BRIDGING THE GAP

LAW & MOTION

Discovery Law and Motion Authorities
Orange County Bar Association
Hon. Franz E. Miller

Selected Authorities re Discovery Motions

Motions to Compel Responses

Interrogatories

California *C.C.P.* 2030.290(a) provides that a party propounding interrogatories, who has not received timely responses, may move for an order compelling responses to those interrogatories. When a party fails to respond to properly propounded discovery within 30 days, plus the 5 additional days for mailing and any extensions, the moving party has no obligation to meet and confer to informally resolve the matter. *See, Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411, and Rutter, *Civil Procedure Before Trial*, Sections 8:1141 and 8:1486.

If the motion is granted, the court will usually order the responding party to respond to the interrogatories without objections, within 14 days. (The court may allow objections if the responding party's failure was the result of mistake, etc., and the party has responded before the motion is granted.) Sanctions are required under pursuant to *C.C.P.* 2030.290(c) unless the court finds the circumstance would make their imposition unjust.

Requests for Production of Documents

California *C.C.P.* 2031.300(a) provides that a party propounding a RFPD, who has not received timely responses, may move for an order compelling responses to those document requests. When a party fails to respond to properly propounded discovery within 30 days, plus the 5 additional days for mailing and any extensions, the moving party has no obligation to meet and confer to informally resolve the matter. *See, Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411, and Rutter, *Civil Procedure Before Trial*, Sections 8:1486. Also, there is no need to demonstrate "good cause" for production when a party is simply seeking responses to its document requests. *See,* Rutter, *Civil Procedure Before Trial*, Section 8:1487.)

The same rules re late compliance and sanctions re interrogatories, above, apply.

Requests for Admissions

Basically the same rules under CCP secs. 2033.280 and 2033.290

Motions to Compel Further Responses

Interrogatories

California *C.C.P.* 2030.300(a) provides that: "On receipt of a response to interrogatories, the propounding party may move for an order compelling a further response if the propounding party deems that the answers provided are evasive or incomplete, that the exercise of the option to produce documents instead is unwarranted, and/or an objection to the interrogatory is without merit or too general. Section 2030.300(b) requires a good faith meet and confer before the motion is brought. Section 2030.300(c) provides that a motion to compel further responses must be noticed within 45 days of receipt of the response absent an agreed extension or court's order extending such time. Finally, Section 2030.300(d) provides that the court shall impose monetary sanctions against the unsuccessful party unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of sanctions unjust.

Request for Production of Documents

California *C.C.P.* 2031.310(a) provides that: "On receipt of a response to inspection demand, the party demanding an inspection may move for an order compelling a further response to the demand if the demanding party deems a statement of compliance to be incomplete, a representation of inability to comply is inadequate, incomplete, or evasive, and/or an objection in the response is without merit or too general." Section 2031.310(b) requires a good faith meet and confer before the motion is brought, as well as a showing of "good cause" for the production sought. Section 2031.310(c) provides that a motion to compel further responses must be noticed within 45 days of receipt of the response absent an agreed extension or court's order extending such time. Failure to file a motion to compel further responses within 45 days, or the time provided for by any extension, waives a party's right to compel further responses because the court lacks jurisdiction. *See*, *Vidal Sassoon, Inc. v. Superior Court* (1983) 147 Cal.App.3d 681, 685, and Rutter, *Civil Procedure Before Trial*, Section 8:1491. Finally, Section 2031.310(d) provides that the court shall impose monetary sanctions against the unsuccessful party unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of sanctions unjust.

However, *C.C.P.* 2031.320(a) provides that a party may seek to compel production of documents as agreed. In *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, the court held that a trial court may treat a motion in accord with the relief sought regardless of its label. *Id.*, at 193.

Requests for Admissions

California *C.C.P.* 2033.290(a) provides that a party who receives responses to RFAs and deems them incomplete or non-responsive may move to compel further responses. Section 2033.290(b) requires a good faith meet and confer before the motion is brought.

Section 2033.290(c) provides that a motion to compel further responses must be noticed within 45 days of receipt of the response absent an agreed extension or court's order extending such time. Finally, Section 2033.290(d) provides that the court shall impose monetary sanctions against the unsuccessful party unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of sanctions unjust.

California *C.C.P.* 2033.280(b) provides that, if timely responses to properly propounded requests for admission are not received, then: "The requesting party may move for an order that the genuineness of any documents and the truth of the matter be deemed admitted, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010.)" Section 2033.280(a) provides that the failure to timely respond waives all objections. But Section 2033.280(c) provides that: "The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220." Thus, given the seriousness of requests for admission being deemed admitted, the code provides that, even if a party did not provide timely responses, it can still file proper responses in substantial compliance before the hearing and avoid having the requests for admission deemed admitted.

Failure to Appear and/or Produce Documents at a Deposition

C.C.P. 2025.450 addresses a party's failure to appear and/or produce documents at deposition. Section 2025.450(a) requires a showing of a proper deposition notice. Section 2025.450(b) provides that: "A motion under subdivision (a) shall comply with both of the following:

(1) The motion shall set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice.

(2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040, or, when the deponent fails to attend the deposition and produce the documents or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance." *See also,* Rutter, *Civil Procedure Before Trial*, Section 8:532.1.

"Good cause" means the moving party must demonstrate:

(1) relevance of the documents to the subject matter of the issues in the case and (2) specific facts demonstrating why such documents are necessary for trial preparation. *See, Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117, and Rutter, *Civil Procedure Before Trial*, Sections 8:532.1 and 8:1495.6. If "good cause" is shown, the burden shifts to responding party to justify any objections made to the document disclosure. *See, Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.

C.C.P. 2024.020(a) provides that: "Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for trial." Trial in this case is set for 11-3-08. Fifteen days before trial is 10-20-08. With the ex parte order shortening time, cross-complainant has filed a timely motion to compel further responses and document production.

The court cannot grant different relief, or relief on different grounds, than those stated in the notice of motion. *See, Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124, and Rutter, *Civil Procedure Before Trial*, Section 9:38. Also, a motion to compel further responses must be accompanied by a separate statement. *See,* CRC, Rule 3.1020(a). No separate statement was submitted in regards to the custodian of records deposition. Therefore cross-complainant Wright's motion should be limited to a motion to compel further responses and production by cross-defendant Chin only.

