



## **How to write a successful discovery motion and what you should do to oppose such a motion.**

Discovery motions are the bane of most attorneys' existence and they are often relegated to the newbie in the office to prepare. Inexperienced associates as well as other attorneys struggle on what needs to be in the papers and exactly how to convince the court that they should win.

### **I. What Your Discovery Motion Should Look Like**

With the courts having budgetary problems and staff shortages, it is in your best interest to make it real clear to the court (1) what has happened; (2) why the discovery you seek is discoverable; (3) how the opposing counsel did not act with "substantial justification" in objecting to the discovery thus entitling you to sanctions; and (4) exactly what you want the court to order.

The practice guides--Weil and Brown, *Civil Procedure Before Trial* (TRG 2019), CEB California Civil Discovery Practice (2019) 4<sup>th</sup> Ed. and *Matthew Bender Practice Guide: California Civil Discovery* -- are good starting points when preparing your motion. There also are numerous seminars on law and motion practice, which I encourage you to attend. To better understand how a judge may rule, go to the court's website and check the judge's tentative rulings. Also, you should check the website of various legal newspapers and magazines to see if there has been an interview given by your particular judge.

Yet, you still may be unsure as to what the meat and potatoes of the motion should look like. After two years in the law and motion department in Alameda County Superior Court and twenty-five years as a private Discovery Referee, I can tell you what I like, and you can take whatever pearls and nuggets you find from there.

#### **A. Meet and Confer Letter:**

1. This is a very important document. It sets the tone of your dispute with opposing counsel, so don't be hostile. Remember this letter is going to be an exhibit to your motion and could make or break your request for sanctions if the court finds that you have not been professional.
2. List every interrogatory, request, and/or deposition question separately and explain why the objections are garbage and why you are entitled to discover the information. You later can take your arguments from this letter and drop them into your Separate Statement of Items in Dispute [CRC 3.1345] saving you much needed time.

#### **B. Notice:**

1. The Notice is not wasted space. The notice is to tell the court and opposing party not only the name, date, time, and location of the motion, but the "nature of the order sought" as well. So, make sure you state the exact remedy you're seeking in detail. If you are seeking sanctions it must be in the Notice. [CRC Rule 3.110(a)]
2. List the nature and title of all documents that will be attached (i.e., Memorandum of Points and Authorities, declarations, etc.) [CRC Rule 3.110(b)]
3. Make sure you comply with CRC Rule 3.1110 regarding pagination of documents, reference to previously filed papers, binding, and formatting. [CRC Rule 3.110(c)-(f)]
4. If any of the exhibits are in a foreign language, you must provide an English translation certified under oath by a qualified interpreter. [CRC Rule 3.110(g)]

#### **C. Points and Authorities**

1. Provide a brief synopsis (two or three sentences) of the crux of the motion that you are bringing before the court.
2. Give a good explanation of the facts of the case. The relevant scope of your discovery depends on these facts. Don't assume the court remembers your case as they handle anywhere from 75 to 100 cases a week.
3. Provide a procedural history of the discovery motion in a timeline laid out like the one below:
  - 4/1/19 Served interrogatories via mail (*Exhibit A*)
  - 4/29/19 Opposing counsel asked for an extension via telephone call (*Declaration*)
  - 5/31/19 Received responses full of objections (*Exhibit B*)
  - 6/14/19 Meet and confer letter sent (*Exhibit C*)
  - 7/3/19 Response to meet and confer letter (*Exhibit D*)
4. State your arguments why you are entitled to your discovery. Categorize your arguments (i.e., "Special Interrogatories #1,7,15 are asking for information regarding plaintiff's limitation on his inability to do his current job").
5. Apply the facts and the law accurately. Point out the obligation to respond in good faith. Point out the garbage objections. Point out that the failure to provide proper responses has delayed your case. If the motion is a motion to compel further responses compel then make your arguments to the specific interrogatories, requests for admissions, requests for production of documents or deposition questions in the Separate Statement of Items in Dispute as required by CRC Rule 3.1345.

6. State your request for sanctions in detail. This includes how many hours you worked on the motion, your hourly rate, and costs—all supported by your declaration.
7. Detail the exact relief you are requesting: (i.e., “*Plaintiff to serve verified responses to interrogatories 1, 2, 3, 4 by 11/1/2019 and attorneys’ fees in the amount of \$2200 and costs in the amount of \$60.*”)
8. Make sure you comply with CRC Rule 3.1113 regarding the requirements for your memorandum.

#### **D. Separate Statement of Items in Dispute**

1. This is the most important document of your motion and the first document that a court will rely on. Do your real argument here. Be detailed in the law as to why the objections are garbage. Apply the facts of your case to show why the information you are seeking is discoverable.
2. Make sure your separate statement is in compliance with CRC Rule 3.1345(c) regarding formatting and content.

