Judge Randolph M. Hammock
LOS ANGELES SUPERIOR COURT

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Discover what you may not know about the Discovery Act

TIPS ON AVOIDING COMMON ERRORS IN DISCOVERY-MOTION PRACTICE AND ON HOW TO IMPROVE YOUR MOTIONS

As an LASC bench officer for the last 12-plus years, and as a practicing civil litigator for almost 25 years before that, suffice it to state that the Civil Discovery Act (Code Civ. Proc., §§ 2016.010 et seq.) has played a somewhat significant role in my professional life.[1] The purpose of this article is to note the common mistakes made by attorneys (and sometimes even the court) in certain discovery motions and to suggest practical tips for improving these motions. As to the former (and for the sake of brevity), only the most glaring of these errors will be discussed. As to the latter, hopefully these tips will be readily apparent in the discussion.

Motions to compel versus motions to compel further responses

There can be no doubt that motions to compel discovery ("MTC") and motions to compel further responses to discovery ("MTCFR") are the most common of all discovery motions. However, one of the most common errors is to treat these motions as if they were the same – they are not. The applicable statutes for each mode of discovery (i.e., written interrogatories, requests for production of documents, and requests for admission) contain separate sections for each of these distinct motions. (Compare § 2030.290(b) with § 2030.300; § 2031.300(b) with § 2031.310; and § 2033.280(b) with § 2033.290.)[2]

Simply put: An MTC applies when the responding party has not *formally responded at all* to the discovery request. This includes a situation in which there has actually been a written response, but it was unverified when it was required to be verified.[3] It is well settled that the failure to verify a response when required to do so is deemed to be no response at all. (*Zorro Inv. Co. v. Great Pacific Securities Corp.* (1977) 69 Cal.App.3d 907, 914.) On the other hand, when there has been a formal response, even if inadequate or evasive, an MTCFR is the applicable motion, not a simple MTC.

Not surprisingly, there are significant procedural differences between these motions. In a simple MTC, there is no requirement for a "separate statement." (See C.R.C., rule 3.1345(b)(1).) The moving party need only demonstrate that a discovery request was properly propounded, the time period to respond (including any extensions thereto) has expired, and no formal response has been received to date.[4] Most importantly, and notwithstanding any motion cut-off dates, there is no time limit (or even diligence requirement) to file such a motion. Additionally, there is no "meet and confer" requirement for an MTC. Technically speaking, a party could file an MTC on the first day after the time period has expired, without even first contacting the responding party's attorney.[5]

In contrast, when filing an MTCFR, there is a required formal separate statement (Cal. Rules of Court, rule 3.1345(a)),[6] and a *jurisdictional* time limit within which that MTCFR must be filed, to wit, 45 days of the service of the formal, verified response (or on or before "any specific later date" to which the parties "have agreed in writing"). (See §§ 2030.300(c), 2031.310(c), and 2033.290(c).)[7] There is also a "meet and confer" requirement before filing any MTCFR. (See §§ 2030.300(b)(1), 2031.310(b)(2), and 2033.290(b)(1).)

Combining discovery motions in a single motion

Another common mistake is when the moving party files an MTC or an MTCFR in a single motion involving more than one type of discovery request or against more than one party's failure to respond or deficient responses. I understand that the moving party's attorney has a desire to save time and money (for the attorney or the client, or both), and as such, filing a single MTC that involves two or more modes of discovery devices, or that is directed against two or more responding parties, may fulfill that desire and seems to make good sense. Unfortunately, however, the LASC's Court Reservation System ("CRS") requires a separate hearing reservation for each discovery motion and separate filing fees for each motion. As a result, you may not be able to obtain the same hearing date for all of your discovery motions and may have to spread them out accordingly. Combining multiple motions under the guise of one motion with one hearing reservation manipulates the CRS and unfairly jumps ahead of other litigants. Moreover, combining motions to avoid payment of separate filing fees deprives the LASC of filing fees it is otherwise entitled to collect.

Although the trial court can exercise its sound discretion to ignore such an improper discovery motion practice, for a "combined MTC" motion, I will typically either still rule on all of these motions (since the standard order is to grant an MTC) with the condition that the additional filing fees must first be paid to the court, or I will simply rule on only one of those motions and deny the others without prejudice, since there is not any 45-day jurisdictional time requirement for MTCs.

Be that as it may, you would be well advised to file a separate MTC or MTCFR for each discovery device and as to each responding party, despite the additional time and money involved. That approach could never be wrong.

Requests for monetary sanctions

What would a discovery motion be without a request for monetary sanctions? As in the Florida Citrus Commission

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commercials of the mid-1970s, most attorneys believe that not asking for monetary sanctions is the same as "Breakfast without orange juice is like a day without sunshine." You just gotta have them.