Financial records are covered by a party's right to privacy. In *Cobb v. Superior Court* (1979) 99 Cal.App.3d 543, the court stated that a right of privacy exists in a party's financial affairs, even if the information sought is admittedly relevant to the litigation. *Id.*, at 550. Similarly, the financial affairs of third parties are entitled to a right of privacy. *See, Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658. In *Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, the court stated that "...there is a right to privacy in confidential customer information *whatever* form it takes, whether that form be tax returns, checks, statements, or other account information." *Id.*, at 481, citing *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 712 to 713. Also, tax records, both state and federal, are privileged to facilitate disclosure and payment of taxes. *See, Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513 to 514, and *Sav-on Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 6. To overcome a right to privacy in financial information, a party must demonstrate a "...compelling need for the information." *See, Hinshaw, Winkler, Draa, Marsch & Still v. Superior Court* (1996) 51 Cal.App.4th 233, 241, and Rutter, *Civil Procedure Before Trial*, Section 795.

Motions to Compel Physical/Mental Exams

C.C.P. 2032.220(a) provides that: "In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, if both of the following conditions are satisfied:

The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive. (2) The examination is conducted at a location within 75 miles of the residence of the examinee." Section 2032.230(a) provides that: "The plaintiff to whom a demand for a physical examination under this article is directed shall respond to the demand by a written statement that the examinee will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination." Section 2032.240(a) provides that the failure to provide a timely written

response waives all objections unless the plaintiff subsequently serves a response in substantial compliance with Section 2032.230 and plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. Section 2032.240(b) provides that: "The defendant may move for an order compelling a response and compliance with a demand for a physical examination."

In addition, *C.C.P.* 2032.020(a) limits the scope of the physical examination to the conditions placed at issue. Also, the statute only provides for a "physical examination" and nothing is said about a history but some questions about physical symptoms would be within scope. *See*, Rutter, *Civil Procedure Before Trial*, Section 8:1520.1 and 8:1520.2.

Finally, *C.C.P.* 2032.310(a) provides that if a party seeks additional physical or mental examinations the party shall obtain leave of court. Such a motion shall be accompanied by a meet and confer and specify the nature of the examination sought.

Meet and Confers

Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 1434-1438:

It is a central precept to the Civil Discovery Act of 1986 (§ 2016 et seq.) (hereinafter Discovery Act) that civil discovery be essentially self-executing. (Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1111 [1 [*1435] Cal. Rptr. 2d 222].) 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." (§ 2025, subd. (o); DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1284 [49 Cal. Rptr. 2d 229].) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order. . . ." (McElhaney v. Cessna Aircraft Co. (1982) 134 Cal. App. 3d 285, 289 [184 Cal. Rptr. 547].) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (DeBlase v. Superior [***5] Court, supra, 41 Cal. App. 4th 1279, 1284; see also Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 122 Cal. App. 3d 326, 330 [175 Cal. Rptr. 888].)

Federal discovery law also requires that, prior to the initiation of a motion to compel, the parties informally attempt to resolve discovery matters. (Nevada Power Co. v. Monsanto Co. (D.Nev. 1993) 151 F.R.D. 118, 120; Tarkett, Inc. v. Congoleum Corp. (E.D.Pa. 1992) 144 F.R.D. 282, 285-286; Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n (N.D.Tex. 1988) 121 F.R.D. 284, 289 ["[t]he purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought"].) Some federal courts have lamented that, "in many instances the [informal] conference requirement seems to have evolved into a pro forma matter." (Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n, supra, 121 F.R.D. at p. 289.)

In Nevada Power Co. v. Monsanto Co., supra, 151 F.R.D. 118, 120, the court HN2offered

the following guidelines for the conduct of an informal negotiation conference: [***6] "[T]he parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a 'sincere effort' to resolve the matter."

These sensible guidelines apply, with equal force, California's Discovery Act. (Greyhound Corp. v. Superior Court (1956) 56 Cal. 2d 355, 371 [15 Cal. Rptr. 90, 364 P.2d 266].)

CA(2a)(2a) Each of the statutes governing discovery contains a provision that requires that the parties, prior to invoking the assistance of the court, attempt [*1436] to informally resolve their discovery disputes. (§ 2030, subd. (l) [interrogatories], 2031, subd. (l) [demand for inspection], 2032, subd. (c)(7) [demand for physical examination], 2033, subd. (l) [requests for admission].) Efforts at informal resolution for these proceedings will necessarily take place after the responses and objections to discovery have been reviewed by the proponent.

[***7] Depositions differ from other manner of discovery mechanisms in that counsel for both parties are present. The immediacy of counsel allows for the instantaneous discussion of an objection and attempts at informal resolution. This proposition has a certain facial appeal and the support of at least one commentator. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1997) P 8:812, p. 8E-97.)

It is the collective experience of lawyers and judges that too often the ego and emotions of counsel and client are involved at depositions. (For some examples of heated exchanges that have taken place at depositions, see Rosenthal v. State Bar (1987) 43 Cal. 3d 612, 629-630 [238 Cal. Rptr. 377, 738 P.2d 723] [petitioner was evasive and hostile at his deposition]; Sabado v. Moraga (1987) 189 Cal. App. 3d 1, 4-7 [234 Cal. Rptr. 249] [counsel advised a witness, who he did not represent, to refuse to be sworn as a witness]; Kibrej v. Fisher (1983) 148 Cal. App. 3d 1113, 1114 [**336] [196 Cal. Rptr. 454] [counsel for deponent repeatedly objected to the use of an interpreter].) Like Hotspur on the field of battle, counsel can become blinded by the combative [***8] nature of the proceeding and be rendered incapable of informally resolving a disagreement. n2 It is for this reason that a brief cooling-off period is sometimes necessary.

The following blow-by-blow account of the deposition illustrates the point: Joseph Fairfield, counsel for Townsend, fired the first salvo of objections when he let it be known, in no uncertain terms, that he considered to be irrelevant any questions not pertaining to a contract purportedly executed on April 20, 1995. After some debate over this objection, counsel for Fidelity National Trust, hoping to have the deposition end by 5 p.m., suggested [***9] that the objections of Townsend be made, but not debated: ". . . this is not the time to argue your cases. There's no judge. . . ."

[*1437] The attorneys, nonetheless, robustly sought to pick up the gauntlet thrown down by Fairfield. "Could we not argue the merits of it now?" suggested counsel for Prudential Realty. After specifying the grounds of the objection, T. Robert Finlay, counsel for proponent EMC, stated, "We will go to court and come back on that." At no point during this debate did counsel indicate that any of such discussion was intended as compliance with the requirement of informal resolution.

As in a prize fight, the deposition continued into the next round. As reflected at pages 76 through 88 and 103 through 114 of the transcript, there occurred new outbreaks of skirmishing over the pugnacious Fairfield's successive objections of relevance. As the deposition moved into the afternoon, tempers flared. "Could you not raise your voice and calm down, please," said Finlay.

