONDING TO DISCO

4.1. Interrogatory Responses – General Principles

The Discovery Act mandates response to interrogatories in one of the following three ways: either by "an answer containing the information sought," by an "exercise of the party's option to produce writings," or by an "objection to the particular interrogatory." Cal. Civ. Proc. Code § 2030.210(a). Responses are due 30 days after service. Cal. Civ. Proc. Code § 2030.260(a).

When answering interrogatories, the response "shall be as complete and straightforward" as possible. Cal. Civ. Proc. Code § 2030.220(a). "If an interrogatory cannot be

answered completely, it shall be answered to the extent possible." *Id*. § 2030.220(b). And if the respondent lacks "personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." *Id*. § 2030.220(c).

4.2. Contention Interrogatories Are Proper

"[L]egal contention questions" are "clearly discoverable when sought by written interrogatory." *Rifkind v. Superior Ct.*, 22 Cal. App. 4th 1255, 1261 (1994).

4.3. RFPD Responses – General Principles

In response to a request for production of documents and things a responding party "shall state that the production . . . demanded will be allowed either in whole or in part." Cal. Civ. Proc. Code § 2031.220; *see also id*. § 2031.240(a) ("If only part of an item or category of item in a demand . . . is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category.").

In the alternative, a responding party may represent that it cannot "comply with the particular demand." *Id*. § 2031.230. In that case the respondent must make the following trio of representations. First the respondent "shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand." *Id*. Second, the respondent shall "specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced,

or stolen, or has never been, or is no longer in the possession custody, or control of the responding party." *Id*. And finally, the respondent "shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item" sought. *Id*.

Late responses "waives any objection to the demand." Cal. Civ. Proc. Code § 2031.300(a).

4.4. Making Document Production – General Principles

"Any documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond." Cal. Civ. Proc. Code § 2031.280(a). Absent objection or agreed-upon extension "documents shall be produced on the date specified in the demand . . . ." *Id*. § 2031.280(b).

4.5. Expense of Producing Documents on Respondent

"The general rule in both state and federal court is that the responding party bears the expense typically involved in responding to discovery requests, such as the expense of producing documents." *Toshiba Am. Elec. Components v. Superior Ct*., 124 Cal. App. 4th 762, 769 (2004).

4.6. Responding to RFAs – General Principles

In responding to requests for admission ("RFAs") the respondent "shall (1) Admit so much of the matter involved in the request as is true . . . (2) Deny so much of the matter involved in the request as is untrue" or "Specify so much of the matter involved in the request as to the truth of which

the responding party lacks sufficient information or knowledge." Cal. Civ. Proc. Code § 2033.220(b). "If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter." *Id*. § 2033.220(c).

"A party to an action may not necessarily avoid responding to a request for admission on the ground that the request calls for expert opinion and the party does not know the answer." *Bloxham v. Saldinger*, 228 Cal. App. 4th 729, 751 (2014); *see Chodos v. Superior Court for Los Angeles County*, 215 Cal. App. 2d 318, 322–323 (1963). "[S]ince requests for admissions are not limited to matters within personal knowledge of the responding party, that party has a duty to make a reasonable investigation of the facts before answering items which do not fall within his personal knowledge." *Smith v. Circle P Ranch Co.*, 87 Cal. App. 3d 267, 273 (1978); *see Lindgren v. Superior Court*, 237 Cal. App. 2d 743, 746 (1965); *Chodos,* 215 Cal. App. 2d at 323. Competent, code-compliant responses must be made after investigation, even as to a "controversial matter, or one involving complex facts," or one that "calls for an opinion." *Bloxham*, 228 Cal. App. 4th at 752.

PRACTICE NOTE RE CODE COMPLIANCE

Failure to make code compliant responses is an easy way for a respondent to lose a discovery motion. The Discovery Act tells us exactly how to respond to the requests. Here is what the code requires:

Code Compliance for Requests for Admission. When it comes to Requests for Admissions, for example, the responding party must either (1) admit as much of the request as is true; and/or (2) deny so much is untrue and/or (3) specify that the responding party lacks sufficient information to respond. *See* Cal. Civ. Proc. Code § 2033.220(b). If the respondent lacks information, then it must state that it performed a reasonable investigation seeking to obtain the missing information. Asserting ignorance is not enough. A code compliant response states *all of these things*.

Code Compliance for Interrogatories. A similar obligation arises in the context of responding to interrogatories (among other requirements). Unlike depositions where the deponent is allowed to simply plead ignorance, responses to interrogatories must declare that a reasonable and good faith investigation was performed before the respondent may state that it lacks the information requested. Cal. Civ. Proc. Code § 2030.220(b).

PRACTICE NOTE RE CODE COMPLIANCE (CONT'D)

Code Compliance for Requests for Production. A perennial frustration for practitioners everywhere is the sense that the opposition is withholding documents in their possession. Invariably this does happen. The question is: what can be done? For good or bad, discovery judges are neither omniscient nor omnipotent. They cannot force untruthful parties to be truthful. And they cannot make missing, or even hidden documents magically materialize. But courts do have the power to order parties, at least, to make code compliant responses.

In response to requests for production, respondents must (among other things) explain why they cannot produce the sought-after documents, stating that the documents (1) never existed; (2) were destroyed, lost, misplaced, stolen, or (3) never in the respondent's possession. Cal. Civ. Proc. Code § 2031.230. Compelling code compliance may not force the opposition to produce the documents sought, but it does create a basis for impeachment at trial, and provide an explanation to the court as to which side should be held responsible for the vacuum of evidence on a subsequent dispositive motion.

A code compliant response is also a powerful tool for excluding any said missing documents at trial. Surprisingly, the second best thing to getting the documents you want is locking those same documents out of the body of evidence.

4.7. Special Timing for Responses to Discovery in Unlawful Detainer Actions

As a consequence of the summary nature of unlawful detainer actions ("UD actions"), the timing for responding to discovery is shortened.

4.7.1. 5 Days Notice for Deposition in UD Actions

Depositions in UD actions only need a minimum of five-days notice. *See* Cal. Civ. Proc. Code § 2025.270(b) ("[O]ral deposition shall be scheduled for a date at least five days after service of the deposition notice, but not later than five days before trial."). *But see id*. § 2025.270(c) (proscribing longer timeframe when consumer documents sought as part of deposition notice).

4.7.1. 5 Days to Respond to Interrogatories in UD Actions

Responses to interrogatories in UD actions are due in five days. *See* Cal. Civ. Proc. Code § 2030.260(b) ("[T]he party to whom the interrogatories are propounded shall have five days from the date of service to respond.").

4.7.2. 5 Days to Respond to RFPD in UD Actions

Requests for inspection or production of documents, in UD actions, "shall specify a reasonable time for the inspection, copying, testing, or sampling that is at least five days after service of the demand." Cal. Civ. Proc. Code § 2031.030(c)(2).

4.7.3. 5 Days to Respond to RFAs in UD Actions

And responses to requests for admission in UD actions, may be due as quickly as five days from service. *See* Cal. Civ. Proc. Code § 2033.250(b) (indicating "the party to whom the request is directed shall have at least five days from the date of service to respond").

4.8. Objections to a Deposition Notice

4.8.1. Waiver Absent Timely Objection, 3 Days in Advance

"Any party served with a deposition notice that does not comply with Article 2 (commencing with Section 2025.210) waives any error or irregularity unless that party promptly serves a written objection specifying that error or irregularity at least three calendar days prior to the date for which the deposition is schedule . . . ." Cal. Civ. Proc. Code § 2025.410(a).

The parameters of these objections, made three days in advance of the deposition, trace the parameters of the technical requirements for the notice, namely, time, place, and a reasonably specific request for documents. See Cal. Civ. Proc. Code § 2025.220(a).

4.8.2. Some Objections May Be Made at the Deposition Itself

Other objections to production of documents in a deposition notice, not related to the lack of specificity of the requests, however, may be made at the deposition itself: "Where the documents sought are privileged, attorney work product, or not relevant to the subject matter, the deponent may seek a protective order or may simply raise these grounds as an objection at the deposition." Michael Paul Thomas, *California Civil Courtroom Handbook and Desktop Reference* § 21:65 (2023 ed.).

4.8.3. Failure to Object at Depo Waives Objection

Failure to make the objections for privilege at the deposition, waives the objections. *See* Cal. Civ. Proc. Code § 2025.460(a) (explaining that objections for the disclosure of

privileged "information" must be "timely made during the deposition").

4.9. Failure to Object to Written Disco Waives Objection

"A party that fails to serve a timely response to the discovery request waives any objection to the request, including one based on privilege or the protection of attorney work product." *Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 403-04 (2007); *see* Cal. Civ. Proc. Code § 2031.300(a) (waiver of objections to RFPD); Cal. Civ. Proc. Code § 2032.240(a) (waiver of objections to "demand for a physical examination"); Cal. Civ. Proc. Code § 2030.290(a) (waiver of objections to interrogatories); Cal. Civ. Proc. Code § 2033.280(a) (waiver of objections to RFAs).

PRACTICE NOTE RE DISCOVERY OBJECTIONS

The duty to make timely objections to discovery demands is another hard and fast rule. Respondents can produce verifications late, can produce documents late (see discussion, below), and can even make supplemental responses later in time, all without terminal consequences. But failing to make objections on the day the discovery is due *waives those objections and all related privileges*—even the hallowed attorney-client privilege and work product doctrine.

On any subsequent motion, the respondent is stuck with the defenses articulated in her objections. As movant, the Master Strategist will always punish the respondent for seeking to assert defenses not tethered to the original discovery objections. Judges are more than happy to simplify their life by disposing of the respondents' defenses on this basis.

4.10. Signed Objections Required

In the case of parties represented by counsel, only signed objections in response to discovery demands are valid objections: "The attorney for the responding party shall sign any responses that contain an objection." Cal. Civ. Proc. Code § 2030.250(c) (for special interrogatories); *id*. § 2031.250(c) (for RFPDs); *id*. § 2033.240(c) (for RFAs).

4.11. Specificity in Objecting to Disco

"If an objection is based on a claim of privilege, the particular privilege invoked shall be stated." Cal. Civ. Proc. Code § 2031.240. Failure to specifically invoke the applicable privilege, even the attorney-client privilege, in initial objections, waives the privilege. *See, e.g*., *Scottsdale Ins. Co. v. Superior Ct.*, 59 Cal. App. 4th 263, 274 (1997) ("We conclude that failure to include an objection expressly based upon attorney-client privilege in the initial response results in waiver of the attorney-client privilege.").

PRACTICE NOTE RE OBJECTION STRATEGY

In an attempt to avoid waiver, many attorneys will simply assert every conceivable objection to each and every discovery demand whether applicable or not. But generic, "repetitive," and "meaningless" objections are known as "boilerplate objections." *Best Prod., Inc. v. Superior Ct.*, 119 Cal. App. 4th 1181, 1185 (2004). "[U]nmeritorious objection[s] to discovery" is sanctionable. *See* Cal. Civ. Proc. Code § 2023.010(e); *see People ex rel. Lockyer v. Superior Ct.*, 122 Cal. App. 4th 1060, 1072 (2004).

Thus, in objecting to discovery, the Master Strategist will abide by the following guidelines:

1. **More is Better**. The penalties for excessive objections is limited to money sanctions. *Catalina Island Yacht Club v. Superior Ct.*, 242 Cal. App. 4th 1116, 1129 (2015). The penalties for failing to timely assert necessary objections, by comparison—namely, waiver of the objections and the privileges—are total. Sometimes it is difficult to predict in advance which is which. Err on the side of making more objections rather than fewer, and always make objections for privilege when there is even a remote potentiality for their application.
2. **Refine the Objections During Meet-and-Confer**. But waive unnecessary and indefensible objections in the meet and confer.
3. **Seek Sanctions**. As movant, you should seek monetary sanctions against a respondent who makes a multitude of "unmeritorious" objections and then stands on those weak objections in opposition to the motion. Cal. Civ. Proc. Code § 2023.010(e).

4.12. Extensions to Respond to Disco

The Discovery Act contemplates that parties "may agree to extend the date for . . . a response to a set of [discovery] demands" in an "informal . . . writing that specifies the extended date . . . for the service of a response." Cal. Civ. Proc. Code § 2031.270(a)-(b) (for RFPD); *see* Cal. Civ. Proc. Code § 2030.270(a)-(b) (substantially the same for interrogatories); Cal. Civ. Proc. Code § 2033.260(a)-(b) (substantially the same for RFAs).

Extensions of this sort presumptively "preserve . . . the responding party['s] right" to assert all objections. Cal. Civ. Proc. Code § 2031.270(c) (for RFPDs); *see id*. § 2030.270(c) (for interrogatories); id. § 2033.260(c) (for RFAs).

4.13. Privilege Log

Historically, privilege logs were not regularly required. *See Hernandez v. Superior Court*, 112 Cal. App. 4th 285, 292 (2003) ("In fact, the expression, 'privilege log,' does not appear in section 2031 or anywhere else in the Code of Civil Procedure, whether in black letters or any other color."). But the rules have changed: "If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." Cal. Civ. Proc. Code § 2031.240(c)(1).

4.14. Lack of Verification

A lack of verification is "tantamount to no response[] at all." *Appleton v. Superior Court*, 206 Cal. App. 3d 632, 635-36 (1988) ("The responses were provided in this case but they

were not verified. Unsworn responses are tantamount to no responses at all.").

Lack of verification, however, does not waive timely made objections. *See Food 4 Less Supermarkets, Inc. v. Superior Court*, 40 Cal. App. 4th 651, 657–58 (1995) ("The omission of the verification . . . does not result in a waiver of the objections made.").

4.15. Instructions Not to Answer Depo. Questions

The Discovery Act "clearly contemplate[s] that deponents not be prevented by counsel from answering a question unless it pertains to privileged matters or deposing counsel's conduct has reached a stage where suspension is warranted." *Stewart v. Colonial W. Agency, Inc.*, 87 Cal. App. 4th 1006, 1015 (2001).

PRACTICE NOTE RE INSTRUCTIONS NOT TO ANSWER

A common area of abuse occurs when attorneys instruct a witness to not answer a deposition question. Instructions to refuse to answer should occur only in response to questions implicating a privilege or right such as the attorney-client privilege, the spousal/marital privileges, the right to refrain from self-incrimination, and the like. All other objections, say for relevance, for hearsay, and even for "harassment," cannot justify an instruction to the witness to refuse to answer.