Naturally, many discovery motions are worthy of an accompanying monetary sanctions request. But does it really have to be in the thousands and thousands of dollars? A standard MTC is simple. How much time does it really take to file a motion that states, in essence: "I served this discovery request on this party's attorney, in this manner, on this date. [Attach Proof of Service] The time limit for a response has expired. To date, I have yet to receive any formal response whatsoever to that discovery request. Order that party to respond to that discovery request, without objections, within X days. Thank you." Please keep in mind that only *reasonable* attorney's fees and costs can be awarded by the court. Given that undeniable fact, why ask for an unreasonable or inflated amount of attorney's fees and/or costs? That approach, not so surprisingly, does not endear you to the Court. Moreover, although an award of monetary sanctions is mandatory to the prevailing party in a discovery motion, in almost every case there are exceptions under which the court can deny these "mandatory" attorney's fees, such as when the court finds that the opposing party acted with "substantial justification" or that "other circumstances make the imposition of the sanction unjust." (See §§ 2030.290(c), 2031.300(c), and 2033.290(d).)[8]

Be that as it may, if you are going to request monetary sanctions in your discovery motion, then do it correctly. I can state without any hesitation whatsoever that I deny many "mandatory" sanctions requests for the following simple reasons: They are either procedurally defective or they are brought against the wrong person or party, or both.

The key statute governing all requests for sanctions under the Civil Discovery Act is section 2023.040. Read it. Know it. Become it. Most mistakes are made by the failure to either "*identify* every person, party, and attorney against whom the sanction is sought" or to include the required information "in the notice of motion." (§ 2023.040, emphasis added.) Simply put: All of the required information must be contained clearly in the "notice of motion," not just in the Memorandum of Points and Authorities or the supporting declaration.[9] The failure to comply with this statute is fatal, for obvious "due process" reasons.[10]

However, surprisingly, the most frequent error committed by attorneys in their monetary sanction requests is this rather simple one: They "identify" the incorrect or inappropriate "person, party or attorney" against whom the sanctions are sought. Typically, the request for monetary sanctions is made against only the responding party, as opposed to that party's attorney. Sometimes the opposite is the case. Often the request is against both. When making a formal monetary sanction request, you should calmly ask yourself a simple question: Who is *actually causing* this discovery dispute? I've got news for you. It is usually the attorney, not the party.

In a typical MTC situation in which the responding party's attorney has failed to respond to your discovery request, and moreover, has failed to even respond to any of your inquiries about the lack of response, I am respectfully suggesting that any monetary sanctions request be made only as to the responding party's attorney (or law firm). What evidence do you have that the failure to serve the required discovery response is the fault of that party, as opposed to the fault of that party's attorney? On the other hand, if you do have evidence that suggests that fact, by all means, feel free to request sanctions against that party.

Whenever I review a procedurally proper monetary sanction request in a discovery motion, I ask myself this: Who is responsible for this discovery dispute? If the discovery responses contain a multitude of hyper-technical or specious objections, unless there is evidence that implies otherwise, I tend to conclude that it is the attorney who signed the response who is responsible, as opposed to the client. Common sense controls.

In short, do yourself and your client a favor. Take a few moments to determine the appropriate person(s) against whom to request sanctions. Don't just mindlessly or automatically request sanctions against a party, an attorney, or both, unless there is ample evidence to suggest that sanctions are, in fact, warranted against that person. Moreover, be *reasonable* in that request.

Unnecessary objections

When it comes to written discovery requests, it would be a gross understatement to say that attorneys love to object, and object, and object . . . . Most of these objections are mere boilerplate, unnecessary, and likely specious. The ultimate irony is, of course, that after several paragraphs of these "objections" (including the "general objections" at the beginning of the response that were "incorporated herein by reference"), the typical response then states: "Without waiving these objections, the responding party further responds as follows . . . ." Indeed.

First and foremost, if the discovery request was sufficiently "vague, ambiguous, unintelligible, etc." (which all mean the same thing) to warrant all of these "objections," then why are you further responding? If you have a righteous objection, then stand by it. By "further responding," the responding party is creating a real problem: to wit, it is now unclear whether the responding party is withholding certain information. Remember, the fundamental premise of a response to a written interrogatory is to be "complete and straightforward." (See § 2030.220(a).) By asserting a multitude of "objections" and then still attempting to "further respond," it seems self-evident that you are not being "complete and straightforward." If you truly are, then why create confusion by objecting in the first place?

Here's a useful tip from the Helpful Hardware Man[12]: Don't object at all, unless there really is a good reason to

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do so. If the request is truly so vague or overbroad (more likely the latter) that it would be unreasonable to respond at all, then stand by your objection. During the "meet and confer" process, you can note these issues and suggest narrowing or rewording the request. That's why there is a mandatory "meet and confer" process in the first place. That is also why the meet-and-confer process is required to be "meaningful."