Once again there was argument and verbal sparring over the propriety of objections. This was followed by mockery and derision. "FINLAY: Would you like to stipulate to strike this portion of the [***10] Complaint in paragraph 17? [P] FAIRFIELD: No. But I'll stipulate that you may enter a judgment against your client." Counsel for Fidelity National Trust, attempting to move the deposition along and cool things off, once again suggested that "[t]his isn't argument time."

The combatants stumbled into the final rounds. Fairfield, counterpunching, accused Finlay of asking an "insulting question." After a lull in the action, counsel for Moffett told Fairfield to stop shouting at him.

Finlay, seemingly caught flatfooted by Fairfield's fusillade of objections, was ill prepared to discuss the law governing relevance. His abbreviated discussions, as well as those remarks interposed by other counsel, were but insubstantial gestures to comply with the mandate of the Discovery Act.

Further protestations to the questions did not occur until later. Once again, there was argument and verbal sparring over the propriety of the objections. The deposition again resumed and, later, there was again argument. At no point did counsel for proponent indicate that these discussions were intended as compliance with the requirement of informal resolution.

Respondent court determined that real parties' [***11] efforts to convince counsel sufficed as attempts at informal resolution. Closer inspection of the record, however, reveals that the exchanges between counsel were plainly only argument and that there was made no effort at informal negotiation. Argument is not the same as informal negotiation. In short, debate over the [*1438] appropriateness of an objection, interspersed between rounds of further interrogation, does not, based upon the record before us, constitute an earnest attempt to resolve impasses in discovery.

Real parties contend that it would have been futile to meet and confer with Townsend. The Discovery Act makes no exception based upon one's speculation that the prospect of informal resolution may be bleak. Our history is replete with examples of traditional

enemies working out their differences [**337] by way of peaceful negotiation and resolution.

We do not propose an absolute rule requiring that informal resolution must always await the conclusion of a deposition. Rather, we find that the statute requires that there be a serious effort at negotiation and informal resolution. We leave it to the parties to determine the proper time, manner, and place for such discussion.

Obregon v. Superior Court (1998) 67 Cal. App. 4th 424, 431-432:

A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the "reasonable and good faith attempt" standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov. Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Greyhound Corp. v. Superior Court (1961) 56 Cal. [***12] 2d 355, 378 [15 Cal. Rptr. 90, 364 P.2d 266] ["Undoubtedly the discovery statutes vest a [*432] wide discretion in the trial court in granting or denying discovery."]; Cf. Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 175 [49 Cal. Rptr. 2d 562] [court has wide discretion in discovery matters]; Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545 [51 Cal. Rptr. 2d 311] [HN7discovery sanctions reversible only for arbitrary, capricious or whimsical action]; Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 487-488 [282 Cal. Rptr. 530] [court has wide discretion in granting and enforcing discovery]; Kuhns v. State of California (1992) 8 Cal. App. 4th 982, 988 [10 Cal. Rptr. 2d 773] [in imposing discovery sanction, court exercises discretion subject to reversal only for manifest abuse exceeding the bounds of reason].) The trial judge's application of discretion in discovery matters is presumed correct, and the complaining party must show how and why the court's action constitutes an abuse of discretion in light of the particular circumstances involved. (See, e.g., Hartbrodt, supra, 42 Cal. App. 4th at p. [***13] 175 [discovery orders presumed correct and will not be disturbed except in case of abuse of discretion]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs 1, supra, P 8:15 et seq., p. 8-4 et seq. [trial court orders generally presumed correct].)

Discovery Referees

§ 639. Appointment of referee in absence of consent

(a) When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases pursuant to the provisions of subdivision (b) of Section 640:

. . .

(5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.

. . .

(c) When a referee is appointed pursuant to paragraph (5) of subdivision (a), the order shall indicate whether the referee is being appointed for all discovery purposes in the action.

(d) All appointments of referees pursuant to this section shall be by written order and shall include the following:

. . .

(2) When the referee is appointed pursuant to paragraph (5) of subdivision (a), the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.

(3) The subject matter or matters included in the reference.

(4) The name, business address, and telephone number of the referee.

(5) The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings as set forth in paragraph (6). . . .

To be used only in extreme circumstances involving: multiple issues, multiple simultaneous motions, multiple continuing motions, and/or where there are numerous, voluminous documents (*Tagares v. Superior Court* (1998) 62 Cal.App.4th 94, 105); degree of vitriol is possibly an additional ingredient

Special thanks to Orange County Superior Court staff attorney Steven Siefert for his invaluable assistance in preparation of (read: virtually total authorship of) these materials

Excerpts from ABA Model Rules

Rule 1.3, comment 1

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Discovery Law and Motion Authorities

Orange County Bar Association

Franz E. Miller

- General Points and Pointers re Motions to Compel
  - Perspective
    - Welcome to my world and its enemy
    - Be a player *now*
  - Use a good treatise on procedure (e.g., Weil & Brown, *Civil Procedure Before Trial*, The Rutter Group)
  - Know and consider local rules
  - General Types
    - Interrogatories
      - Separate statement required to compel further response
    - Requests for Production of Documents
    - Requests for Admissions
      - Motion required for admissions to be deemed admitted
    - Mental/physical exams
    - Appearance at deposition and/or production of documents at deposition
  - Know time limits for bringing motion (e.g., 45 days to compel further responses)
  - Distinguish between motions to compel responses versus motions to compel further responses
    - Time limit re latter
    - Meet and confer requirement re latter
  - Sanctions
    - Monetary sanctions (can be a two-way street)
    - Evidentiary, issue, and terminating sanctions
  - Consider seeking a protective order
    - Undue burden
    - Invasion of privacy/revelation of trade secrets
  - When to file and not to file
    - File: You really need the stuff and absolutely no compromise is possible
    - Don't file: All other times