If a deposition has truly become unreasonably harassing, the deponent's remedy is not to refuse to answer questions but rather to suspend the deposition, walk out the door, and immediately move for a protective order.

PRACTICE NOTE RE RESPONDING TO REFUSALS TO ANSWER

When faced in oral deposition with improper instructions to the deponent to refuse to answer, the Master Strategist will troubleshoot the issue in the following order:

1. **Clarify That Witness Refuses to Answer.** Create a clear record that the witness is abiding by counsel's instruction to refuse to answer the questions posed. Without this clarification any subsequent motion will be moot.
2. **Educate Counsel.** Allow counsel to save face, perhaps by meeting and conferring outside the client's earshot.. Refrain from sounding didactic or condescending. Counsel may refuse to back down in this instance for many reasons, pride among them, but may be nonetheless deterred from making further improper objections.
3. **Circle Back Later**. In a surprising number of circumstances, the subject matter of a question for which the attorney instructed the witness to refuse to answer, will be less objectionable *later* in the deposition. After five or six hours, as fatigue sets in and the coffee wears off, attorneys may become less vigilant, and witnesses may become more bold, answering questions that that they should not, and answering them faster than counsel can object. In some cases, the more chatty witnesses may even offer up the answer you were looking for, without being directly asked. Try asking the objectionable questions later in the day and see if you can get what you need.

PRACTICE NOTE RE RESPONDING TO REFUSALS TO ANSWER (CONT'D)

4. **Call the Judge**. Explore with your judge at the case management conference, or during some other unrelated hearing, whether she would be available for an on-the-spot, telephonic conference to adjudicate objections during depositions. This is a more common practice performed by magistrate judges in federal court, but a potential solution available from an accommodating judge (or judge pro tem) in state court as well.
5. **Move to Compel**. If all else fails, note on the record that you intend to move to compel a response to your question. Explore the parameters of the issue in an attempt to define the subject area, and related subject areas, that counsel refuses to allow investigation. Be sure to (1) state clearly that the deposition continues to be open pending your motion to compel; and (2) conclude your deposition with a time credit sufficient to allow exploration of the issue on any follow-up deposition.
6. **Informal Discovery Conference**. Attempt to resolve the (hopefully) narrow issue in an "informal discovery conference" which is a low-cost, relatively high-speed alternative to a full-blown discovery motion. *See* Cal. Civ. Proc. Code § 2016.080(a).
7. **Discovery Referee**. When parties find themselves in repeated and intractable discovery disputes, it may make sense for them to agree to appoint and pay for a discovery referee. *See* Cal. Civ. Proc. Code § 638; Cal. R. Ct. 3.901.

4.16. Single Deposition Allowed

"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." Cal. Civ. Proc. Code § 2025.610(a). But "for good cause shown, the court may grant leave to take a subsequent deposition." *Id*. § 2025.610(b).

5. PRE-MOTION PROCEDURES

5.1. Meet-and-Confer Obligation

"The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain an informal resolution of each issue." *Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1435 (1998) (internal quotation marks omitted); *see* Cal. Civ. Proc. Code § 2016.040 ("A meet-and-confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion."); Cal. Civ. Proc. Code § 2033.290(b) (requiring a meet-and-confer declaration in support of motion for further requests for admission).

"This rule is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order . . . lessen[ing] the burden on the court and reduc[ing] the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial

resolution of discovery disputes." *Stewart v. Colonial W. Agency, Inc.*, 87 Cal. App. 4th 1006, 1016 (2001).

PRACTICE NOTE RE MEET AND CONFER STRATEGY

Meet and confer is often the most hotly contested area of the motion. Craft meet-and-confer communications so that they can be later reassembled into a story starring you as the polite problem-solver and the opposing party in the role of hostile problem child. This is not so easy. The opposition will do everything she can to draw you into a mud fight, leaving everyone filthy.

Look at it from the judge's perspective. What will the judge think when she reads these meet-and-confer communications? In order to distinguish yourself from the opposition you have to emerge not simply as representing the superior argument (having the better argument is not enough) but also being squeaky clean. **Master Rule Number One in meet-and-confer is: be squeaky clean**.

5.2. Meet-and-Confer – Meaning

The meet-and-confer obligation "requires that there be a serious effort at negotiation and informal resolution." *Clement v. Alegre*, 177 Cal. App. 4th 1277, 1294 (2009). Moreover, "a reasonable and good faith attempt at informal resolution entails something more than bickering with opposing counsel. Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." *Ellis v. Toshiba Am. Info. Sys., Inc.*, 218 Cal. App. 4th 853, 880 (2013) (internal quotation marks, alterations, and ellipsis omitted); *see Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1439 (1998).

PRACTICE NOTE RE MEET AND CONFER MOTION ARGUMENTS

Master Rule Number Two in meet-and-confer: Give the judge an easy way out. Judges hate complication. They want to make a decision and sign the order. They want an easy way out of the meet-and confer morass. Give it to them.

1. **Did the movant meet the minimal obligations**? Meet and confer obligations are fairly light. Your goal, as movant, is simply to meet the minimum requirements so you can walk through the door and make your motion. Your meet-and-confer letter/e-mail should not be more than a few pages long and only a few paragraphs, if at all possible. Creating a long complex meet-and-confer record simply allows the opposition to use your words against you.
2. **Did the opposition meaningfully respond**? The opposition has an obligation to respond, to offer concessions, or explain why concessions are unreasonable. Again, the Master Strategist understands that no goal is served by bickering with the movant. The likelihood that you will be able to convince the would-be movant of her error is near zero.
3. **Could either side have avoided the motion**? After deciding the motion, the judge will examine whether to sanction the losing side. When evaluating sanctions, most judges will revisit the meet-and-confer record asking themselves whether the motion could have been avoided in the first place. Look at the meet-and-confer dialogue through this lens. Offer your opposition reasonable concessions. Let the other side be petty. Do not join them. Judges will often award sanctions at the termination of a discovery motion as a consequence of the losing party refusing a reasonable concession made during meet-and-confer.

5.3. Meet-and-Confer – Single Letter

"A single letter, followed by a response which refuses concessions, might in some instances be an adequate attempt at informal resolution, especially when a legitimate discovery objective is demonstrated." *Obregon v. Superior Court*, 67 Cal. App. 4th 424, 432 (1998).

5.4. Discovery Response Timing Extended by Written Agreement

Generally speaking, responses to written discovery are due within thirty days—plus any mail/delivery/e-service add-on. *See* Cal. Civ. Proc. Code § 2030.260(a) (responses to interrogatories due in 30 days); *id*. § 2031.260(a) (responses to RFPD same); *id*. § 2033.250(a) (responses to RFAs same). This timetable may be extended by mutual agreement of the parties, "in a writing" that "specifies the extended date for service of a response." Cal. Civ. Proc. Code § 2030.270(b) (extending interrogatory responses); *id*. § 2031.270(b) (extending RFPD responses); *id*. § 2033.260(b) (extending RFA responses).

6. MOTION PROCEDURES ON THE PAPERS

Broadly, there are three kinds of discovery motions.

First there is a motion to compel discovery when the responding party **fails to respond at all.**

Second there is a motion to compel **further discovery**, when the responding party's responses are inadequate or objections unmeritorious.

Third, in the context of RFAs, there is a special **"deemed admitted"** motion that seeks to have non-responded RFAs deemed admitted by way of court order.

Each of these three categories have different procedures for meet and confer, for the movants' separate statements, and ways for the responding party to remedy.

6.1. Moving to Compel a Failure to Respond to Discovery AT ALL

Sometimes the opposition fails to serve a response to discovery **at all**. Service of discovery responses without verifications is, technically, no response.

6.1.1. Moving to Compel a Failure to Respond AT ALL to Interrogatory Demands

"If a party to whom interrogatories are directed fails to serve a timely response . . .[t]he party propounding the interrogatories may move for an order compelling response to the interrogatories." Cal. Civ. Proc. Code § 2030.290(b). In that case, the "party to whom the interrogatories are directed waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product." *Id*. § 2030.290(a).

All that need be shown in the moving papers is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. *See Leach v. Superior Ct*., 111 Cal. App. 3d 902, 906 (1980). No meet and confer declaration and no separate statement is required. *See Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 404 (2007) ("Unlike a

motion to compel further responses, a motion to compel responses is not subject to a 45–day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a 'meet-and-confer' requirement."); Cal. R. Ct. Rule 3.1345 ("A separate statement is not required . . . [w]hen no response has been provided to the request for discovery . . . .").

6.1.1. Moving to Compel a Failure to Respond AT ALL to RFPD

"If a party to whom a demand for inspection, copying, testing, or sampling is directed fails to serve a timely response to it . . . [t]he party making the demand may move for an order compelling response to the demand." Cal. Civ. Proc. Code § 2031.300(b).

Upon failure to timely respond to RFPDs, the "party to whom the demand for inspection, copying, testing, or sampling is directed waives any objection to the demand, including one based on privilege or on the protection for work product." *Id*. § 2031.300(a). No meet and confer and no separate statement is required. *See Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 404 (2007) ("Unlike a motion to compel further responses, [in] a motion to compel responses . . . the propounding party does not have to demonstrate . . . that it satisfied a 'meet-and-confer' requirement."); Cal. R. Ct. Rule 3.1345(b) ("A separate statement is not required . . . [w]hen no response has been provided to the request for discovery…").

6.1.2. Moving to Compel for Failure to Respond AT ALL to RFAs

"The law governing the consequences for failing to respond to requests for admission may be the most unforgiving in civil procedure." *Demyer v. Costa Mesa Mobile Home Ests*., 36 Cal. App. 4th 393, 394–95 (1995), *disapproved on other grounds by Wilcox v. Birtwhistle*, 21 Cal. 4th 973 (1999). "If a party to whom requests for admission are directed fails to serve a timely response" then party serving the RFAs "may move for an order that . . . the requests be deemed admitted." Cal. Civ. Proc. Code § 2033.280(b). In that case, then the "party to whom the requests for admission are directed waives any objection to the requests, including one based on privilege or on the protection for work product." *Id*. § 2033.280(a).

No meet and confer and no separate statement is required. *See Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 404 (2007) ("Unlike a motion to compel further responses . . . the propounding party does not have to demonstrate . . . that it satisfied a 'meet-and-confer' requirement."); Cal. R. Ct. Rule 3.1345 ("A separate statement is not required . . . [w]hen no response has been provided to the request for discovery . . . .").

6.2. Moving to Compel FURTHER Discovery

Sometimes the opposition serves a response to discovery but that response is incomplete or not compliant with the Code. Out of an abundance of caution it is often prudent to move both to **compel discovery** (discussed above) and to compel **further discovery** in order to give the court jurisdiction to compel complete code-compliant responses pertaining to all possible initial-conditions.

6.2.1. Moving to Compel FURTHER Responses to Interrogatories

Upon "receipt of a response to interrogatories, the propounding party may move for an order compelling a further response" if: "(1) An answer to a particular interrogatory is evasive or incomplete" or "(2) An exercise of the option to produce documents under Section 2030.230 is unwarranted or the required specification of those documents is inadequate" or "(3) An objection to an interrogatory is without merit or too general." Cal. Civ. Proc. Code § 2030.300(b).

"As a general matter, the statutory scheme" for motions to compel further responses to interrogatories, "imposes no obligation on a party propounding interrogatories to establish good cause or prove up the merits of any underlying claims." *Williams v. Superior Ct.*, 3 Cal. 5th 531, 550 (2017).

The motion to compel further responses to interrogatories shall submit "a meet-and-confer declaration under Section 2016.040." Cal. Civ. Proc. Code § 2030.300(b)(1).

6.2.2. Moving to Compel FURTHER Production of Documents

Upon "receipt of a response to a demand for" production of documents or things, "the demanding party may move for an order compelling further response" if "(1) A statement of compliance with the demand is incomplete" or "A representation of inability to comply is inadequate, incomplete, or evasive" or "An objection in the response is without merit or too general." Cal. Civ. Proc. Code § 2031.310(a).

"Good cause" for production of documents is established where it is shown that the request is made in good faith and that the documents sought are relevant to the subject

matter and material to the issues in the litigation." *Associated Brewers Distributing Co. v. Superior Court of Los Angeles* County, 65 Cal. 2d 583, 588 (1967). If good cause is shown, the burden shifts to the responding party to justify any objections made to document production. *Kirkland v. Superior* Court, 95 Cal. App. 4th 92, 98 (2002).

The motion to compel further response to request for production, "shall set forth specific facts showing good cause justifying the discovery sought by the demand." Cal. Civ. Proc. Code § 2031.310(b)(1). The motion shall also submit a "meet-and-confer declaration under Section 2016.040." Cal. Civ. Proc. Code § 2031.310(b)(2).

6.3. Moving to Compel FURTHER RFAs

Upon "receipt of a response to requests for admissions, the party requesting admissions may move for an order compelling a further response" if "(1) An answer to a particular request is evasive or incomplete" or "(2) An objection to a particular request is without merit or too general." Cal. Civ. Proc. Code § 2033.290(a).

The motion shall also submit "a meet and confer declaration under Section 2016.040." Cal. Civ. Proc. Code § 2033.290(b).

6.4. Moving to Compel Initial Disclosures

"A party's obligations" to make initial disclosures under Cal. Civ. Proc. Code § 2016.090, "may be enforced by a court on its own motion or the motion of a party to compel disclosure." Cal. Civ. Proc. Code § 2016.090(a)(4).

6.5. Failure to File a Separate Statement

"[A]ny motion involving the content of a discovery request or the responses to such a request must be accompanied by

a separate statement." Cal. R. Ct. 3.1345(a). Movant's failure to file a Separate Statement gives the Court authority to deny the motion on that basis or to grant the motion notwithstanding this failure. *See* Cal. R. Ct. Rule 3.1345(a); *see St. Mary v. Superior Ct.*, 223 Cal. App. 4th 762, 778 (2014) (denying motion due to failure to file "the requisite separate statement" stating the discovery request, the response, "and legal reasons why the response is inadequate"); *see also Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 409 n.14 (2007) (holding the "court [has] discretion to compel further answers notwithstanding the absence of a separate statement").

PRACTICE NOTE RE SEPARATE STATEMENT

Judges either love or hate separate statements. Some judges claim that the separate statement is the very first document they review, and the principal one upon which they rely. But an increasing number of judges seem to largely ignore separate statements. Who can blame them? The separate statement can easily run on for many hundreds of pages, often repeating, verbatim, the same objections and arguments found in the memorandum of points and authorities.