#### **E. Declaration:**

1. Authenticate all your exhibits.
2. Describe your meet and confer with opposing counsel in detail. It helps to summarize the meet and confer efforts other than just referring to an exhibit. That way the court doesn’t have to flip through a stack of exhibits which can be quite lengthy.
3. If there is a request for sanctions, state your hourly rate. Outline in detail the time spent on the motion and any future time you anticipate spending. Calculate the attorneys’ fees and add the costs. **SHOW YOUR WORK!**

#### **F. Proposed Order:**

1. Proposed order is to be lodged and served with the moving papers. [CRC Rule 3.113]
2. Have the order state which interrogatory, request for production of document, request for admission, and/or deposition question have been granted and the date line as to when that verified response is to be served or the deposition needs to take place by (i.e., “Verified answers to Special Interrogatories, Set #1, #1, 2, 5, 7, 13 are to be served no later than \_\_\_\_.”). This allows the court to easily modify the order if necessary.
3. For monetary sanctions, leave blank the amount of sanctions awarded so the court can fill in the number. List the amount for costs. State each person the award is to be against.
4. For issue and/or evidence sanctions describe in detail exactly what you want the court to exclude. Make sure that it is clear and precise so it will be clear to the trial judge.

## Other Helpful Hints:

1. Do not go over the 15-page limit without obtaining a court order. [CRC Rule 3.1113 (e)]
2. Font size is not to be smaller than 12 points and the typeface must be essentially equivalent to Courier, Times New Roman, or Arial. [CRC Rules 2.104 and 2.105]
3. Though CRC 2.08 allows for 1.5-line spacing, double space is preferred.
4. Understand the procedural rules for Judicial Notice and their effect on your motion. [Ev. C §451, Ev. C §452, CRC Rule 3.1113(l)]
5. You must do a table of contents and table of authorities if the motion is 10 or more pages. CRC 3.1113(f) However, many judges appreciate a table of contents in any motion.
6. If you are bringing a motion to compel answers to special interrogatories or requests for admissions that are over the initial 35 allowed, then make sure and attach your “*Declaration of Necessity*.”
7. If a department wants courtesy copies, make sure you get a full set to the department in a timely fashion.
8. Most importantly, **PROTECT YOUR REPUTATION**. Be accurate in your citation of the facts as well as the law. Do not overreach. Do not try and be clever. Do not show disrespect to opposing counsel or their client. The research staff, as well as the judges, will remember you.

## II. THE OPPOSITION

You have been served with the Motion to Compel Further Responses with a Separate Statement of Items in Dispute the size of your fist and your response is due in two weeks. Now what do you do? First, take a deep breath. This is the time you decide when to whether you want to amend your discovery responses because how you respond may end up setting the tone between you and opposing counsel for the entire case.

Look at the Separate Statement of Items in Dispute and determine whether or not you have made any garbage objections. If you have, offer to respond to those interrogatories, requests for admissions and/or requests for productions of documents by a date no later than when your opposition is due.

If you strongly believe the interrogatories or requests are vague, ambiguous, overbroad and/or burdensome, this is the time to reach out to opposing counsel and explain in detail why you are having trouble responding to the discovery and give suggestions on how they should rephrase the interrogatories and/or requests. ***Do this in writing as soon as possible***. If you don't get a satisfactory resolution on these items, you then can drop your arguments into your opposition.

Claims of privileges must be protected by the attorney, but remember that they are generally narrowly construed. The work product doctrine and the right of privacy are another story. These objections are not privileges and can be overruled--except for absolute work product--if there is a showing that the discovery is necessary for a fair resolution of the lawsuit. [See *Valley Bank of Nevada v. Superior Court* (1975) 15 C3d 652, 316 and *Coito v. Superior Court* (2012) 54 C4th 480] Consider negotiating a protective order with opposing counsel as a court most likely would grant one in the cases involving privilege, work product doctrine, or the right of privacy.

If all else fails, prepare your opposition. Follow the same advice given above on how to write you're a discovery motion. However, one additional piece of advice--though the code does not require it, you should prepare your own Separate Statement of Items in Dispute. This document is **GOLDEN** because this will become the first document the court reviews in deciding the motion as it will have all the information the court needs in this one document. Your Separate Statement of Items in Dispute headings should look like this:

**Form Interrogatory #12.1:** State the request or interrogatory verbatim.

**Response:** State your response verbatim.

**Supplemental Response (provide dates):** State any supplemental response verbatim.

**Why There Should Be a Further Response:** State moving papers' Separate Statement of Items in Dispute arguments verbatim.

**Why There Should Not be a Further Response:** Do not use conclusory statements. You need to be **very** specific in the law and the applicability of the law to your case if you are not responding to the discovery on claims of privilege, work product and/or privacy. If you are arguing that your objections are not garbage objections, then explain in detail why.

The final piece is your declaration. You should prepare your declaration the same as if YOU were filing the motion. However, if the moving papers are requesting sanctions then you must address this full on. Describe how you "**acted with substantial justification**" in objecting to the discovery and opposing the motion. Detail your entire meet and confer efforts (i.e., explain the problems with the interrogatory/request, and how you offered to respond to the discovery if everyone could agree to a protective order, etc.). Don't forget to request sanctions yourself for all the time you have spent in your attempts to meet and confer and in opposing and arguing the motion.