- Discovery referees
  - CCP 639 is the controlling statute
  - To be used only in extreme circumstances involving multiple issues, multiple simultaneous motions, multiple continuing motions, and/or where there are numerous, voluminous documents
  - A court that sends you to a discovery referee on its own motion is usually not a happy court and, at best, you will usually catch at least some of the fallout
  - When to consider moving for a discovery referee:
    - Standards above are met
    - Cost of bringing the motions exceeds cost of the referee
    - You believe the referee will conclude you are the "good person"
- Meet and confers
  - See attached authorities
  - A misnomer because an actual meeting is not required
  - It is more than a letter that says, "If you don't produce the responses I exactly as I want them and when I want them, I'll file my motion the next day."
  - If you need to take that approach to show you are a tough litigator, you are in a world of hurt
- The ethics of discovery and discovery disputes
  - Some pertinent ABA model rules
    - 1.3, comment 1 – represent with zeal but are not bound to press for every advantage; must be courteous
    - 1.2(a) – bound by client decisions only re lawful objectives of the litigation
    - 1.5(a) – reasonable fees only
    - 1.6(b)(5) – client confidentiality exception when lawyer is accused of wrongdoing
    - 3.1 – Meritorious Claims and Contentions
    - 3.2 – Expediting Litigation
    - 3.3 – Candor toward the Tribunal
    - 3.4 – Fairness to Opposing Party and Counsel
  - Applications (or, It Sounded Good at the Time)
    - My client made me do it
    - Dare I tell that my client is completely recalcitrant
    - I will keep them so busy responding to discovery they won't be able to prepare for trial
    - I will keep them so busy responding to discovery they will go broke trying to prosecute the action
    - I better withhold this piece of evidence because I can't possibly win if they know about it
    - I will throw so much irrelevant paper at them in response, they'll never be able to figure out what's pertinent

EXHIBIT "B"
SUMMARY JUDGMENT MOTIONS—
REQUIRED FORMAT OF WRITTEN EVIDENTIARY OBJECTIONS AND PROPOSED ORDER ON SUCH OBJECTIONS

CRC rule 3.1354 establishes the required format for all written evidentiary objections regarding evidence in support of or opposition to a motion for summary judgment. Rule 3.1354 also establishes the required format for the proposed order on such objections. There are two permissible formats for the objections and the proposed order. The following examples are taken directly from rule 3.1354.

Format for Evidentiary Objections

(First Format):

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Objection Number 2

"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)

Grounds for Objection 2: Irrelevant (Evid. Code, §§ 210, 350-351).

(Second Format):

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**
1. Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).
2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."	Irrelevant (Evid. Code, §§ 210, 350-351).

Format for Proposed Order on Evidentiary Objections

(First Format):

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Court's Ruling on Objection 1: Sustained: _____

Overruled: _____

Objection Number 2

"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)

Grounds for Objection 2: Irrelevant (Evid. Code, §§ 210, 350-351).

Court's Ruling on Objection 2: Sustained: _____

Overruled: _____

(Second Format):

Objections to Jackson Declaration

Material Objected to:	**Grounds for Objection:**	**Ruling on the Objection**
1. Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, §702(a)).	Sustained: _____ Overruled: _____
2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."	Irrelevant (Evid. Code, §§ 210, 350-351).	Sustained: _____ Overruled: _____

Date: _____ _____

Judge

EXHIBIT "A"
SUMMARY JUDGMENT MOTIONS—
REQUIRED FORMAT FOR SEPARATE STATEMENTS

CRC rule 3.1350(h) establishes the required format for separate statements in support of or opposition to a motion for summary judgment. The following examples are taken directly from rule 3.1350.

Separate Statement in Support of a Motion for Summary Judgment

Moving Party's Undisputed Material Facts and Supporting Evidence:	***Opposing Party's Response and Supporting Evidence:***
1. Plaintiff and defendant entered into a written contract for the sale of widgets. Jackson declaration, 2:17-21; contract, Ex. A to Jackson declaration.	
2. No widgets were ever received. Jackson declaration, 3:7-21.	

Separate Statement in Support of Opposition to a Motion for Summary Judgment

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	***Opposing Party's Response and Evidence:***
1. Plaintiff and defendant entered into a written contract for the sale of widgets. Jackson declaration, 2:17-21; contract, Ex. A to Jackson declaration.	Undisputed.
2. No widgets were ever received. Jackson declaration, 3:7-21.	Disputed. The widgets were received in New Zealand on August 31, 2001. Baygi declaration, 7:2-5.

Separate Statement in Support of a Motion for Summary Adjudication

ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Supporting Evidence:	***Opposing Party's Response and Supporting Evidence:***
1. Plaintiff was injured while mountain climbing on a trip with Any Company USA. Plaintiff's deposition, 12:3-4.	

2. Before leaving on the mountain climbing trip, plaintiff signed a waiver of liability for acts of negligence. Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.	

Separate Statement in Support of Opposition to a Motion for Summary Adjudication

ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	***Opposing Party's Response and Evidence:***
1. Plaintiff was injured while mountain climbing on a trip with Any Company USA. Plaintiff's deposition, 12:3-4.	Undisputed.
2. Before leaving on the mountain climbing trip, plaintiff signed a waiver of liability for acts of negligence. Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.	Disputed. Plaintiff did not sign the waiver of liability; the signature on the waiver is forged. Jones declaration, 3:6-7.

Exhibit “A”

TEN AREAS IN WHICH LAW & MOTION MISTAKES ARE FREQUENTLY MADE

Civil Case Management Policies and Procedures, and Hot Tips on Motion Practice
Honorable Franz E. Miller
Research Attorney David J. Hesseltine

1. Be Respectful Of The Court's Time And Make Your Papers User Friendly

- Keep the court informed. Let the court know as earlier as possible if a motion is to be continued or taken off calendar. Motions are typically worked up a few days in advance, which means the court already spent the time to review and analyze the motion if you wait until the day of the hearing to take it off calendar.
- Timely file and serve all documents. If any document is going to be filed or served late, let the court know and provide a declaration explaining the reasons why the document was not timely filed and served.
- Do not modify the briefing schedule without court permission.
- Make your papers easy to use—e.g., separately bind exhibits, use exhibit tabs (not just colored paper), clearly identify all documents relating to the motion, etc. Do not be afraid to break things into multiple volumes for ease of use.
- Always proofread your papers and ensure consistency.

2. Never File Any Time Sensitive Document By Mail

- If the filing gets delayed or rejected for any reason—e.g., lost in the mail or insufficient filing fees—your client may not be able to obtain relief from the consequences of the untimely filing.
- *Kientz v. Harris* (1952) 117 Cal.App.2d 787 (notice of intent to move for new trial timely received by the clerk of the court, but was not filed until several days later when the appropriate filing fee was submitted; Court of Appeal held that notice of intent was untimely).
- *Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457 (court clerk properly refused to accept complaint tendered for filing on the eve of the statute of limitations because the check for the filing fee was $3 short).
- Relief under CCP §473(b) is not available for the failure to comply with these sorts of jurisdictional prerequisites. (See, e.g., *Advanced Building Maintenance v. State Compensation Insurance Fund* (1996) 49 Cal.App.4th 1388, 1393.)

3. Always Lodge The Original Of A Proposed Pleading With The Court Or Bring It To The Hearing—Do NOT Attach The Original To The Motion

- When bringing a motion for leave to file an amended pleading (e.g., complaint, answer, or cross-complaint) or a pleading in the first instance (e.g., a cross-complaint or a complaint-in-intervention), a copy of the proposed pleading must be included with the motion. (See, e.g., CRC rule 3.1324(a)(1).)