The separate statement seems to be a relic of a time when parties took the Rule of 35 seriously (see below) and motions typically involved perhaps, *at most*, a dozen or so discovery demands. Now that motions can often implicate hundreds of requests, the separate statement has mutated from a helpful reference source into an impenetrable tome (or tomb—the place where arguments go to die).

Nonetheless, in the absence of local rule or order of the court to the contrary, *see* Cal. R. Ct. 3.1345(b)(2), the cautious movant will file and serve a complete separate statement as required by the Rules of Court. *See id*. 3.1345(c). Similarly, the cautious respondent will also submit a counter-separate statement. Perhaps these documents are never read. But the stakes are often too high to risk otherwise.

6.6. Sometimes No Separate Statement Is Required

"A separate statement is not required" however when (1) "no response has been provided to the request for discovery; or (2) When a court has allowed the moving party to submit—in place of a separate statement—a concise outline of the discovery request and each response in dispute." Cal. R. Ct. 3.1345(b).

6.7. Party Fails to Oppose Motion (Order Language)

Using contact information available, [Prevailing Party] shall notify [Party] of this tentative and of the date, time, and location of the instant hearing. At hearing (if any) [Prevailing Party] shall submit a proposed order setting out the relief it seeks, describing efforts made to notify [other Party] of this hearing, and integrating the contents of this tentative ruling. In the absence of a hearing, [Prevailing Party] shall timely comply with Cal. R. Ct. 3.1312, submitting a proposed order in the form stated above.

6.8. Briefing Does Not State a Clear Remedy (Order Language)

The parties are ordered to meet-and-confer in advance of the hearing. The parties are ordered to appear at hearing and report on the meet-and-confer efforts. Each party shall appear at hearing with a proposed order or in the alternative to stipulate to a single proposed order.

6.9. Failure to Sign Papers

Although failing to sign papers in support of a discovery motion does not, alone, authorize the Court to strike the papers, *see* Cal. Civ. Proc. Code § 128.7(a) & (g), failing to sign moving papers is disfavored. Failing to personally sign a declaration in compliance with the Code invalidates the declaration, making its contents inadmissible. *See* Cal. Civ. Proc. Code § 2015.5; *Kulshrestha v. First Union Commercial Corp.*, 33 Cal. 4th 601, 606 (2004) (describing a "'declaration' as a writing that is signed, dated, and certified as true under penalty of perjury").

6.10. Failure to Attach Documents Authorizes Dismissal of the Motion

"Serving a notice of motion and motion to compel . . . without the supporting papers identified therein render[s] the motion untimely" permitting the court to dismiss the motion, at its discretion, with or without prejudice. *Weinstein v. Blumberg*, 25 Cal. App. 5th 316, 321 (2018).

6.11. Failure to Cite to Authority Waives the Argument

"Further, it is established that [a] . . . brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." *Mansell v. Bd. of Admin.*, 30 Cal. App. 4th 539, 545-46 (1994) (internal quotation marks omitted).

6.12. Submit a Meet-and-Confer Declaration for MTC FURTHER Responses

The Court may not grant certain motions to compel in the absence of a meet-and-confer declaration. *See* Cal. Civ. Proc. Code § 2016.040 ("A meet-and-confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion."). The meet-and-confer declaration is required in support of a motion for *further* requests for admission, Cal. Civ. Proc. Code § 2033.290(b), *further* responses to interrogatories, Cal. Civ. Proc. Code § 2030.300(b)(1), and *further* responses to requests for production, Cal. Civ. Proc. Code § 2031.310(b)(2).

6.13. No Need to Submit Meet and Confer Declaration When No Response to Disco Was Made AT ALL

But when a party fails to respond to discovery demands at all, then no meet-and-confer and no meet-and-confer declaration is required. *See Leach v. Superior Ct.*, 111 Cal. App. 3d 902, 906 (1980); *see Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 404 (2007) ("Unlike a motion to compel further responses, a motion to compel responses is not subject to a 45–day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a 'meet-and-confer' requirement.").

PRACTICE NOTE RE WHAT NOT TO DO IN MEET AND CONFER

1. **Do not try to convince the opposition that you are right and they are wrong**. In its Platonic form, the meet-and-confer process is supposed to bring reasonable minds together, obviating motion practice. But it rarely works like that. For good or for bad, many lawyers believe they were hired to argue. But if you are not careful, you may end up creating a record featuring you as the vexatious advocate. Decline to be so portrayed.
2. **Do not use emotional language.** Judges understand that the bad actor in a meet-and-confer dialogue is often the one arguing, shaming, blaming, punishing, and name-calling. It may feel good to use emotionally-laden language. But don't do it. It will not convince the opposition they are wrong and it will not convince the Judge you are right. Emotional language is sometimes helpful in front of a jury. Less so before a good law and motion judge.
3. **Do not seek to use meet-and-confer conferences as an opportunity to convey toughness.** Consider this: if you lose a discovery motion and your client is ordered to pay sanctions due to your obstreperous meet-and-confer e-mails, this will not telegraph "toughness" to the other side. It will telegraph that you lack emotional control. Instead, develop a strategy to *win* the motion. And you win by producing to the Judge a meet-and-confer record wherein you acted courteously while the opposition did not. Be squeaky clean. Let the bad lawyers be bad.

7. FORMATTING PAPERS

Many clerks and judges care more than you might imagine about the formatting of your notices and briefings. Proper formatting might not win a motion. But improper formatting is annoying and hard to read. Worse, it signals to the decision maker, the research attorney, the law clerk, or the judge, that the author is not especially careful with her work product. Non-compliant formatting may erode an advocate's credibility.

For a full discussion of formatting for papers filed in the superior courts, see the California Rules of Court Rules 2.100 et seq. and 3.1110 et seq. A few of the more important rules are discussed here.

7.1. Caption Page Formatting

Caption pages should include the attorney's identifying information in the upper left-hand corner. Cal. R. Ct. 2.111(1).

The title of the court should be located on or about line 8 of the caption page. *Id*. 2.1111(3).

The date, time, name of the hearing officer, department, date the action was originally filed, and trial date should be located below the case number and the title of the paper. Cal. R. Ct. 3.1110(b).

Although not required, it may be helpful for the court to note the date of any appellate reversals, remands, and remittiturs on the caption page.

7.2. Identification as a "DISCOVERY MOTION"

Many jurisdictions require that discovery motions be identified with the words "DISCOVERY" or "DISCOVERY

MOTION" in the caption. *See, e.g*., S.F.L.R. 8.10(A)(4). Whether your particular jurisdiction requires this or not, it is a good habit to simply include this appellation as a matter of course and thereby avoid accidentally omitting it on those occasions when it is required.

7.3. Table of Contents and Authorities

"A memorandum that exceeds 10 pages must include a table of contents and a table of authorities." Cal. R. Ct. 3.1113(f).

PRACTICE NOTE RE TABLES' EFFECT ON PAGE LIMITS

Including a table of contents ("TOA") and authorities ("TOA"), causes the page numbering to restart at "1" beginning on the first text page of your briefing.

Without the TOA/TOC the **caption page** would be numbered as page "1" causing the first text page of your briefing to begin at "2" or sometimes "3." Under the applicable page limits, your brief needs to be one to two pages shorter when TOA/TOC is omitted.

7.4. Combining Motion Papers WITHIN a Motion

Combining motion papers together is easier for clerks to handle and more convenient for judges to read. The modern rules permit all motion papers **within the same motion** to be "filed as separate documents or combined in one or more documents if the party filing a combined pleading specifies these items separately in the caption of the combined pleading." Cal. R. Ct. 3.1112.

At minimum the notice and the memorandum of points and authorities should be combined together as a single document. *See* Cal. R. Ct. 3.1113(j) ("To the extent

practicable, all supporting memorandums and declarations must be attached to the notice of motion.").

Although it is technically allowed, it will often not be "practical," for a declaration, let alone multiple declarations, each with voluminous exhibits, to be combined with the other motion papers. Declarations with their exhibits should usually be filed separately. *Id*.

PRACTICE NOTE RE COMBINING MOTION PAPERS BETWEEN MOTIONS

Although there is no rule on this, it may be easier for the practitioner to draft and more convenient for the court to review a single declaration pertaining to multiple separate but interrelated discovery motions filed and served on the same day. The caption page should indicate that it is a "COMBINED" declaration pertaining to multiple discovery motions. Such as:

COMBINED DECLARATION OF DOUGLAS ROBBINS IN SUPPORT OF:

PLAINTIFFS' MOTION TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES AND FORM INTERROGATORIES;

AND

PLAINTIFFS' MOTION TO COMPEL FURTHER RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

To be on the safe side, separate (albeit identical) copies of an omnibus declaration of this sort, should be submitted to the clerk as part of **each** individuated e-filing. But the omnibus declaration likely only needs to be served on the opposition and courtesy-copied to the court once.

8. RULES OF EVIDENCE FOR MOTION PRACTICE

8.1. Declarations Are Not Hearsay

Statements located in a declaration submitted in support of a motion are not hearsay for purposes of that motion. *See* Cal. Civ. Proc. Code § 2009; *McDonald v. Superior Court*, 22 Cal. App. 4th 364, 370 (1994) ("However, section 2009 specifically provides for the use of affidavits in connection with motions.").

8.2. Declarations May Not be Based on Information and Belief

Competent declarations shall assert facts that the declarant has a basis to know. Allegations "based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion." *Lopez v. Univ. Partners*, 54 Cal. App. 4th 1117, 1124 (1997). Conclusory allegations in declaration are likewise improper and may be disregarded.

8.3. Denials to RFAs Are Not Admissible Evidence

"[D]enials of RFA's are not admissible evidence in an ordinary case, i.e., a case where a party's litigation conduct is not directly in issue." *Gonsalves v. Li*, 232 Cal. App. 4th 1406, 1417 (2015).

9. MOTION TIMING

9.1. Forty-Five Day Rule

In order to compel further responses to discovery, the movant must notice the respective motions "within 45 days of the service of the verified response . . . or on or before

any specific later date to which the propounding party and the responding party have agreed in writing." Cal. Civ. Proc. Code § 2030.300(c) (interrogatories); *see id*. § 2031.310(c) (demand for inspection of documents); *id*. § 2033.290(c) (requests for admission). Failure to timely notice said motions results in waiver. *Id.* §§ 2030.300(c), 2031.310(c), 2033.290(c); *see Sexton v. Superior Court*, 58 Cal. App. 4th 1403, 1410 (1997) (holding waiver this context may be "*quasi-jurisdictional*" rendering "the court without authority to rule on motions to compel other than to deny them"). *But see Sinaiko Healthcare Consulting, Inc. v. Pac. Healthcare Consultants*, 148 Cal. App. 4th 390, 404 (2007) ("Unlike a motion to compel further responses, a motion to compel responses is not subject to a 45–day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a 'meet-and-confer' requirement.").

9.2. Unverified Responses Toll the 45-Day Clock

"[T]he language is clear that the clock on a motion to compel begins to run once verified responses or supplemental verified responses are served. . . . Thus, if responses are not verified, the clock cannot begin to run." *Golf & Tennis Pro Shop, Inc. v. Superior Ct*., 84 Cal. App. 5th 127, 135 (2022) (internal quotation marks omitted).

PRACTICE NOTE RE THE FORTY-FIVE DAY RULE

The Forty-Five Day Rule can be punishing. You have forty-five days from service of a verified discovery response to file your motion to compel (sixty-days in the case of document demands attached to deposition notices and subpoenas). If you miss the deadline, your motion is over before it even begins. Most judges consider this a jurisdictional issue, and cannot grant reprieves based on excuses, good, bad, or otherwise. Parties can stipulate to extensions beyond forty-five days but the extension must be in writing.

From the **perspective of the respondent**, you want the forty-five days to run as soon as possible. But the forty-five day clock can be *tolled*, i.e. stopped, if you are not careful. That is why the Master Strategist will abide by the following rules when serving **responses to discovery**:

1. **Serve Verifications Immediately**. Until verifications to your discovery responses have been served, the forty-five day clock is frozen. Get those verifications out the door.

2. **Produce Documents Immediately**. Some attorneys have gotten into the bad habit of responding to request for production first and then leisurely producing the actual documents at some point in the future. Bad idea. Not only is this a violation of the code, *see* Cal. Civ. Proc. Code § 2031.280(b), the forty-five day clock does not tick until you have produced the documents you promised to produce.

3. **Do Not Promise Additional Documents**. Sometimes attorneys produce some documents and promise to look for and produce *additional* documents later. Another bad idea. Promising the opposition that more documents are on-the-way stops the forty-five day clock in the interim.

9.3. May Not Circumvent 45 Day Rule By Re-Issuing Disco

After having failed to move within the time limit, a party may not simply re-propound the same or substantially similar discovery, resetting the clock and thereby effectively circumventing the 45-day limit. *See Prof'l Career Colleges, Magna Inst., Inc. v. Superior Court*, 207 Cal. App. 3d 490, 494 (1989) ("[I]t would be an absurdity to say that a party who fails to meet the time limits of section 2030 may avoid the consequences of his delay and lack of diligence by propounding the same question again."). *But see Carter v. Superior Court*, 218 Cal. App. 3d 994, 997 (1990) (distinguishing *Professional Career Colleges Magna Institute, Inc* by noting that even if the time table for bringing a MTC RFPD, the same documents may still be acquired by propounding a different kind of discovery, such as document production ancillary to a deposition notice or subpoena).

9.4. EXCEPTION: No Time Limit for Failure to Produce Documents as Promised

If a responding party agrees to comply with a demand for production and/or inspection of documents, *see* Cal. Civ. Proc. Code § 2031.010(b), but then fails to produce documents or permit inspection, compliance may be compelled on a motion, Cal. Civ. Proc. Code § 2031.320(a). There is no time limit on when this motion can be filed. Nor is there a meet-and-confer requirement. Under these circumstances, even the service of verified discovery responses is insufficient to trigger the running of the forty-five-day clock.

9.5. Opposition Must Be Filed 9 Court Days Prior

Papers opposing a motion must be served and filed at least nine court days before the hearing unless the court permits a longer time. Cal. Civ. Proc. Code § 1005(b); *see* Cal. R. Ct. 3.1300(a); *see also* Cal. R. Ct. 3.1300(e) (explaining that absent electronic filing, the latest a paper may be filed is at the close of business of the clerk's office on the day the paper is due); Cal. R. Ct. 2.253(b)(7). For these reasons the court may "in its discretion, refuse[] to consider a late filed paper." Cal. R. Ct. § 3.1300(d).