Another suggestion for the responding party: If you truly need to assert objections, and you still want to attempt to "further respond" in view of those objections, then simply state that fact and make an appropriate *conditional* response. For example, if the request is woefully "overbroad," after asserting that objection, you can further respond that you have unilaterally limited the scope to certain dates or time periods. Not only is this allowed under the Code of Civil Procedure, it also demonstrates good faith and reasonableness on your part. (See, e.g., § 2030.220(b) ["If an interrogatory cannot be answered completely, it shall be answered to the extent possible."]; see also § 2030.240(a) ["If only a part of an interrogatory is objectionable, the remainder of the interrogatory shall be answered."].)

Last, but not least, please keep in mind that discovery is allowed to be quite broad. The ultimate standard is whether the request is "reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) Needless to say, it is unusual for a court to sustain an objection based solely upon that ground.

Ultimately, if you take anything away from reading this article, let it be this: Know the rules. Follow them. Be sure that the facts of your case justify the relief – and the sanctions – that you are requesting. And if you object, have a good reason and stand by it. "Suit the action to the word, the word to the action."[13]

Randolph M. Hammock is a Superior Court Judge, currently sitting in an Independent Calendar ("IC") Court at the Stanley Mosk Courthouse, in which he presides over unlimited civil cases. He graduated from San Diego State University (1980) and the University of San Diego, School of Law (1983). During his almost 25 years of practicing law (primarily as a civil trial attorney), Judge Hammock was admitted to and actively practiced law in a total of 15 states, as well as over 20 federal district courts and courts of appeal. As such, he is likely to have passed more bar exams than any other practicing lawyer in the United States. He was a member of LATLA/CAALA from the mid 1980s to his appointment as a Superior Court Referee in the juvenile dependency court in 2008, where he served until he was elected as a Judge of the Los Angeles Superior Court in 2010. He has been a member of the American Board of Trial Advocates (ABOTA) since 2000.

Endnotes:

[1] Unless otherwise expressly stated, all further statutory references are to the Code of Civil Procedure.

[2] There are no "motions to compel" an initial response to requests for admission. Instead, here is a motion for an order for the requests for admission to have been "deemed admitted." (§ 2033.280(b).)

[3] Verifications are not required if the response "contains only objections." (See §§ 2030.250(a), 2031.250(a) and 2033.240(a).) In other words, if there is at least one substantive response (including the proverbial "without waiving the above-stated objections, the responding party further responds as follows . . ."), then a proper verification is required.

[4] If the responding party serves a formal response to the outstanding discovery after the MTC is filed, but before the hearing is commenced – which is quite common – then the MTC becomes moot and will only be left on calendar, if requested, for purposes of ruling on any sanctions request.

[5] Of course, as a matter of professional courtesy and civility, the court would expect and encourage such a prior attempt, although the court could not normally require it.

[6] As of January 1, 2020, there is a new exception to the separate statement requirement if the 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. Rules of Court, rule 3.1345(b)(2).) Of course, this means the separate statement is still required in the absence of court permission to file the alternative "concise outline."

[7] There appears to be a subtle, yet interesting, difference in the respective statutes' wording between the propounding party's unilateral granting of an extension of time to respond to a discovery request and an agreement between the propounding and responding parties to extend the 45-day time limit in which to file an MTCFR. The former requires an agreement – which may be "informal" – that "specifies the extended date," which must be "confirmed in a writing." The latter requires a "specific later date" to which the parties "have agreed in writing." There is no express mention of an "informal" agreement in the latter situation. Does this mean that a formal written agreement signed by the parties (or their attorneys) is needed in the latter situation, as opposed to a simple confirming letter or email from one party to another? Perhaps. (Compare § 2030.270(b) with § 2030.300(c); § 2031.270(b) with § 2031.310(c); and § 2033.260(b) with § 2033.290(c).)

[8] The only situation in which the award of monetary sanctions is, in fact, mandatory without any exceptions is when there's a motion for an order to deem a request for admission to have been admitted, and "before the hearing on the motion," the responding party serves a "proposed response" to the RFAs at issue that is in "substantial compliance with Section 2033.220." In this common situation, the motion is to be denied as moot, and an award of monetary sanctions against the appropriate person(s) must be issued by the court. (See § 2033.280(c).)

[9] Interestingly enough, there is no requirement to state the exact amount of monetary sanctions in the notice of motion. Only the "type" of sanctions is required to be stated therein, to wit, "monetary" or "evidentiary," etc. Of course, it is not improper to include the exact monetary amount in the notice of motion. If you choose not to do so, then the exact amount of monetary sanctions should be included in either the memorandum of points and authorities or the supporting declaration.

[10] Although this statute does not expressly discuss a request for sanction in an opposition, since there is no separate "notice of motion" typically in an opposition, it is strongly suggested that you include the required information in the first page of the opposition, as opposed to much later in the opposition papers. The earlier, the better for "due process" purposes.

[11] In further point of fact, there is often evidence to the contrary in the supporting documentation itself. If, for example, the client verified the responses weeks before the attorney served them, the chances are good that the party had nothing to do with the delay.

[12] "Ace is the place with the helpful hardware man." Copyright by Ace Hardware Corporation, 1970.

[13] (Shakespeare, Hamlet, act III, scene 2.)