- However, if the motion is granted, the Court cannot properly take the motion apart to file any proposed pleading that is attached as an exhibit; the motion must be left intact.
- As such, the original of the proposed pleading should be lodged with the court or brought to the hearing for filing. Otherwise, the moving party will be required to incur the time and expense of filing the original at a later time.

4. A Request For Discovery Sanctions Must Be Made In The Notice Of Motion, Must Identify What Sanction Is Being Sought, And Must Identify Against Whom The Sanction Is Being Sought

- CCP §2023.040 states as follows: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. 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."
- As such, a request made only in the points and authorities will be denied and a request for sanctions against a party only will preclude sanctions against counsel.

5. Be Certain All Proofs Of Service Comply With The Relevant Code Sections

- A Proof of service by mail pursuant to the firm's business practice for collection and processing of mail must include not only a statement that that the person signing the proof is readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, but also a statement that "the envelope was sealed and placed for collection and mailing on that date following ordinary business practices." (CCP §1013a(3).)
- This latter statement is often omitted, including on some pre-printed forms.
- Proof of service by personal delivery must be signed by the person who actually delivered the documents. Signature by the person who gave the documents to the messenger is insufficient as is the statement "I caused the documents to be delivered."
- Proof of service must be filed with the court at least five court days before the hearing. (CRC rule 3.1300(c).) It is not sufficient to show up at the hearing with the proof of service.
- The proof of service must be signed.

6. Declarations Must Set Forth Proper Oath

- If a declaration is executed outside of California, it must state that the declarant declares under penalty of perjury "under the laws of the State of California." (CCP §2015.5)
- Under the laws of the United States of America and simply under penalty of perjury are not sufficient if the declaration is signed outside of California.

7. Motions To Withdraw And Applications For Pro Hac Vice Admission Must Fully Comply With The Governing Rules Of Court

- Motions to withdraw as counsel of record are governed by CRC rule 3.1362.

- ❖ Motion must be made on Judicial Council forms, including (a) Notice of Motion and Motion to Be Relieved as Counsel, (b) Declaration in Support of Attorney's Motion to Be Relieved as Counsel, and (c) Order Granting Attorney's Motion to Be Relieved as Counsel.
- ❖ The proposed order must be served with the motion.
- ❖ If service on the client is by mail, the address must be confirmed within 30 days prior to the service. If address cannot be confirmed, counsel must make reasonable efforts to find a more current address and inform the court of those efforts and the outcome.

- ➢ Applications for pro hac vice admission are governed by CRC rule 9.40.
  - ❖ Attorney cannot be a resident of California, regularly employed in California, or regularly engaged in substantial business, professional, or other activities in California.
  - ❖ The Attorney must submit a verified application showing (a) his or her residence and office address, (b) all courts to which the attorney has been admitted and the date of admission, (c) the attorney is in good standing with all such courts, (d) the attorney is not currently suspended or disbarred in any court, (e) all cases in which the attorney has applied to appear pro hac vice within the last two years and whether each application was granted, and (f) the name, address, and telephone number of an attorney licensed in California that will be attorney of record.
  - ❖ A fee must be paid to the State Bar, a copy of the application must be served on the State Bar, and proof of such payment and service must be submitted with the application.

8. Any Joinder Must Be Timely And In Proper Form

- ➢ A simple notice of joinder that is commonly filed a few days before the hearing is not sufficient to obtain any relief.
- ➢ Our Court of Appeal allows a party to join in the argument and even evidence of another party, but the joining party must file and serve a request for relief in their own name and such request must be timely filed and served. (See *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1390-91 (addressing anti-SLAPP motion under CCP section 425.16); see also *Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47 (addressing motion for summary judgment); *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636-37 (same); compare *Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660-62 (2nd Appellate District case allowing joinder in anti-SLAPP motion when timely filed and specifically requested relief in naming of joining party).)
- ➢ A joinder also may require an explanation as to why the argument and evidence of the moving party entitles the joining party to relief. For example, a party seeking to join in another party's summary judgment motion will need his or her own separate statement to support the request for relief. (See *Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636-37.)

9. A Request For Judicial Notice Must Be Properly Made And What May Be Judicially Notice Is Limited

- The party requesting judicial notice must provide the Court with sufficient information to enable it to take judicial notice of the requested matter. (Evid. Code §453.) For example, the Court must be provided with a copy of any document that is the subject of the request and such document must either be certified or otherwise authenticated through admissible evidence. (See, e.g., *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 746 (declining to take judicial notice of document from Nevada court because it was not a certified copy and was not otherwise properly authenticated).) Evidence of any other necessary foundational facts also must be provided. (See, e.g., *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 162 (declining to take judicial notice because proponent failed to show that the subject was not reasonably subject to dispute).)
- The specific grounds upon which judicial notice is requested should be specified. For example, do not simply request judicial notice pursuant to Evidence Code sections 452 and 453. Rather, for example, state judicial notice is requested pursuant to Evidence Code section 452(d) because the document is a record of another court.
- Judicial notice must be requested for a proper purpose. For example, the court may take judicial notice of the fact that a particular document was filed with the court. However, the court may not take judicial notice of the facts contained in most documents. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1569; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864–865 (court may take judicial notice of declaration filed in an action, but not of the truth of the statements made in the declaration).)
- Moreover, judicial notice of one fact does not establish other facts. For example, judicial notice that a grant deed was recorded vesting title in a person's name does not establish that such person still holds title several years later.

10. Separate Statements And Evidentiary Objections On Summary Judgment Motions Must Be Done Properly

- CRC rule 3.1350 establishes most of the rules regarding separate statements.
  - The separate statement must be in the dual-column format established by CRC rule 3.1350(h). (See Exhibit "A" attached hereto.)
  - The separate statement must set forth the essential facts necessary to support the cause of action or challenge thereto; legal conclusions are not sufficient. For example, it is not proper or sufficient to state that Defendant wrongfully converted Plaintiff's property. A separate statement must set forth the facts necessary to establish each element of the claim for conversion: (1) Plaintiff's ownership or right to possession of the property, (2) Defendant's conversion of the property or wrongful act or disposition of the property, and (3) damages.
  - Specific citations to all evidence necessary to establish the facts must be provided. That means a reference to the exhibit, title, page, and line numbers. A reference to Defendant Jones' deposition without more is not sufficient.

The court has the discretion to refuse to consider evidence that is not cited in the separate statement.