But in light "of the strong policy of the law favoring the disposition of cases on the merits" the Court may, in its discretion, consider late-filed opposition even in the absence of a section 473 motion. *Juarez v. Wash Depot Holdings, Inc.*, 24 Cal. App. 5th 1197, 1202 (2018) (holding the "trial court did not act unreasonably by considering" a two day late opposition because the movant failed to "establish prejudice other than perhaps the inconvenience of working on the weekend"); *see Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 613 (2019) (holding "trial courts are authorized to consider late-filed opposition papers for good cause if there is no undue prejudice to the moving party").

9.6. Sixteen Court-Days to Notice the Motion

"Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing." Cal. Civ. Proc. Code § 1005(b).

9.7. Discovery Cutoff 30 Days Before Trial

Absent written agreement of the parties, *see* Cal. Civ. Proc. Code § 2024.060, and absent order of the court, *id*. § 2024.050, lay "discovery proceedings" shall be "complete . . . on or before the 30th day . . . before the date initially set for the trial of the action," *id*. § 2024.020(a). Moreover, unless otherwise ordered, "a continuance or postponement of the trial date does not operate to reopen discovery proceedings." *Id*. § 2024.020(b).

9.8. Discovery Motion Cutoff 15 Days Before Trial

Absent written agreement of the parties, *see* Cal. Civ. Proc. Code § 2024.060, and absent order of the court, *id*. § 2024.050, "motions concerning [lay] discovery" may be heard no later than "the 15th day, before the date initially set for the trial of the action," *id*. § 2024.020(a).

10. MOTION SERVICE

10.1. Methods of E-Service

E-service may be accomplished by way of e-mailing documents directly, or by way of e-mailing a hyperlink which triggers or leads to download of the document. *See* Cal. R. Ct. 2.250(b)(2)-(4); Cal. Civ. Proc. Code § 1010.6(a)(1)(B)-(C).

10.2. Consensual E-Service

"[E]lectronic service of the document is authorized if a party or other person has expressly consented to receive electronic service in that specific action [or] the court has ordered electronic service on a represented party or other represented person . . . . Express consent to electronic

service may be accomplished either by (i) serving a notice on all the parties and filing the notice with the court, or (ii) manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service." Cal. Civ. Proc. Code § 1010.6(a)(2)(A)(ii)

10.3. Mandatory E-Service

Generally, all represented parties must accept e-service whether they want to or not.

10.3.1. Definition of E-Service

"'Electronic service' means service of a document, on a person, by either electronic transmission or electronic notification. Electronic service may be performed directly by a person, including a party, by a person's agent, including the person's attorney, or through an electronic filing service provider, and by a court." Cal. Civ. Proc. Code § 1010.6(a)(1)(A); Cal. R. Ct. Rule 2.250(b)(2) ("'Electronic service' has the same meaning as defined in Code of Civil Procedure section 1010.6.").

"'Electronic transmission' means the transmission of a document by electronic means to the electronic service address at or through which a person receives electronic service." *Id*. § 1010.6(a)(1)(B).

10.3.2. Mandatory Acceptance of E-Service

A party represented by counsel must accept e-service. Cal. Civ. Proc. Code § 1010.6(b)(2) (indicating a "person represented by counsel, who has appeared in an action or proceeding, shall accept electronic service"); *see id*. §

1010.6(b)(3) ("Before first serving a represented person electronically, the person effecting service shall confirm the appropriate electronic service address for the counsel being served.").

10.3.3. Mandatory E-Service By Way of Court Order

"The court may order electronic service on a person represented by counsel who has appeared in an action or proceeding." Cal. Civ. Proc. Code § 1010.6(b)(1).

10.3.4. Compelling Others to Serve E-Process

While these rules mandate that represented parties must **accept** e-service, they do not necessarily require a party to **serve** e-process on others. But there is a way to compel this sort of service too:

> A person represented by counsel shall, upon the request of any person who has appeared in an action or proceeding and who provides an electronic service address, electronically serve the requesting person with any notice or document that may be served by mail, express mail, overnight delivery, or facsimile transmission.

Cal. Civ. Proc. Code § 1010.6(b)(4).

10.3.5. Parties In Pro Per Are Not Required to Accept E-Service

Parties in pro per are not required to accept e-service. Rather they may, if they choose, consent to e-service. *See* Cal. Civ. Proc. Code § 1010.6(c)(2)-(3). They may also withdraw consent. *Id*. § 1010.6(c)(4). A pro se party may consent to accepting e-service by signing, serving, and filing Judicial Council Form EFS-005-CV.

10.4. E-Service, Mail Service, and Overnight Delivery Extends Deadlines to Respond

Unless served personally, a paper or notice creating a deadline under law shall be extended by a certain amount of time depending upon the method that the paper or notice was served.

10.4.1. Two Additional Days for E-Service

With a few exceptions, service of papers via e-service extends "any response . . . by two court days." Cal. Civ. Proc. Code § 1010.6(a)(3)(B).

10.4.2. Two Additional Days for Overnight Delivery

"Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document served by Express Mail or other method of delivery providing for overnight delivery shall be extended by two court days." Cal. Civ. Proc. Code § 1013(c).

10.4.3. Five Days for Mail Service

"Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of

mailing or the place of address is outside the United States." Cal. Civ. Proc. Code § 1013(a).

PRACTICE NOTE RE E-SERVICE

The more significant consequence of e-service, mandatory or otherwise, is that it affects motion timing.

Service via regular mail usually pushes out most events by five days. But discovery and other papers served via electronic delivery cuts the buffer down to two days. The Master Strategist will always demand e-service by way of Cal. Civ. Proc. Code § 1010.6(b)(4), in order to minimize the opposition's time to serve documents.

10.5. Service of Courtesy Copies In San Francisco Superior Court

"Courtesy copies are required for any filed document requiring court review, action, or signature." L.R.S.F. 2.7(B); *see* S.F. Super. Ct., *Law & Motion and Discovery* (2026), https://sfsuperiorcourt.org/divisions/civil/law-motion. "For papers filed by E- filing, all courtesy copies must include the relevant Transaction Receipt." L.R.S.F. 2.7(B)(4).

10.6. Continuance for Failure to Serve Courtesy Copies (Order Language)

This motion is continued to [new date] to give [party] the opportunity to comply with Local Rule 2.7(B). [party] must deliver courtesy copies of the [moving/opposition/reply] papers to Judge Pro Tem [name and land address of JPT],

with a cover letter stating the new hearing date, no later than [current hearing date] at 4:00 pm or the motion will be [granted/denied]. Any exhibit must be separated by an exhibit tab per California Rules of Court 3.1110(f). The Court has courtesy copies of the [moving/opposition/reply] papers.

10.7. Service On One Attorney Is Sufficient

Service is only required on a single attorney who represents a party, not on the dozens or, potentially, hundreds of attorneys that might represent that same party. *See Adaimy v. Ruhl*, 160 Cal. App. 4th 583, 588 (2008) (holding no authority exists "supporting the proposition that service of notice is not effective if made on [only] one of multiple attorneys representing a party").

11. WHERE TO BRING THE MOTION

Much of the following discussion pertains to filing a discovery motion in San Francisco County. Other jurisdictions may or may not have similar rules. Consult your jurisdiction's latest local rules and website guidance for instruction on where to file your discovery motion.

11.1. Unless Assigned to a Judge for All Purposes, Discovery is Usually Heard in Law and Motion

Some jurisdictions regularly assign a judge to hear a matter for all purposes. But most California State courts use a master calendar system, hearing discovery motions in a centralized law and motion department.

11.1.1. SF Local Rules: Law and Motion – Civil

In San Francisco, for matters not assigned to a single judge, discovery motions are heard in Law and Motion, currently Departments 301 for odd numbered cases and 302 for even numbered cases. *See Law & Motion and Discovery*, SUPER. CT. CAL, COUNTY OF S.F. (2026), https://sf.courts.ca.gov/divisions/civil-division/law-motion-and-discovery.

11.1.2. SF Local Rules: Law and Motion – Real Property Court

In San Francisco, real property matters usually heard in Real Property Court, Department 501, refer any and all discovery motions to Departments 301 and 302. *See Real Property Court Information*, SUPER. CT. CAL., COUNTY OF S.F. (2026), https://sf.courts.ca.gov/divisions/civil-division/real-property-court. "If the matter is not resolved in the Discovery Department[s]" 301 or 302, then "the hearing will be re-set for Department 501 per Local Rule 10(B)." *Id.*; *see* L.R.S.F. 8.0 & 8.10(A)(1).

11.2. Scheduling the Discovery Motion

Depending on the jurisdiction, discovery motions are either self-scheduled or require permission from the department

11.2.1. SF Local Rules: Self-Calendared Motions

In San Francisco discovery motions are self-calendared—no need to contact the clerk for a reservation. Simply meet and confer with the opposition for a mutually agreeable date. *See Law & Motion and Discovery*, Super. Ct. Cal., County of S.F. (2026), https://sf.courts.ca.gov/divisions/civil-division/law-motion-and-discovery. Then schedule the

hearing in compliance with the Code. *See* Cal. Civ. Proc. Code §§ 1005, 1167.4, 1170.

11.2.2. SF Local Rules: Calendar in Depts. 301 or 302

In San Francisco, schedule the discovery hearing for 9 a.m. either in Departments 301 for odd case numbers, Department 302 for even case number, or the Real Property Court. *See* L.R.S.F. 8.10(A)(2); *Law & Motion and Discovery*, Super. Ct. Cal., County of S.F. (2026), https://sf.courts.ca.gov/divisions/civil-division/law-motion-and-discovery.

11.3. Tentative Rulings

The superior court is not required to issue tentative rulings, but most do. Virtually all jurisdictions now issue **online** tentative rulings the day before the hearing. The courts also offer telephonic tentative rulings as a legacy-nod to a bygone era. *See* Cal. R. Ct. 3.1308(a) (no longer requiring telephonic tentative notification as long as Local Rules designate an alternative method).

Practitioners should prefer online written tentatives to its telephonic counterpart. Telephonic tentative rulings are hard to understand and often far too long to be timely and accurately ingested.

11.3.1. Contesting a Tentative Ruling

Absent local rule to the contrary, a party seeking to contest the tentative ruling must do so "by 4:00 p.m. on the court day before the hearing" notifying the court and "all other parties" of an "intention to appear" at the hearing and the nature of the issues challenged. *See* Cal. R. Ct. 3.1308(a)(1). Local rules sometimes permit notice of this sort to occur via

e-mail. But absent local rules, a standing rule, or order from the bench, the Rules of Court require that, "A party must notify all other parties by telephone or in person" in order to effectively challenge the tentative, and reserve that party's right to make arguments at the next-day's hearing. *Id.*

11.3.2. SF Local Rules: Obtaining a Tentative Ruling

In San Francisco, tentative rulings are usually available by 3 p.m. and may be obtained by calling 415-551-4000 or by way of the Court's website. See L.R.S.F. 8.3(B), (F); *see also Law & Motion and Discovery*, Super. Ct. Cal., County of S.F. (2026), https://sf.courts.ca.gov/divisions/civil-division/law-motion-and-discovery.

11.3.3. SF Local Rules: Contesting the Tentative

In San Francisco, a party may contest the tentative ruling by giving "notice to opposing parties and the court promptly, but no later than 4:00 p.m. the day before the hearing." L.R.S.F. 8.3(D). "Notice of contesting a tentative ruling must be provided by sending an email to the court to contestdept302tr@sftc.org with a copy to all other parties stating, without argument, the portion(s) of the tentative ruling that the party contests." *Id*.

11.3.4. SF Local Rules: Preparing an Order

In San Francisco, whether the tentative is contested or not, the "prevailing party on a tentative ruling is required to prepare a proposed order repeating verbatim the substantive portion of the tentative ruling and must bring the proposed order to the hearing" or, if appearing

remotely, via e-mail to the clerk at contestdept302tr@ sftc.org. L.R.S.F. 8.3(G).

11.4. Discovery Hearing

The vast majority of law and motion departments now hold their hearings remotely, usually via ZOOM, Microsoft Teams, or CourtCall. In some departments, personal appearances are not even possible.

11.4.1. SF Local Rules: Remote Hearings

In San Francisco, discovery hearings for odd case numbers are held in Department 301 and for even case numbers in Department 302. *Law & Motion and Discovery*, Super. Ct. Cal., County of S.F. (2026), https://sf.courts.ca.gov/ divisions/civil-division/law-motion-and-discovery. All hearings are conducted remotely at 9 a.m. ZOOM links, meeting identification, passcodes, and dial-in numbers for the appropriate departments are located online. *Id*.

11.4.2. SF Local Rules: In Person Hearings Allowed

In San Francisco, in-person appearances are still permitted. *Id*.

12. MOTION IRREGULARITIES

"It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. This rule applies even when no notice was given at all." *Carlton v. Quint*, 77 Cal. App. 4th 690, 697 (2000); *see also Tate v. Superior Court*, 45 Cal. App. 3d 925, 930 (1975); *De Luca v. Board of Supervisors*, 134 Cal. App. 2d 606, 609 (1955).

PRACTICE NOTE RE MOTION IRREGULARITIES

Parties make all kinds of procedural mistakes. Some of these mistakes can be terminal, like violating the Forty-Five Day Rule for filing a motion, or failing to timely serve objections to discovery demands. But other procedural mistakes do not matter so much. For example, movants might blow the sixteen-day notice to file a motion or opponents might miss the nine-court-days to file opposition and still survive to tell the tale.

As a general matter, the courts are disinclined to grant or deny a motion with prejudice simply because one side or the other fumbled a non-prejudicial notice requirement. More often, the remedy for these low-impact errors is to seek and obtain a continuance. But if a continuance runs counter to your litigation strategy, then there's not much remedy to be had. Moreover, as *Carlton* and *Tate* hold, a party can waive objections to certain procedural errors simply by opposing, responding, and/or showing up to argue the merits.