- ❖ When summary adjudication is sought, each issue on which summary adjudication is sought must be separately identified in the separate statement by its own heading that matches the statement of the issue from the notice of motion verbatim. Following each such heading, the undisputed facts necessary to support that particular issue, and that particular issue only, must be set forth. Do NOT have one master list of facts that gets restated for every issue even though some of the facts do not relate to each issue.
- ❖ Opposing separate statements MUST state whether each and every fact is "disputed" or "undisputed." Do not just object to the way a particular fact is phrased or respond to just a portion of the fact.
- ❖ If a fact is disputed, the opposing party must cite all evidence upon which it disputes the fact. Again, the court does not have to consider evidence that is not cited in the separate statement.
- ❖ A fact may be disputed on the basis of evidentiary objections, but the objections must be set forth in a separate document; they may not be argued in the separate statement. (CRC rule 3.1354(b).) If disputing a fact based on evidentiary objections, the separate statement should state that the fact is disputed because it is based on inadmissible evidence and then cite to the separately filed evidentiary objections. For example: Disputed. This fact is based upon inadmissible hearsay. See Evidentiary Objection Nos. 4, 5 and 7 to Declaration of Defendant Jones.

- ➢ Evidentiary objections on summary judgment motions are governed by CRC rules 3.1352 and 3.1354.
  - ❖ Written objections must be filed and served at the same time as the objecting party's opposition or reply brief. For example, the opposing party must file its written evidentiary objections at the same time as the opposition.
  - ❖ Written objections must be set forth in a separate document and be in one of the two formats established by CRC rule 3.1354(b). (See Exhibit "B" attached hereto.)
  - ❖ Written objections must be accompanied by a proposed order in one of the two formats established by CRC rule 3.1354(c). (See Exhibit "B" attached hereto.)
  - ❖ Make separate evidentiary objections to each objectionable portion of an item of evidence. Do not make a string of objections to a large amount of evidence. For example, if a paragraph in a declaration has several sentences and several of the statements set forth therein are objectionable, make separate evidentiary objections to each objectionable statement. A string of evidentiary objections to an entire paragraph will be overruled unless the entire paragraph is objectionable.

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Attorneys for Defendant
ANOTHER CORP.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ONE CORPORATION, a California corporation, Plaintiff, v. ANOTHER CORPORATION, a California corporation, Defendants.	Case No. 07CC10000 Assigned for all purposes to Hon. Callum Likai Seaum, Dept. C100 **DEFENDANT ANOTHER CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF ONE CORPORATION AND FOR SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HUMBLE ASSOCIATE IN SUPPORT THEREOF** Date: April 1, 2009 Time: 9:30 a.m. Place: Dept. C100 Action filed: January 13, 2008 Trial date: September 29, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 1, 2009, at 9:30 a.m., or as soon thereafter as the matter can be heard, in Department C100 of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California 92701, Defendant Another Corporation (Another Corp.) will, and hereby does, bring this Motion to Compel Responses and Production of Documents from Plaintiff One Corporation (One Corp.).

The Motion will seek, and hereby does seek, an order compelling One Corp. to (1) serve responses without objections to the "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests), (2) produce all responsive documents, and (3) pay sanctions of $490 to Another Corp.

This Motion is made pursuant to California Code of Civil Procedure section 2031.300 on the ground One Corp. has failed to serve a timely response to the Requests. It is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Declaration of Humble Associate and accompanying exhibits attached hereto, the pleadings, papers, and other documents on file herein, and such further evidence or argument as the Court may properly consider at or before the hearing on this Motion. This Motion does not require a separate statement because "no response has been provided to the request for discovery." (Cal. Rules of Court, rule 3.1020(b).)

Dated: February 20, 2009

DEWEY, CHEATEM & HOWE LLP

By: _____
Humble Associate

Attorneys for Defendant
ANOTHER CORP.

MEMORANDUM OF POINTS AND AUTHORITIES

Months ago, Defendant Another Corporation (Another Corp.) served document requests on Plaintiff One Corporation (One Corp.). Another Corp. gave One Corp. ***two extensions*** to respond. One Corp. has served no response. ***None***. Another Corp. respectfully seeks an order compelling One Corp. to (1) serve responses to its document requests forthwith and without objections, (2) produce all responsive documents, and (3) pay sanctions.

FACTS

One Corp. alleges Another Corp. breached the 2007 Agreement by providing subpar webhosting services. Another Corp. contends it met the contractual terms and industry standards.

To prepare its defense, Another Corp. served its "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests) on November 1, 2008. (Declaration of Humble Associate (Associate Decl.), ¶ 2 & Ex. A.) The ten individual requests addressed material facts underlying One Corp.'s claims and Another Corp.'s defenses. (*Ibid*.) One Corp.'s response was initially due on December 1, 2008. (*Ibid*.)

At One Corp's requests, Another Corp. ***twice*** agreed to extend One Corp.'s deadline to respond to the Requests. (Associate Decl., ¶ 3.) As a result, the deadline to respond to the Requests became February 5, 2009. (See *id*. & Ex. B.) But One Corp. failed to serve any response at all. (*Id*., ¶ 4.) Another Corp.'s counsel sent an email to One Corp.'s counsel on February 12, 2009, asking One Corp. to serve responses forthwith and without objections. (*Id*., ¶ 5 & Ex. C.)

ANALYSIS

Discovery "expedite[s] and facilitate[s] both preparation and trial." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.) "One of the principal purposes of discovery [is] to do away 'with the sporting theory of litigation namely, surprise at trial.'" (*Ibid*.)

To avoid trial by ambush, the requesting party may move for an order compelling responses when a party fails to timely respond to requests for production of documents. (Cal. Code Civ. Proc., § 2031.300, subd. (b).) Moreover, "[t]he party to whom the inspection demand is directed waives any objection to the demand, including one based on privilege or on the protection for work product . . . ." (Cal. Code Civ. Proc., § 2031.300, subd. (a).) The requesting party need ***not*** try to resolve the matter informally before bringing a motion to compel when the responding party offers no response at all. (See Cal. Code Civ. Proc., § 2031.310, subd. (b)(2); see also Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial, § 8:1486.) And the Court "shall" impose monetary sanctions against the losing party on a motion to compel unless the party acted "with substantial justification" or sanctions are "unjust." (Cal. Code Civ. Proc., § 2031.300, subd. (c).)

One Corp. has failed to respond to the Requests at all. (Associate Decl., ¶ 4.) It has no justification for its stonewalling. For Another Corp. to prepare fully for a fair trial, One Corp. must respond to the Requests without objections and produce all responsive documents. (See Cal. Code Civ. Proc. §, 2031.300, subds. (a), (b).) And One Corp. should pay sanctions of $490 to compensate Another Corp. for its attorney fees and costs in connection with this motion. (Associate Decl., ¶ 6.)