PRACTICE NOTE RE MOTION IRREGULARITIES (CONT'D)

So when it comes to **minor** motion irregularities, the Master Strategist will pick a lane. Here are some lanes to consider:

Note the Error. One approach is simply to note the opposing party's procedural error, in passing, as one more example among many of the ways in which the opposition lacks diligence and violates rules. Then proceed to argue the briefing—effectively waiving further remedy. You may get a point in the judge's calculus, albeit not likely a dispositive one.

Obtain a Continuance. Refrain from responding to the opposing party's arguments on the merits. Instead argue the procedural issues, seeking a continuance in order to address the prejudice caused by the opposing party's non-notice, late notice, late-filing, or other motion irregularity. Indicate your intent to provide a substantive response at the later date.

Show the Irremediable Prejudice. On more rare occasions the courts will grant or deny a motion with prejudice for violating a minor procedural requirement when that requirement intersects with a more fundamental interest. Motion timing may not be all that crucial, for example, unless it pushes the motion past the discovery cutoff, permanently affects the availability of evidence, or has implications for other trial events. If you can show that the technical error has more prejudicial consequences, or is part of a larger pattern and practice of intentionally abusing process for some improper goal, then a court may be inclined to offer a more serious remedy than mere hearing continuance.

13. ANTI-SLAPP STAY

All discovery and discovery motions are stayed upon the filing of an anti-SLAPP motion: "All discovery proceedings in the action shall be stayed upon the filing of a notice of

motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion." Cal. Civ. Proc. Code § 425.16(g); *The Garment Workers Ctr. v. Superior Ct*., 117 Cal. App. 4th 1156, 1161 (2004) (indicating the anti-SLAPP statute "automatically stays all discovery in the action as soon as a SLAPP motion is filed").

"[T]he Supreme Court determined that an appeal from the denial of an anti-SLAPP motion automatically stays, under section 916, all further trial court proceedings on the merits." *Young v. Tri-City Healthcare Dist.*, 210 Cal. App. 4th 35, 49 (2012) (citing *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 188 (2005)).

14. PRIVACY ANALYSIS

14.1. Constitutional Right of Privacy for Individuals

The California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." Cal. Const. art. I, § 1 (emphasis added).

14.2. Financial Privacy Four-Part Test

In analyzing the right of privacy under the California Constitution, "First, the claimant must possess a legally protected privacy interest." *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 370 (2007) (internal quotation marks omitted); *see Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (1994) ("The first essential element of

a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest."); *see also Alch v. Superior Court*, 165 Cal. App. 4th 1412, 1423 (2008) ("As subsequent cases have confirmed, discovery orders implicating privacy rights are evaluated under the framework established in *Hill,* and reiterated in *Pioneer* . . . ."). "Second, the claimant must have a reasonable expectation of privacy under the particular circumstances, including the customs, practices, and physical settings surrounding particular activities." *In re Ins. Installment Fee Cases*, 211 Cal. App. 4th 1395, 1420 (2012); *see Pioneer Electronics (USA), Inc.*, 40 Cal. 4th at 370; *Hill*, 7 Cal. 4th at 36-37. Third, "invasion of privacy complained of must be serious in nature, scope, and actual or potential impact to constitute an egregious breach of social norms, for trivial invasions afford no cause of action." *Pioneer Electronics (USA), Inc.*, 40 Cal. 4th at 371 (internal quotation marks omitted).

Finally, if a right of financial privacy is found, the Court must conduct a balancing test:

> If there is a reasonable expectation of privacy and the invasion of privacy is serious, then the court must balance the privacy interest at stake against other competing or countervailing interests, which include the interest of the requesting party, fairness to the litigants in conducting the litigation, and the consequences of granting or restricting access to the information.

Puerto v. Superior Court, 158 Cal. App. 4th 1242, 1251 (2008); *see Pioneer Electronics (USA), Inc.*, 40 Cal. 4th at 371

(holding that "privacy interest[s] . . . must be measured against other competing or countervailing interests in a 'balancing test'"); *see also Williams v. Superior Court*, 3 Cal. 5th 531, 557 (2017) (approving the balancing test and "disapprov[ing]" any rule that "require[s] a party seeking discovery of private information to always establish a compelling interest or compelling need . . . in every case").

14.3. Corporations Have No Constitutional Right to Privacy

"[C]orporations have no California right to privacy that is protected by the California Constitution or statutory law." *Cmty. Action Agency of Butte Cnty. v. Superior Ct. of Butte Cnty.*, 79 Cal. App. 5th 221, 238 n.10 (2022); *see Nativi v. Deutsche Bank Nat'l Trust Co.*, 223 Cal. App. 4th 261, 314 n.16 (2014) ("Several appellate courts have concluded that this constitutional provision does not apply to corporations.").

14.4. Corporations Do Enjoy a (Lesser) Common Law Right to Financial Privacy

While "corporations do not have a right of privacy protected by the California Constitution" they "do have a . . . lesser right [to privacy] than that held by human beings," one that is "not a constitutional right" and thus "not . . . a fundamental right." *SCC Acquisitions, Inc. v. Superior Court*, 243 Cal. App. 4th 741, 755–56 (2015).

"Because the corporate privacy right is not constitutionally protected," determining whether a discovery request "infringe[s] that right is resolved by a balancing test. The discovery's relevance to the subject matter of the pending dispute and whether the discovery 'appears reasonably

calculated to lead to the discovery of admissible evidence' is balanced against the corporate right of privacy." *Id*. (quoting *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court*, 137 Cal. App. 4th 579, 595 (2006)). "Doubts about relevance generally are resolved in favor of permitting discovery." *SCC Acquisitions*, 243 Cal. App. 4th at 756; *see Hecht*, 137 Cal. App. 4th at 595; *see also Jiae Lee v. Dong Yeoun Lee*, No. CV 19-8814 JAK (PVCX), 2020 WL 7890868, at *6 (C.D. Cal. Oct. 1, 2020).

PRACTICE NOTE RE FINANCIAL PRIVACY

Not all parties' rights to financial privacy are the same. In general terms, natural persons, not party to the action, have the strongest claims to financial privacy. Natural persons who are party to the action have a mid-level claim to the right. And corporate entities and non-natural persons have the weakest claim.

Some factors can weaken the right. Putting a claim or defense at issue in litigation that implicates the sought-after information will usually weaken the right to financial privacy. Whereas financial facts that have nothing to do with the litigated issues are more strongly protected.

Other factors can bolster the right. When a non-financial privacy right overlaps with financial privacy, then it bolsters and amplifies the later right. For example, if medical privacy or sex privacy were to be implicated by certain financial transactions, then those financial transactions enjoy additional fortification from disclosure.

14.5. Privacy in Medical Records

The right of privacy extends to information in an individual's medical records, information about his or her physical and mental condition, and information in his or her medical history. *See John B. v. Superior Court*, 38 Cal. 4th 1177, 1198-99 (2006); *Hill v. National Collegiate Athletic Assn.,* 7 Cal.4th 1, 41 (1994); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678-679 (1979).

14.6. Privacy in Medical Treatment for Drug and Alcohol Consumption

Medical history includes care and treatment for consumption of alcohol and/or prescription medicine even when driving under the influence. *See, e.g*., *Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1012 (1992) (holding that no disclosure may be made of women's center records of plaintiff's treatment for driving under the influence and symptoms of withdrawal); *Carlton v. Superior Court*, 261 Cal. App. 2d 282 (1968) (holding no inspection of hospital records is permitted related to alleged intoxicated condition of defendant driver who was hospitalized after accident).

14.7. Balancing Test in Revealing Private Medical Information

"The right to privacy, however, is not absolute." *John B. v. Superior Court*, 38 Cal. 4th 1177, 1199 (2006). In appropriate circumstances, this right must be balanced against other important interests. *See Hill v. National Collegiate Athletic Assn.,* 7 Cal. 4th 1, 37 (1994). "On occasion [a party's] privacy interests may have to give way to [the] opponent's right to a fair trial. Thus, courts must balance the right of civil litigants to discover relevant facts against the privacy

interests of persons subject to discovery." *Vinson v. Superior Court*, 43 Cal. 3d 833, 842 (1987).

In discovering medical records that reveal substance abuse or the consumption of prescription drugs, the bar is high. "The burden is on the party seeking the constitutionally protected information to establish direct relevance" of the evidence sought. *Davis*, 7 Cal. App. 4th at 1017. "Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice" to overcome the medical record privilege. *Id*.

14.8. Privacy in Sexual Activity

California provides to its citizens a constitutional right to privacy. Cal. Const. art. I, § 1. The right of privacy may be invoked by a litigant as justification for a refusal to answer questions which unreasonably intrude on that right. *Britt v. Superior Court*, 20 Cal. 3d 844, 143 (1978). While "[t]he right of privacy does not come into play simply because the litigant would rather not reveal something" the courts have recognized a "zone of privacy," in "one's sexual relations," *Fults v. Superior Court*, 88 Cal. App. 3d 899, 902-05 (1979).

15. REOPEN DISCOVERY

15.1. Factors to Consider in Reopening Discovery

The Code explains that when the court "exercise[es] its discretion" to "grant leave . . . to reopen discovery after a new trial date has been set" it "shall take into consideration any matter relevant to the leave requested." Cal. Civ. Proc. Code § 2024.050(a)-(b). Those factors include:

> (1) The necessity and the reasons for the discovery.
>
> (2) 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.
>
> (3) 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.
>
> (4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action.

Id. § 2024.050(b).

15.2. Hearing Discovery Motions After the Discovery Cutoff

"Although" a party has "no right to have its motion to compel [discovery] heard after the passage of the discovery motion cutoff date . . . the trial court [has] discretion to hear the motion . . . upon a successful motion for leave to reopen discovery." *Pelton-Shepherd Indus., Inc. v. Delta Packaging Prod., Inc.*, 165 Cal. App. 4th 1568, 1587 (2008) (emphasis omitted).

16. EXPERT WITNESS

16.1. Motion to Augment Expert Witness List

"On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to . . . [a]ugment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained." Cal. Civ. Proc. Code § 2034.610.

16.2. Principal Factors in Authorizing Augmentation of Expert Witness List

A motion to augment an expert witness list shall be granted only upon considering the "the extent to which the opposing party has relied on the list of expert witnesses" and upon a finding that the opposing party "will not be prejudiced in maintaining that party's action or defense on the merits." Cal. Civ. Proc. Code § 2034.620(a)-(b).

16.3. Additional Factors in Authorizing Augmentation of Expert Witness List

In addition, to grant the motion to augment the expert witness list, the Court must find at least one of the following two conditions: (1) that the "moving party" did not fail in the "exercise of reasonable diligence" to "call that expert witness . . . or have decided to offer the different or additional testimony of that expert witness"; or (2) that the movant's failure to "call that expert witness, or to offer the different or additional testimony of that expert witness" was "a result of mistake, inadvertence, surprise, or excusable neglect, and the moving party has . . .[s]ought leave to augment . . . promptly after deciding to call the expert witness" and "thereafter served a copy of the proposed expert witness information concerning the expert . . . on all other parties." *Id*. § 2034.620(c).

16.4. No Privilege in Non-Retained-Expert Treating Physician

"[T]he identity and opinions of treating physicians are not privileged. Rather, because they acquire the information that forms the factual basis for their opinions independently of the litigation, they are subject to no special discovery restrictions." *Kalaba v. Gray*, 95 Cal. App. 4th 1416, 1421–22 (2002).

16.5. Non-Retained-Expert Treating Physician, Need Not Be Disclosed as Retained Expert

Even in the absence of being named as an expert, this kind of witness, "may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work." *Kalaba v. Gray*, 95 Cal. App. 4th 1416, 1422 (2002); *see also Schreiber v. Estate of Kiser*, 22 Cal. 4th 31, 38 (1999) ("Indeed, defendants have a strong incentive to depose treating physicians well prior to the exchange of expert information to ascertain whether their observations and conclusions support the plaintiff's allegations.").

16.6. Non-Retained-Expert Treating Physician May Testify to the Standard of Care

While a treating physician not designated as an expert may not testify as to her "*present* expert opinion[]" as to the standard of care, that physician may testify as to what she believed the standard of care was at the time of treatment in order to provide a rationale for her treatment plan: "Questions to the defendant physicians about their

impressions and reasons for their action or lack of action *at the time the medical procedure was performed* are, of course, entirely appropriate." *Cty. of Los Angeles v. Superior Court*, 224 Cal. App. 3d 1446, 1455-56 (1990) (emphasis added).

17. PROTECTIVE ORDERS

17.1. Entry of Blanket Protective Order

"The court, for good cause shown," may issue a "protective order" to the effect 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." Cal. Civ. Proc. Code § 2031.060(b). "[T]he issuance and formulation of protective orders are to a large extent discretionary." *Nativi v. Deutsche Bank Nat'l Trust Co.*, 223 Cal. App. 4th 261, 316-17 (2014); *see Raymond Handling Concepts Corp. v. Superior Court*, 39 Cal. App. 4th 584, 588 (1995).

17.2. The Vying Interests In Issuing a Protective Order: Discovery of Truth and Protection of Privacy

"The state has two substantial interests in regulating pretrial discovery. The first is to facilitate the search for truth and promote justice. The second is to protect the legitimate privacy interests of the litigants and third parties." *Stadish v. Superior Court*, 71 Cal. App. 4th 1130, 1145 (1999) (citations and internal quotation marks omitted); *see Nativi*, 223 Cal. App. 4th at 317 ("A trial court must balance the various interests in deciding whether dissemination of the documents should be restricted.").

17.3. Burden of Showing Good Cause for Protective Order

"[T]he burden is on the party seeking the protective order to show good cause for whatever order is sought." *Fairmont Ins. Co. v. Superior Court*, 22 Cal. 4th 245, 255 (2000). But the movant cannot satisfy this burden by submitting "conclusory" declarations "lack[ing] any factual specificity." *Nativi*, 223 Cal. App. 4th at 318. It is error for the trial court to issue an umbrella protective order limiting or quashing the production of documents when the moving party fails to make a "factual showing that (1) the documents . . . contained confidential commercial information or information in which it had any protectable interest or (2) dissemination of the documents to the public would result in injury." *Id*.

PRACTICE NOTE RE FORM PROTECTIVE ORDERS

A nice model protective order can be found on the Los Angeles Superior Court website. *See Los Angeles Model Stipulation and Protective Order*, Super. Ct. Cal., County of L.A. (2026), https://www.lacourt.org/division/civil/pdf/formprotectiveorder1confidential_1.pdf.

Other nice model protective orders can be found on the U.S. District Court webpage. *See Model Protective Orders*, U.S. Dist. Ct. for N. Dist. of Cal. (2026), https://cand.uscourts.gov/rules-forms-fees/northern-district-guidelines/model-protective-orders.

17.4. Protective Orders Enforcing the Rule of 35

17.4.1. The Rule of 35

Presumptively no party may propound more than 35 requests for admission (exclusive of RFAs for genuineness of documents) or more than 35 special interrogatories. *See* Cal. Civ. Proc. Code § 2033.030 (limiting RFAs to 35); Cal. Civ. Proc. Code § 2030.030(a)(1) (limiting special interrogatories to 35). This is referred to as the Rule of 35.

17.4.2. The Declaration of Necessity to Overcome the Rule of 35

The propounding party can overcome the Rule of 35 by submitting a code-compliant declaration. *See* Cal. Civ. Proc. Code § 2033.050; *id*. § 2030.050. this declaration is often referred to as the "Declaration of Necessity."

17.4.3. Striking the Declaration of Necessity Requires a Protective Order

To protect the Rule of 35 and strike all special interrogatories or RFAs propounded excess of the first 35, the responding party may move for a protective order holding that "contrary to the representations made in [the] declaration" the demands in excess of 35 are "unwarranted." Cal. Civ. Proc. Code § 2033.080(b)(2) (for RFAs); Cal. Civ. Proc. Code § 2030.090(b)(2) (for special interrogatories).

Complicating matters, however, the motion to strike the "declaration of necessity may only be challenged by way of . . . a protective order." Michael Paul Thomas, *Cal. Civ. Ctrm. Hbook. & Desktop Ref*. § 21:109 (2023 ed.); *see Catanese v. Superior Ct*., 46 Cal. App. 4th 1159, 1165 (1996), *abrogated*

on other grounds by Lewis v. Superior Ct., 19 Cal. 4th 1232 (1999). That means, simply objecting to the discovery in excess of 35 is not sufficient, "Rather, the responding party must seek a protective order." Lee Smalley Edmon & Curtis E.A. Karnow, *California Practice Guide: Civil Procedure Before Trial* § 956 (Rutter eds. 2026).

17.4.4. On Motion for Protective Order the Burden Shifts to the Propounding Party

"If the responding party seeks a protective order on the ground that the number of" discovery demands "is unwarranted, the propounding party shall have the burden of justifying the number of" discovery demands beyond 35. Cal. Civ. Proc. Code § 2033.040(b) (for RFAs); Cal. Civ. Proc. Code § 2030.040(b) (for "specially prepared interrogatories").

PRACTICE NOTE RE MOTIONS OPPOSING DISCOVERY IN EXCESS OF 35

It does not seem fair, and perhaps it is a bad public policy, but this means the **victim** of the discovery abuse—propounding dozens, perhaps hundreds of requests in excess of 35—will have 32 to 35 days to (1) review the discovery, (2) meet-and-confer with the other side, (3) obtain dates for the motion hearing and comply with Local Rules' pre-motion procedure, and (3) draft up, file, and serve a motion for protective order. It is a lot of work.

If you do move to strike disco in excess of 35, this is how to frame the arguments:

1. **Limited Parties**. When the number of parties is limited, or when virtually all the parties on each side have a unity of interests (e.g. husband and wife or CEO and company), then additional discovery beyond 35 is less likely to be warranted.
2. **Limited Issues**. When the factual predicates for the claims are fairly limited in time/space—regardless of the number of legal theories that describe those allegations—then additional discovery is likely unnecessary.
3. **Unremarkable Theories**. When the claims seek relief based on unremarkable legal theories, then additional discovery is not likely to be necessary.

18. PRIVILEGES AND PROTECTIONS

18.1. The Attorney-Client Privilege ("AC Privilege")

18.1.1. The AC Privilege Keeps Clients Secrets

"The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential." *Roberts v. City of Palmdale,* 5 Cal. 4th 363, 371 (1993). The attorney-client privilege confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." Cal. Evid. Code §§ 953, 954.

18.1.2. AC Privilege Policy Rationale

Our Supreme Court has explained the policy rationale for maintenance of the attorney-client privilege, even when it results in the suppression of evidence:

> [The privilege's] . . . fundamental purpose is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship . . . . [T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.

Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 732 (2009) (alterations, quotation marks, and citations omitted).

18.1.3. The AC Privilege Protects Transmission Not Content

The attorney-client privilege protects the relationship, regardless of the content of the particular communication: "the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship." *Los Angeles Cty. Bd. of Supervisors v. Superior Ct.*, 2 Cal. 5th 282, 289–90 (2016); *see also Fiduciary Tr. Internat. of California v. Klein*, 9 Cal. App. 5th 1184, 1198 (2017) ("In assessing whether a communication is privileged, the initial focus of the inquiry is on the 'dominant purpose of the relationship' between attorney and client and not on the purpose served by the individual communication.").

18.1.4. AC Privilege Burden Shifting Test

The Court shall engage in a two-part burden-shifting test: "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, *i.e*., a communication made in the course of an attorney-client relationship." *Id*. at 733. "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence" and the burden then shifts to the "opponent of the claim of privilege . . . to establish the communication was not confidential or that the privilege does not for other reasons apply." *Id*.

18.2. The Fifth Amendment Privilege ("5A Privilege")

18.2.1. The 5A Privilege Defined

The Fifth Amendment declares in part that "No person . . . shall be compelled in any Criminal Case to be a witness against himself." U.S. Const. amend. V. "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

18.2.2. The 5A Privilege Applies in Civil Context

The Fifth Amendment privilege against self-incrimination applies in civil proceedings. *United States v. Balsys,* 524 U.S. 666, 671-72 (1998); *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). "[I]n the civil context, the invocation of the privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner." *Doe v. Glanzer,* 232 F.3d 1258, 1263 (9th Cir. 2000); *United States v. Bodwell,* 66 F.3d 1000, 1001 (9th Cir.1995) (per curiam).

18.2.3. The 5A Privilege "Link in the Chain" Theory

"The [5th Amendment] privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a *link in the chain of evidence* needed to prosecute the claimant for a . . . crime." *United States v. Hubbell,* 530 U.S. 27, 38 (2000) (internal quotation marks omitted and emphasis added).

18.2.4. The 5A Privilege Objective Reasonableness Standard

The basis for the Fifth Amendment privilege, however, is not found in the witness' mere subjective belief: "The witness is not exonerated from answering merely because he declares that insodoing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. Rather, Fifth Amendment, "protection must be confined to instances where the witness has *reasonable* cause to apprehend danger from a direct answer." *Id.* at 486 (emphasis added).

18.2.5. When Evaluating the 5A Privilege, the Court Must Make Decisions With Limited Evidence

Because the witness are preserving their Constitutional right to silence, the Court must often make difficult decisions as to the reasonability of the invocation with limited evidence at hand:

> [I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as

> much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

Id. *Hoffman*, 341 U.S. at 486–87 (internal quotation marks omitted).

18.2.6. The 5A Privilege – the Act of Producing Documents is Privileged

"In the case of a [request to produce documents,] the only thing compelled is the act of producing the document . . . ." *Fisher v. United States,* 425 U.S. 391, 410 n.11 (1976); *Baltimore City Dep't of Soc. Servs. v. Bouknight,* 493 U.S. 549, 554-55 (1990). The compelled production of documents may nonetheless implicate the privilege against self-incrimination "because the act of complying with the . . . demand testifies to the existence, possession, or authenticity of the things produced." *Bouknight,* 493 U.S. at 555; *Fisher,* 425 U.S. at 410.

18.2.1. The 5A Privilege – Documents Not Prepared by the Privilege Holder

Documents not prepared by the privilege holder are not protected by the Fifth Amendment. *Fisher,* 425 U.S. at 409-10; *United States v. Osborn,* 561 F.2d 1334, 1339 (9th Cir. 1977). Therefore, for instance, "the contents of . . . bank records . . . are not privileged under the Fifth Amendment." *Doe v. United States,* 487 U.S. 201, 206 (1988); *In re Grand Jury Proceedings,* 40 F.3d 959, 961-62 (9th Cir. 1994).

18.2.2. 5A Privilege – Does Not Protect Entities

Furthermore, the privilege against self-incrimination only protects natural persons, not artificial entities such as corporations. *Doe,* 487 U.S. at 206; *Braswell v. United States,* 487 U.S. 99, 102 (1988). For this reason, "corporate records are not private and therefore are not protected by the Fifth Amendment." *Braswell,* 487 U.S. at 109.

18.3. The Hospital Committee Privilege

18.3.1. The Hospital Committee Privilege Defined

"Neither the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . shall be subject to discovery." Cal. Evid. Code § 1157(a). Section 1157 "gives a blanket exclusion from discovery to proceedings and records of committees of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital." *Roseville Community Hospital v. Superior Court,* 70 Cal. App. 3d 809, 813 (1977).

18.3.2. The Hospital Committee Privilege – Policy Rationale

By enacting this discovery exemption, "[t]he Legislature intended . . . to encourage full and free discussions in the hospital committees in order to foster health care evaluation and improvement." *Brown v. Superior Court*, 168 Cal. App. 3d 489, 501 (1985). Section 1157 also removes a disincentive to voluntary physician participation in peer review by exempting participating physicians from the burdens of discovery and involuntary testimony. *West Covina Hospital v. Superior Court*, 41 Cal. 3d 846, 851–52 (1986).

18.4. Tortfeasor Net Worth Privilege

18.4.1. Net Worth Protected from Discovery

In the absence of an order to the contrary, "[n]o pretrial discovery by the plaintiff shall be permitted with respect to" either defendant's "financial condition" nor with respect to "profits the defendant . . . gained by virtue of the [alleged] wrongful course of conduct." Cal. Civ. Code § 3295(a)-(c).

18.4.2. Motion to Discover Net Worth

Plaintiff may obtain evidence of defendant's net worth and/or profits gained by the alleged malfeasance upon showing of a "prima facie case of liability for [punitive] damages." Cal. Civ. Code § 3295(a). Parties may make a motion seeking this evidence or preventing discovery into this evidence at "any time," *id*. § 3295(c), including at trial, and even after trial. *See Mike Davidov Co. v. Issod*, 78 Cal. App. 4th 597, 609 (2000).

18.4.3. Court Authority to Sua Sponte Compel Production of Evidence of Net Worth

Even in the absence of a dedicated motion, a finding of malice, oppression, or fraud at trial authorizes the court to issue an order compelling defendant to produce said evidence. *See Pfeifer v. John Crane, Inc.*, 220 Cal. App. 4th 1270, 1306 (2013). Said order may occur after trial and even in the absence of a formal, noticed motion. *See Mike Davidov Co.,* 78 Cal. App. 4th at 609.

19. REMEDY FOR ACCIDENTAL WAIVER OF PRIVILEGE

19.1. Discretion to Relieve Waiver of Privilege in the Context of Discovery Events

The court has *discretionary* power to relieve a party or its attorney from waiver of a privilege caused by a technical violation of the Discovery Act: "The court, on motion, may relieve that party from this waiver on its determination that: . . . (1) The party has subsequently served a response that is in substantial compliance with" the applicable code sections **and** "(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." Cal. Civ. Proc. Code § 2030.290(a) (relief for deficient interrogatory response); *id*. § 2031.300(a) (same for responses to requests for production of documents); *id.* § 2033.280(a) (same for responses to requests for admission).

19.2. Distinguished from Relief Under Section 473

These provisions of the Discovery Act, and *not* section 473 of the California Code of Civil Procedure, control relief from waiver in the discovery context. *See City of Fresno v. Superior Ct.*, 205 Cal. App. 3d 1459, 1467 (1988). Thus, relief may be granted despite the passage of time, and regardless the omission of an attorney declaration of fault. *See* Cal. Civ. Proc. Code § 473(b). In ordering "relief for defaults" under the Discovery Act, however, the court shall employ the "same standard . . . [for] interpreting mistake, inadvertence or excusable neglect" as found "in section 473." *City of Fresno,* 205 Cal. App. 3d at 1467.

19.3. Relief from Waiver Due to Technical Noncompliance

The court may grant relief from waiver of a privilege caused by technical errors that "anyone could have made." *Zamora v. Clayborn Contracting Grp., Inc.*, 28 Cal. 4th 249, 258 (2002); *see St. Mary v. Superior Ct.*, 223 Cal. App. 4th 762, 779 (2014) ("Where there is compliance as to all matters of substance, technical deviations are not to be given the stature of noncompliance. Substance prevails over form."); *Comunidad en Accion v. Los Angeles City Council*, 219 Cal. App. 4th 1116, 1134–35 (2013) (holding attorney's error was "an isolated mistake in an otherwise vigorous and thorough" representation).

19.4. No Relief for Attorney Malpractice

Relief from waiver shall not be granted in cases of more serious errors—ones that amount to attorney malpractice. *See Huh v. Wang*, 158 Cal. App. 4th 1406, 1423 (2007), *as modified* (Jan. 16, 2008) ("Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable.").

20. MOTION REMEDIES

20.1. Prevailing Party To Propose Order (Order Language)

[Prevailing Party] shall prepare a form of the order recapitulating this tentative ruling and shall bring a copy of the proposed order to the hearing, if any. In the absence of a hearing, the prevailing party shall timely comply with Cal. R. Ct. 3.1312.

20.2. Shall Respond to Written Disco (Order Language)

[Name of Responding Party] shall make objection-free code compliant, verified further responses to [Name of Propounding Party's] Form Interrogatories-General, Set One, Special Interrogatories, Set One, and Request for Production of Documents, Set One, no later than ten (10) days from the from date of execution of this Order. In their responses, the [Name of Responding Party] shall furthermore not exercise the option to produce writings under Code of Civil Procedure Section 2030.230, as that option has been waived.

20.3. Shall Produce Documents (Order Language)

[Name of Responding Party] shall produce to [Name of Propounding Party], [describe production], including but not limited to privileged e-mail and other privileged communications among and between [Parties], third parties, and/or counsel, responsive to [Name of Propounding Party's] Request for Production of Documents, Set One, Nos. [numbers].

20.4. Remedies for RFAs: Deemed Admitted

Usually issue sanctions are only available upon violation of order of the court. But in the case of requests for admission ("RFAs") they may be "deemed admitted" if respondent fails to make a timely response. Cal. Civ. Proc. Code § 2033.280(b). A "deemed admitted" order shall issue against the respondent unless, "before the hearing on the motion," the responding party serves "a proposed response to the requests for admission" both verified and "in substantial compliance" with the Discovery Act. *Id*. § 2033.280(b)-(c).