CONCLUSION

For all these reasons, Another Corp. respectfully requests the Court grant this Motion and enter an order compelling One Corp. to (1) serve responses, without objections, to the Requests, (2) produce all responsive documents, and (3) pay sanctions to Another Corp. in the amount of $490.

Dated: February 20, 2009

DEWEY, CHEATEM & HOWE LLP

By: _____
Humble Associate

Attorneys for Defendant
ANOTHER CORP.

DECLARATION OF HUMBLE ASSOCIATE

I, Humble Associate, declare and state as follows:

1. I am an Associate in the law firm of Dewey, Cheatem & Howe LLP, counsel of record for Defendant Another Corporation (Another Corp.) in the above-captioned action. I am duly admitted to practice before all courts of the State of California. I am one of the attorneys responsible for representing Another Corp. in this action. I am familiar with the files and pleadings in this action and have personal knowledge of the facts stated herein. If called upon to do so, I could and would competently testify to the contents of this Declaration.

2. On November 1, 2008, Another Corp. served on Plaintiff One Corporation (One Corp.) its "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests). The Requests contained ten individual document requests, each concerning material allegations underlying One Corp.'s claims and Another Corp.'s defenses. Based upon the service date, One Corp.'s response to the Requests was initially due on December 1, 2008. A true and correct copy of the Requests is attached hereto as Exhibit "A."

3. At One Corp.'s request, Another Corp. twice agreed to extend the deadline for the City to respond to the Requests. As a result, the deadline for One Corp. to respond to the Requests became February 5, 2009. A true and correct copy of a December 29, 2008 email from One Corp.'s counsel confirming the February 5, 2009 deadline is attached hereto as Exhibit "B."

4. To date, One Corp. has failed to serve any response to the Requests.

5. On February 12, 2009, I sent an email to One Corp.'s counsel demanding that One Corp. serve responses to the Requests forthwith and without objections. A true and correct copy of that email is attached hereto as Exhibit "C."

6. I am a seven-plus-year licensed California attorney, specializing in business and real estate litigation. I have devoted more than one-half hour to drafting and conducting research for the Motion and accompanying materials. I anticipate spending another one hour reviewing and analyzing any opposition to the Motion, drafting a reply in support of the Motion, and preparing for and attending the hearing on the Motion. My normal billing rate for Another Corp. is $300 per hour. Accordingly, the attorneys' fees incurred by Another Corp. in connection with the Motion will be in

excess of $450 (one and one-half hours at $300 per hour). In addition, Another Corp. will incur $40 in costs for filing fees in connection with this Motion. Total attorney fees and costs equal $490.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was made this ____ day of _____ , 2008, in Anytown, California.

_____
Humble Associate

DEWEY, CHEATHAM & HOWE LLP
IMA PARTNER (STATE BAR NO. 100000)
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Attorneys for Defendant
ANOTHER CORP.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ONE CORPORATION, a California corporation,

Plaintiff,

v.

ANOTHER CORPORATION, a California corporation,

Defendants.

Case No. 07CC10000

Assigned for all purposes to
Hon. Callum Likai Seaum, Dept. C100

[PROPOSED] ORDER GRANTING DEFENDANT ANOTHER CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF ONE CORPORATION AND FOR SANCTIONS

Date: April 1, 2009
Time: 9:30 a.m.
Place: Dept. C100

Action filed: January 13, 2008
Trial date: September 29, 2009

Defendant Another Corporation's (Another Corp.) Motion to Compel Responses and Production of Documents from Plaintiff One Corporation (One Corp.) and for Sanctions came on regularly for hearing on April 1, 2009, at 9:30 a.m., in Department C100 of the above-referenced Court. The parties appeared as stated on the record.

The Court, having read and considered the papers in support of and in opposition to the Motion and the pleadings and other papers on file herein, and having heard and considered the arguments of counsel, and good cause appearing therefor, hereby ORDERS as follows:

The Motion is GRANTED.

1. One Corp. is hereby ORDERED to serve responses without objections to the Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation and to produce all responsive documents by _____, 2009; and

2. One Corp. is hereby ORDERED to pay a monetary sanction to Another Corp. in the amount of $_____ for attorney fees and costs it incurred in connection with this Motion.

IT IS SO ORDERED.

Dated:

By: _____
HONORABLE CALLUM LIKAI SEAUM
SUPERIOR COURT JUDGE

Court Designation List

Family, Juvenile, Probate, and Mental Health Cases should be filed at the Lamoreaux Justice Center (LJC).

Small Claims, Limited Civil, Unlimited Civil, Complex Civil, Criminal, and Traffic Cases should be filed pursuant to this Court Designation List. Use the city where the action arose or where a defendant resides. If the defendant is a business, use the city where the business is located. If the action concerns real property, use the city where the real property is located.

Criminal and Traffic Cases: Use the city where the offense is alleged to have occurred.

City	Unlimited Civil	Limited Civil	Small Claims	Family	Probate	Mental Health	Juvenile	Traffic	Criminal
Aliso Viejo	CJC	HJC/LH	HJC/LH	***Unless otherwise designated, all Family, Probate, Mental Health, and Juvenile matters are filed at LJC***				HJC/LH	HJC/NB
Anaheim	CJC	NJC	NJC					NJC	NJC
Brea	CJC	NJC	NJC					NJC	NJC
Buena Park	CJC	NJC	NJC					NJC	NJC
Costa Mesa	CJC	HJC/LH	HJC/LH					HJC/NB	HJC/NB
Cypress	CJC	WJC	WJC					WJC	WJC
Dana Point	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Fountain Valley	CJC	WJC	WJC					WJC	WJC
Fullerton	CJC	NJC	NJC					NJC	NJC
Garden Grove	CJC	WJC	WJC					WJC	WJC
Huntington Beach	CJC	WJC	WJC					WJC	WJC
Irvine	CJC	HJC/LH	HJC/LH					HJC/NB	HJC/NB
La Habra	CJC	NJC	NJC					NJC	NJC
La Palma	CJC	NJC	NJC					NJC	NJC
Laguna Beach	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Laguna Hills	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Laguna Niguel	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Laguna Woods	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Lake Forest	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Los Alamitos	CJC	WJC	WJC					WJC	WJC
Mission Viejo	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Newport Beach	CJC	HJC/LH	HJC/LH					HJC/NB	HJC/NB
Orange	CJC	CJC	CJC					CJC	CJC
Placentia	CJC	NJC	NJC					NJC	NJC
Rancho Santa Margarita	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
San Clemente	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
San Juan Capistrano	CJC	HJC/LH	HJC/LH					HJC/LH	HJC/NB
Santa Ana	CJC	CJC	CJC					CJC	CJC
Seal Beach	CJC	WJC	WJC					WJC	WJC
Stanton	CJC	WJC	WJC					WJC	WJC
Tustin	CJC	CJC	CJC					CJC	CJC
Villa Park	CJC	CJC	CJC					CJC	CJC
Westminster	CJC	WJC	WJC					WJC	WJC
Yorba Linda	CJC	NJC	NJC					NJC	NJC