20.5. Defense to RFA Deemed Admitted Motion

Stated in the negative, "a motion to have admission requests deemed admitted may *not* be granted where the record establishes . . . that (1) proposed . . . verified . . . responses to the requests have been served prior to the hearing on the motion and (2) such responses are in substantial compliance with the provisions of section 2033." *Tobin v. Oris*, 3 Cal. App. 4th 814, 828 (1992) *disapproved on other grounds of by Wilcox v. Birtwhistle*, 21 Cal. 4th 973 (1999).

PRACTICE NOTE RE RFA DEEMED ADMITTED MOTIONS

When a party fails to respond at all to requests for admission, those requests may be "deemed admitted" unless the responding party serves "proposed" RFA responses prior to the hearing. RFAs and only RFAs offer this uniquely dangerous proposition: fail to amend prior to the hearing and have potentially lawsuit-killing-admissions, entered against your client.

In this case, there really is no good choice but to amend the RFAs. As discussed below, for *other* discovery motions, there may be adverse consequences in the form of monetary sanctions weighing against early amendment. But in this narrow case, the risks involved in failing to amend the RFAs before the hearing are simply too great. Monetary sanctions can be paid; and you will live to fight another day. But RFAs deemed admitted may very well result in the end of your action or defense.

20.6. Limited Remedies for Failing to Provide Privilege Log

"If an objection" to a discovery demand "is based on a claim of privilege or a claim that the information sought is protected work product, the response" may require "a privilege log." Cal. Civ. Proc. Code § 2031.240(c)(1). But violating this provision, alone, does not waive the privilege. *See Catalina Island Yacht Club v. Superior Court*, 242 Cal. App. 4th 1116 (2015) (holding the "trial court lacks authority to order the objection waived even if the responding party fails to serve a privilege log, serves an untimely privilege log, or serves a privilege log that fails either to adequately identify the documents to which the objection purportedly applies or provide sufficient factual information for the propounding party to evaluate the objection").

Rather the court's authority is limited to "order[ing] . . . a privilege log . . . or supplemental privilege log." *Id*. Violation of the court's order, however, may result in "evidence, issue, and even terminating sanctions." *Id.*

21. MONETARY SANCTIONS

21.1. Monetary Sanctions Shall Be Imposed Upon Losing Party

Under the Discovery Act, "the court shall impose a monetary sanction . . . against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel . . . unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Cal. Civ. Proc. Code § 2030.290(c) (interrogatories); Cal. Civ. Proc. Code §

2031.300(c) (request for production of documents); Cal. Civ. Proc. Code § 2025.480(j) (further responses during oral deposition); Cal. Civ. Proc. Code § 2033.080(d) (protective orders for RFAs).

"Monetary sanctions, in an amount incurred, including attorney fees, by anyone as a result of the offending conduct, *must be imposed* unless the trial court finds the sanctioned party acted with substantial justification or the sanction is otherwise unjust." *Deck v. Devs. Inv. Co.*, 89 Cal. App. 5th 808, 830 (2023).

21.2. Need Not Show Prejudice

"A prevailing party on a motion to compel further responses to discovery requests need not show prejudice in order to recover monetary sanctions." *Deck v. Devs. Inv. Co.*, 89 Cal. App. 5th 808, 833 (2023).

21.3. Mandatory Monetary Sanctions for Certain RFAs

"It is mandatory that the court impose a monetary sanction . . . on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." Cal. Civ. Proc. Code § 2033.280(c). In this narrow context, offering evidence of "substantial justification" is no defense.

21.4. Sanctionable Conduct Explained

"Misuses of the discovery process include" persisting in seeking non-discoverable materials, abusing the discovery process, "[e]mploying a discovery method . . . that causes unwarranted annoyance, embarrassment, oppression, or undue burden and expense, [f]ailing to respond or to submit

to an authorized method of discovery, [m]aking . . . an unmeritorious objection to discovery, [or] an evasive response to discovery, [d]isobeying a court order to provide discovery, [m]aking or opposing, unsuccessfully . . . a motion to compel or to limit discovery" and failing to meet-and-confer, when required, "in a reasonable and good faith attempt to resolve" the discovery dispute. Cal. Civ. Proc. Code § 2023.010(a)-(i).

"Other sanctionable discovery abuses include providing false discovery responses and spoliation of evidence." *Dep't of Forestry & Fire Prot. v. Howell*, 18 Cal. App. 5th 154, 191 (2017), *disapproved on other grounds by*, *Presbyterian Camp & Conf. Centers, Inc. v. Superior Ct.*, 12 Cal. 5th 493, 516 n.17 (2021).

21.5. Monetary Sanctions For Unsuccessful Allegations of Misuse of Discovery

"The court may impose a monetary sanction" against "one engaging in the misuse of the discovery process . . . one unsuccessfully asserting that another has engaged in the misuse of the discovery process, [and/or] on any attorney" so advising, "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." Cal. Civ. Proc. Code § 2023.030(a).

21.6. Bad Faith in Responses May be Imputed from Bad Faith PRIOR Responses

The Court may leverage a history of bad faith responses as a basis for finding the current set of responses were likely made in bad faith: "It certainly could have deemed his initial discovery responses to be so frivolous as to have been

in bad faith, such that any subsequent professions of good faith would be suspect." *Manlin v. Milner*, 82 Cal. App. 5th 1004, 1024 (2022).

21.7. Sanctions for Failure to Meet and Confer

"[T]he court shall 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." Cal. Civ. Proc. Code § 2023.020.

21.8. Additional Monetary Sanctions for Failure of Document Production

In "addition" to any other sanctions or remedies imposed "a court shall impose a one-thousand-dollar ($1000) sanction, payable to the requesting party, upon a" finding that a "party, person, or attorney": (1) "did not respond in good faith to a request for the production of documents . . . or . . . inspection demand" or (2) "produced requested documents within seven days before the court was scheduled to hear a motion to compel production" or (3) "failed to [meet-and-confer] with the party or attorney requesting the documents in a reasonable and good faith attempt to resolve informally any dispute concerning the request." Cal. Civ. Proc. Code § 2023.050(a)(1)-(3).

The court, "may, in its discretion, require an attorney who is [so] sanctioned . . . to report the sanction, in writing, to the State Bar within 30 days of the imposition of the sanction." *Id*. § 2023.050(b).

21.9. The Meaning of Substantial Justification

"'[S]ubstantial justification' as used in the [discovery] statutes means a justification that is well-grounded in both law and fact." *Diepenbrock v. Brown*, 208 Cal. App. 4th 743, 747 (2012). "The burden of proving 'substantial justification' for failing to comply with a discovery order compelling answers or production of documents and opposing a motion to compel compliance is on the losing party claiming that it acted with 'substantial justification.'" *Doe v. U.S. Swimming, Inc.*, 200 Cal. App. 4th 1424, 1435 (2011).

21.10. Sanctions Awarded Even After Compliance With Disco

Although responses to the demand have finally been submitted to the propounding party, that does not resolve the sanctions issue. *See* Cal. R. Ct. 3.1348(a) ("The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though . . . the requested discovery was provided to the moving party after the motion was filed.").

21.11. Sanctions Awarded Even In the Absence of an Opposition

"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. R. Ct. 3.1348(a).

21.12. Sanctions Sought By Opposition

Sanctions may be sought in opposition, even in the absence of its own formal notice of motion and even if said

opposition is filed beyond 45 days from the discovery response service date. *See London v. Dri-Honing Corp*., 117 Cal. App. 4th 999, 1005 (2004).

PRACTICE NOTES RE PREDICTING MONETARY SANCTIONS

The judiciary varies widely in response to requests for discovery sanctions. Some judges are in the habit of awarding zero dollars, almost no matter how badly the litigants behaved. Other judges default to a sanctions award even when the losing side had good reason for acting as it did. Predicting the victor in a discovery motion is difficult enough. Predicting an award of sanctions is often sheer guesswork.

Look at this this way: when does a party ever enter into a discovery dispute, or make/oppose a motion, believing it will lose and have to pay sanctions? Almost never. The party paying sanctions is almost *always* caught by surprise. There are no certain outcomes. Being on the side of the angels is no guarantee of success. The safer alternative is to resolve your discovery disputes short of a hearing.

PRACTICE NOTE RE OPPOSING THE MOTION

Two rules stand in opposition. On the one hand, sanctions may be awarded against the party for unsuccessfully "opposing" a discovery motion. Cal. Civ. Proc. Code § 2023.010(h). On the other hand, sanctions are still authorized against the party who *refrains* from opposing a discovery motion. Cal. R. Ct. 3.1348(a).

PRACTICE NOTE RE OPPOSING THE MOTION (CONT'D)

Guidelines for Pre- and Post-Motion Amendments. Opposing the motion and conceding the motion *both* present sanctions risks. Between a rock and a hard place, the Master Strategist will proceed:

1. **Avoid the Quagmire**. Decide during the meet-and-confer process to amend your discovery responses in such a way that would avoid the motion. Do not wait until the motion has been filed. By then it may be too late.
2. **Amend for Defense**. Prior to the motion, amend with code compliant responses so that they are defensible. Remember, you don't have to win *everything* to avoid sanctions. Set up your position to at least win *something*. If you can prevail on even a few discovery issues, then it significantly weakens the movant's ability to collect sanctions against you.
3. **Avoid Post-Motion Amendments**. Once the motion has been filed, it is effectively too late to amend your discovery responses without exposing yourself and your client to sanctions. Thus, after the motion has been noticed, do not amend your discovery responses unless you obtain a quid pro quo promise in writing to dismiss the motion and void the request for sanctions. *But see supra* Practice Note Re RFA Deemed Admitted Motions.
4. **Seek Counter-Sanctions**. In opposition to the motion, seek sanctions against the movant. The request for sanctions may act as a leverage point in any subsequent stipulation for the mutual waiver of sanctions.

21.13. Procedural Requirements for Monetary Sanctions

Monetary sanctions may only issue upon proper notice, upon the submission of admissible evidence, and upon complying with appropriate procedure.

21.13.1. Against Whom Sanctions Are Sought

"A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought . . . ." Cal. Civ. Proc. Code § 2023.040.

21.13.2. Amount of Sanction

A request for monetary sanction must state the "amount of any monetary sanction sought" Cal. Civ. Proc. Code § 2023.040, and the authority or "grounds for issuance of the order," Cal. R. Ct. 3.1110(a).

21.13.3. Sanction Motion Timing

While best practices suggest that a request for sanctions be made as part of the motion proper, "a motion for discovery monetary sanctions may be filed separately from a motion to compel." *London v. Dri-Honing Corp.*, 117 Cal. App. 4th 999, 1007 (2004).

21.13.4. Argument and Declaration in Support

Where monetary sanctions are sought, the "notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought." Cal. Civ. Proc. Code § 2023.040. Some courts have

suggested that notice of the request for sanctions must also be located in the caption to the motion or opposition.

PRACTICE NOTES RE DEFENDING AGAINST SANCTIONS (CONT'D)

The Master Strategist is aware of the highly variable nature of monetary sanction awards. In defending against sanctions awards, acts according to the following principles:

1. **Lay Groundwork from the Beginning**. Before a motion is even filed, think about how your meet-and-confer communications will be received by the judge. Offer concessions that put you in no worse position, but make the opposition look unreasonable when they refuse. Let the bad lawyers be bad. Remember *Miranda*. Do not give your opposition a quotable passage to use against you.
2. **Explain Sanctions Risk to the Client**. A sanction award against your client can be humiliating. Avoid the heart-ache. Describe the risks to the client in advance of the motion. Tell her that these motions are fraught and sanctions are unpredictable. If the worst comes, your client will be prepared. If the worst does not come, you are a hero.
3. **Argue Substantial Justification**. If you lose a discovery motion, the Court will deny sanctions if you can prove you acted with substantial justification. The standard may be murky, but in general terms, it means you acted, *in large part*, because *no nonprejudicial alternative was available to you*. Many practitioners fail to argue the substantial justification, believing there is no conceivable way they were going to lose the motion in the first place. Fifty percent of those practitioners are wrong.

PRACTICE NOTE RE WINNING MONETARY SANCTIONS

Winning sanctions requires two ingredients: (1) technical compliance; and (2) equity. The Master Strategist will proceed thus:

1. **Jurisdictional Requirements**. The Court has no authority to award you sanctions unless you ask for them in the right way. That means the request, the amount, and the identity of the party subject to those sanctions should be located in the notice of motion, in the memorandum of points and authorities, and in declaration. In declaration, the amount of the sanctions must be grounded in facts: the hours spent, the fee rate, and the reasonableness of the fees.
2. **Prevailing Party Requirement**. On a discovery motion, the winner "shall" be awarded monetary sanctions. When faced with a *partially* successful motion, the court may be inclined to split the baby and refuse to award sanctions to anyone. As movant, the Master Strategist will jettison the weak arguments, and give up the borderline demands, targeting an end-game wherein *the court grants the motion in totality, or near-totality*.
3. **The Equities Requirement**. The code places no burden on the winning party to prove that fairness and equity demand a sanctions award. But as a practical matter, most judges feel uncomfortable issuing an award, or much of an award, without some sense that they are performing justice. Do not let the judge pity the losing party. Argue that the acrimony, the expense, and the involvement of the court, simply did not have to be, and note the *three easy things the opposition could have done to avoid the motion*.

22. NON-MONETARY SANCTIONS

22.1. General Legal Standard: Willful Violation of Court Order

Generally speaking, non-monetary sanctions for discovery abuse will not be imposed in the absence of willful failure to comply with a prior court order. "[T]wo facts are generally prerequisite to the imposition of nonmonetary sanctions . . . : (1) absent unusual circumstances, there must be a failure to comply with a court order, and (2) the failure must be willful." *Biles v. Exxon Mobil Corp.*, 124 Cal. App. 4th 1315, 1327 (2004). The sanction "should be appropriate to the dereliction . . . enable the party seeking discovery to obtain the objects of the discovery he seeks," but not serve as a vehicle for "punishment." *Id*.

22.2. Incremental Approach

"[S]anctions are generally imposed in an incremental approach, with terminating sanctions being the last resort." *Dep't of Forestry & Fire Prot. v. Howell*, 18 Cal. App. 5th 154, 191–92 (2017). But "even under the Civil Discovery Act's incremental approach, the trial court may impose terminating sanctions as a first measure in extreme cases, or where the record shows lesser sanctions would be ineffective." *Id*.; *Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 246 Cal. App. 4th 566, 604 (2016).

22.3. Procedure for Obtaining for Non-Monetary Sanctions

Sanctions may be ordered only upon a regularly noticed motion. Cal. Civ. Proc. Code § 2023.030 (authorizing the court to impose monetary and non-monetary sanctions

"after notice to any affected party, person, or attorney, and after opportunity for hearing"); *Sole Energy Co. v. Hodges*, 128 Cal. App. 4th 199, 208 (2005) ("Discovery sanctions may not be ordered ex parte, and an order purporting to do so is void.").

In addition, a non-monetary sanction order must be in writing, such as a minute order, Cal. Civ. Proc. Code § 1003, an order prepared by a party, or prepared by the court itself. *See* Cal. R. Ct. 3.1312.

22.4. Non-Monetary Sanctions Explained

The Court may impose three kinds of non-monetary sanctions: issue sanctions, evidentiary sanctions, and terminating sanctions.

22.4.1. Issue Sanctions

"The court may impose an issue sanction ordering that designated facts shall be taken as established" or "prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses." Cal. Civ. Proc. Code § 2023.030(b).

22.4.2. Evidentiary Sanctions

"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." Cal. Civ. Proc. Code § 2023.030(c).

22.4.3. Terminating Sanctions Explained

"The court may impose a terminating sanction by . . . striking out the pleadings or parts of the pleadings . . .

staying further proceedings . . . dismissing the action, or any part of the action . . . [or] rendering a judgment by default" against a party disobeying a discovery order. Cal. Civ. Proc. Code § 2023.030(d).

22.4.4. Terminating Sanctions Totality of the Circumstances Test

The propriety of terminating sanctions is determined by "the totality of the circumstances" the willfulness of the improper acts, "the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery." *Lang v. Hochman*, 77 Cal. App. 4th 1225, 1246 (2000) (issuing a terminating sanction after violation of three discovery orders).

22.4.5. Special Terminating Sanctions for Egregious Conduct Even Absent Violation of a Prior Court Order

"[T]here exists a line of case law that authorizes the imposition of terminating sanctions as a first remedy based on the inherent power of the court in certain circumstances." *Dep't of Forestry & Fire Prot. v. Howell*, 18 Cal. App. 5th 154, 192 (2017).

Thus, under special egregious circumstances a terminating sanction order may be obtained even in the absence of the violation of a prior court order. "California trial courts possess the inherent power to issue a terminating sanction for pervasive misconduct" even in the absence of "violation of a [prior] court order." *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal. App. 4th 736, 763, 765 (2007).

23. SPOLIATION

23.1. Spoliation Defined

"Spoliation occurs when evidence is destroyed or significantly altered or when there is a failure to preserve property for another's use as evidence in current or future litigation." *Strong v. State of California*, 201 Cal. App. 4th 1439, 1458 (2011); *see also R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486, 496 (1999) ("Spoliation is the intentional destruction or suppression of evidence . . . .").

23.2. Spoliation Policy Rationale

Such conduct is condemned because "[d]estroying evidence can destroy fairness and justice . . . increases the risk of an erroneous decision [and] . . . increase[s] the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1, 8 (1998).

23.3. Tort of Spoliation Excised

The Supreme Court excised the tort of spoliation in 1998: "Accordingly, we hold that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which . . . the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1, 17 (1998). The prohibition was later expanded to negligent spoliation, *see Strong v. State*, 201 Cal. App. 4th 1439, 1459 (2011), and to

apply to third parties, *see Temple Community Hospital v. Superior Court*, 20 Cal. 4th 464, 477 (1999).

23.4. Discovery Sanctions Is the Remedy for Spoliation

"While there is no tort cause of action for the intentional [or negligent] destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions." *Williams v. Russ*, 167 Cal. App. 4th 1215, 1223 (2008).

A terminating sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence. *See R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486, 496 (1999).

23.5. Other Non-Tort Remedies for Spoliation

Other nontort remedies for the spoliation of evidence include state bar "discipline, including suspension and disbarment" for attorneys who suppress or destroy evidence, *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1, 12-13 (1998), and "criminal penalties for spoliation." *Id*. at 13; *see* Cal. Penal Code § 135.

24. CONTEMPT

"It is well settled that the court has inherent power to enforce compliance with its lawful orders through contempt." *In re Nolan W.*, 45 Cal.4th 1217, 1230 (2009). But "[b]ecause of the potential punishment, [a contempt proceeding] is considered quasi-criminal, and the defendant

possesses some of the rights of a criminal defendant." *People v. Gonzalez*, 12 Cal. 4th 804, 816 (1996). Under rules going back many decades, a finding of civil contempt requires an elaborate procedure.

24.1. Contempt Procedure – The Initiating Affidavit

First an initiating affidavit must issue. *See* Cal. Civ. Proc. Code § 1211 ("When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."); *Koehler v. Superior Court*, 181 Cal. App. 4th 1153, 1169 (2010) ("It has long been the rule that the filing of a sufficient affidavit is a jurisdictional prerequisite to a contempt proceeding."); *In re Cowan*, 230 Cal. App. 3d 1281, 1286–1287 (1991).

24.2. Contempt Procedure – Personal Service

"Second, a contempt citation must be served personally." *Koehler*, 181 Cal. App. 4th at 1169; *see Cedars-Sinai Imaging Med. Grp. v. Superior Court*, 83 Cal. App. 4th 1281, 1287 (2000). "Service of an order to show cause to bring a party into contempt is insufficient if made by mail on the party's attorney of record." *Id*. Failure to personally serve the affidavit denies the Court of jurisdiction. *See Cedars-Sinai Imaging Med. Grp. v. Superior Court*, 83 Cal. App. 4th 1281, 1286–87 (2000) ("Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; otherwise, the court lacks jurisdiction to proceed." (emphasis omitted)).

24.3. Contempt Procedure – Finding of Facts

Third, a contemptuous act, such as failing to comply with a discovery order, occurring outside the presence of the court requires the court to find sufficient facts to satisfy a four-part test: "the issuance of an order, the contemnor's knowledge of the order, the contemnor's ability to obey it, and the contemnor's willful disobedience." *Koehler*, 181 Cal. App. 4th at 1169.

24.4. Contempt Procedure – Disco Notice Insufficient

"The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court." Cal. Civ. Proc. Code § 2023.030(e). But this provision does not obviate the regular procedural requirements to find contempt. *See Koehler v. Superior Court*, 181 Cal. App. 4th 1153, 1169-70 (2010); *e.g., Van v. LanguageLine Sols*., 8 Cal. App. 5th 73, 83 (2017).

25. POST-JUDGMENT DISCOVERY

After judgment, a creditor is may deploy certain discovery tools for purposes of collecting money on her debt.

25.1. Post-Judgment Requests for Production

"The judgment creditor may demand that any judgment debtor produce and permit the party making the demand . . . to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made in the manner provided in Chapter 14" of the Discovery Act, Cal. Civ. Proc. Code § 2031.010 et seq., "if the demand requests information to aid in enforcement of

the money judgment." Cal. Civ. Proc. Code § 708.030(a). "The judgment debtor shall respond and comply with the demand in the manner and within the time provided by Chapter 14" of the Discovery Act. *Id*.

25.2. Post-Judgment Special Interrogatories

"The judgment creditor may propound written interrogatories to the judgment debtor," and the "judgment debtor shall answer the interrogatories in the manner and within the time provided by Chapter 13" of the Discovery Act, Cal. Civ. Proc. Code § 2030.010, et seq. Cal. Civ. Proc. Code § 708.020(a).

26. CIVILITY & PROFESSIONALISM

26.1. Incivility Inefficiencies

The Court of Appeal has stated:

> Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears.
>
> Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for

> instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. All sides lose, as does the justice system, which must supervise the hostilities.
>
> By contrast, civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook.

Karton v. Ari Design & Constr., Inc., 61 Cal. App. 5th 734, 747 (2021).

26.2. The Court is Empowered to Adjust Attorney Fee Awards in Light of Civility

The court has authority to reduce an attorneys' fees award, when the prevailing party's attorney engaged in uncivil conduct. *See Snoeck v. Exaktime Innovations, Inc.*, 96 Cal. App. 5th 908, 928 (2023) (holding evidence of attorney "incivility" may justify a "downward departure from the lodestar figure").

26.3. The Bar Advises Civility

The California Rules of Civility admonishes against "conduct that is unbecoming a member of the Bar" instructing attorneys to refrain from "disparaging the intelligence, integrity, ethics, morals or behavior of . . . counsel, parties or participants" and "avoid hostile, demeaning or humiliating words." *California Attorney Guidelines of Civility and Professionalism* § 4 (2004), https://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf.

PRACTICE NOTE RE CIVILITY

Once parties begin a mud fight, it is often difficult for your judge to single out the responsible actor. Everyone looks filthy. And the judge hardly has time nor interest to dig into the 100-page meet-and-confer record to get to the bottom of it all. Some guidelines:

1. **Avoid the Ad Hominin**. Of course, the parties disagree about the facts. That does not make the opposition a "liar." Strong language accusing counsel and parties of perpetuating a hoax, a fraud, or a cheat will likely backfire.
2. **Soft Conclusions**. When placing blame, argue the facts such that they, alone, lead the judge to an ineluctable conclusion. When it comes time to articulate that conclusion, do so softly, and allow the judge to come to you.
3. **Go Quietly**. Judges are presumptively suspicious of arguments that sound like angry banging. A judge may be inclined to follow your language and tone, however, if it more closely tracks her own: circumspect, and with grace.

26.4. Attacking the Court Itself

"Impugning the integrity of the trial judge without facts is rarely a good idea and serious accusations against a trial judge . . . had better be supported by concrete evidence." *Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc.*, 56 Cal. App. 5th 771, 793 (2020).

27. RHETORIC & STRATEGY

27.1. May Deploy Multiple Discovery Tools

"A party is permitted to use multiple methods of obtaining discovery and the fact that information was disclosed under one method is not, standing alone, a proper basis for refusing to provide discovery under another method." *Irvington-Moore, Inc. v. Superior Court*, 14 Cal. App. 4th 733, 739 (1993); *see Coy v. Superior Court*, 58 Cal. 2d 210, 218-219 (1962).

27.2. Parties in Pro Per Enjoy No Prerogative

"Under the law, a party . . . choos[ing] to act as his or her own attorney . . . . is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." *Nwosu v. Uba*, 122 Cal. App. 4th 1229, 1246–47 (2004). Thus, "the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." *Rappleyea v. Campbell*, 8 Cal. 4th 975, 984-85 (1994); *see Robert J. v. Catherine D.*, 171 Cal. App. 4th 1500, 1527 (2009) (holding "pro per litigants are held to the same standard as parties represented by trained legal counsel"). Parties in pro per are "not entitled to disregard the rules for timely responding to

discovery . . . not immune from the consequences of a failure to do so, . . . [n]or . . . entitled to submit belated responses" to discovery. *Stover v. Bruntz*, 12 Cal. App. 5th 19, 31 (2017).

27.3. Trial Court May Not Make Party's Argument For Them

In motion papers, parties must cite to legal authorities and to admissible evidence. *See* Cal. R. Ct. 3.1113. When a party fails under Rule 3.1113 to provide citation to the record and to legal authority, the Court shall not "comb the record and the law for factual and legal support that a party has failed to identify" because to do so would "cast [the Court] as a tacit advocate for the moving party's theories." *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.*, 197 Cal. App. 4th 927, 934 (2011).

27.4. Silence Creates Waiver

"Of course parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat [the] . . . . contention as waived." *Schoendorf v. U.D. Registry, Inc.*, 97 Cal. App. 4th 227, 237 (2002).

27.5. Two Wrongs Do Not Make a Right

The other side's violation of the Discovery Act does not justify one's own. The courts have explained it this way: when it comes to discovery responses, "two wrongs do not make a right." *Stephen Slesinger, Inc. v. Walt Disney Co*., 155 Cal. App. 4th 736, 776 (2007).

Persuasive authority is in accord. *See, e.g., Morton v. Twitter, Inc.*, No. CV2010434GWJEMX, 2021 WL 4535341, at *1 (C.D. Cal. Aug. 3, 2021) ("A party . . . cannot refuse to produce relevant, responsive information because it thinks the other party should have disclosed certain information."); *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 235 (W.D.N.Y. 1998) ("Defendants' failure to respond to Plaintiff's Requests does not . . . excuse Plaintiff from complying with Defendants' discovery requests."); *Elkay Mfg. Co. v. Ebco Mfg. Co.*, No. 93 C 5106, 1995 WL 389822, at *8 (N.D. Ill. Feb. 15, 1995) (admonishing that the "argument on this point amounts to nothing more than a cry of 'you started it!'--the kind of statement one hears on playgrounds but which has no place in a court of law"); *Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1440 (D. Del. 1989) (holding "'unclean hands' arguments" of this sort "have no relevance to a motion to compel"); *Blake Assocs., Inc. v. Omni Spectra, Inc.*, 118 F.R.D. 283, 288 (D. Mass. 1988) (holding it is sanctionable conduct when a party refuses to produce documents "unless" the opposition "produces its documents first").

27.6. No New Evidence In Reply

"The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers." *Jay v. Mahaffey*, 218 Cal. App. 4th 1522, 1537 (2013).

27.7. The Fishing Expedition Argument

As a general rule, discovery **is** the proper forum for conducting fishing expeditions. *See Williams v. Superior Ct.*, 3 Cal. 5th 531, 551 (2017) (holding, in passing the Discovery Act "the Legislature . . . establish[ed] a broad right to

discovery" that "permit[s] parties . . . to engage in 'fishing expeditions'" (alterations omitted)); *Greyhound Corp. v. Superior Ct. In & For Merced Cnty.*, 56 Cal. 2d 355, 384 (1961) (holding "there is nothing improper about a fishing expedition, per se"); *Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 246 Cal. App. 4th 566, 591 (2016) (explaining that the discovery "rules are applied liberally in favor of discovery . . . and (contrary to popular belief), fishing expeditions are permissible in some cases"); *Cruz v. Superior Ct.*, 121 Cal. App. 4th 646, 653 (2004); *Gonzalez v. Superior Ct.*, 33 Cal. App. 4th 1539, 1546 (1995).