Legend:

CJC - Central Justice Center: 700 Civic Center Drive, Santa Ana, CA 92701

HJC-LH - Harbor Justice Center, Laguna Hills: 23141 Moulton Parkway, Laguna Hills, CA 92653-1206

HJC-NB - Harbor Justice Center, Newport Beach: 4601 Jamboree Road, Newport Beach, CA 92660

LJC - Lamoreaux Justice Center: 341 The City Drive, Orange, CA 92870

NJC - North Justice Center: 1275 North Berkeley, Fullerton, CA 92838

WJC - West Justice Center: 8141 13th Street, Westiminster, CA 92683

Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Community Court
909 N. Main St.
Santa Ana, CA 92701

Civil Complex Center
751 West Santa Ana Blvd
Santa Ana, CA 92701

Department CJ1
Orange County Men's Jail
550 N Flower St.
Santa Ana, CA 92703

Harbor Justice Center
Laguna Hills Facility
23141 Moulton Parkway
Laguna Hills, CA 92653-1206

Harbor Justice Center
Newport Beach Facility
4601 Jamboree Road
Newport Beach, CA 92660-2595

Lamoreaux Justice Center
341 The City Drive South
Orange, CA 92868-3205

North Justice Center
1275 North Berkeley Avenue
Fullerton, CA 92832-1258

West Justice Center
8141 13th Street
Westminster, CA 92683-4593

ORANGE COUNTY SUPERIOR COURT LOCATIONS

ORANGE COUNTY SUPERIOR COURT WEBSITE

WWW.OCCOURTS.ORG

- Court Locations
- Judicial Officers
- Local Rules
- Calendar Schedules
- Case Information
- Official Forms
- How to File
- E-Filing
- Tentative Rulings

Guidelines for Successfully Navigating Through Civil Law and Motion Waters

By Elizabeth Olsen and Janet M. Christoffersen,
Legal Research Department
Orange County Superior Court

What's in a motion?

a. *Notice:* include what relief you are seeking against whom, including sanctions, the type of sanctions and against whom they are sought, as well as the case or statutory authority ("grounds") for the relief sought. If you omit any of the foregoing, your motion may be denied. California Rules of Court, Rules 3.1110, 3.1112.

b. *Memorandum of Points and Authorities:* There are page limits for this portion of the motion. See California Rules of Court, Rule 3.1113(d). Be careful to avoid extensive footnotes in an effort to avoid the page limit. There are specifications as to the size and type of font to be used in court filings. California Rules of Court, Rules 2.104, 2.105. Even if your opponent fails to note aberrations, don't count on the court to ignore these defects.

Make sure you provide analysis of the authority you cite: tell how the law applies to the facts of your case. Don't use string cites.

Be sure to read the cases you cite, because your opponent and the court will. Your opponent, as well as the court, will also likely Shepardize the authority you cite, so check it yourself before including it in your papers.

Wherever possible, rely upon state law; secondary authority (out-of-state or federal) generally is discretionary. Where secondary authority is cited, a copy must be filed with the court. California Rules of Court, Rule 3.1113(j).

Never cite treatises, such as Witkin or The Rutter Group practice guides, as the sole authority for your argument.

If your memorandum reaches a certain page limit, which differs depending on the type of motion involved, you must include a table of authorities and a table of contents. If you anticipate that your memorandum will exceed the page limit, you must seek the court's permission via ex parte application before filing such a memorandum. California Rule of Court, Rule 3.1113(e).

As a courtesy to all concerned, prior to filing your motion, double-check the accuracy of your citations, which must include the *official* report volume, page number and year of publication. California Rules of Court, Rule 3.1113(c).

c. *Declaration:* Generally, this portion of the motion is the foundation for the facts which support the relief sought. Declarations generally must be made by persons with personal knowledge of the facts contained therein—you, as counsel for your client, most likely do not have personal knowledge of a contract entered into between your client and his/her adversary.

The declaration must affirmatively state facts which confirm that the declarant has personal knowledge of the information. If the declarant is offering business records as exhibits, include all of the foundational facts to support that the declarant is competent to offer the documents as exhibits.

The declaration must include an attestation that the declarant states under penalty of perjury that the facts are true. The declaration must be signed by the declarant and also include the date and location of its execution. If the declaration is signed outside California, the declaration under penalty of perjury must also add "under the laws of the State of California."

d. *Exhibits:* Exhibits should always be offered through a declaration by a declarant that is competent to offer the exhibits. The exhibits must be tabbed. California Rules of Court, Rule 3.1110(f).

If you have multiple declarations, each referencing different exhibits, number or alphabetize all exhibits consecutively – do not offer four Ex A's or Ex 1's with each of four declarations; it is confusing to the parties, the court and the record. If the exhibits are extensive, they should be offered in a separate document.

e. *Judicial notice:* Before you request that the court take judicial notice of a document, determine whether it is the type of document of which the court may take judicial notice – i.e., a court order or judgment, not a declaration or memorandum of points and authorities. See Evidence Code §§ 450, *et seq.;* California Rules of Court, Rules 3.1113(m), 3.1306(c).

A request for judicial notice is a separate document, which should include the authority under which judicial notice is sought and copies of all documents for which judicial notice is sought. In some instances, a certified copy of the document must be provided, i.e., a grant deed or order from another court or case.

f. *Proof of service:* Be sure to check on your time limitations and serve your motion in a timely fashion. CCP §§ 1005, 1013, 437c, 425.16(f), etc. Determine whether you need to give additional time to your adversary based on the type of service you intend to implement. The proof of service must be signed by the person that actually served the document. "Caused to be" served is not personal knowledge.

Service by fax is authorized only where the parties agree to such service. CCP § 1013(e)

g. *Filing your motion:* Check California Rules of Court, Rule 2.100 et seq. to determine the required formatting of your motion.

Most, if not all, motions that you file with the court must be accompanied by a filing or motion fee, the amount of which is not uniform. Check the court's website, the local rules, the California Rules of Court, statutes or, failing that, contact the court directly to determine what fees are required before you file the motion.

Some courts also require that you "reserve" a hearing date before filing the motion. Check on the court's website, the local rules, or contact the department directly on this issue before the motion is filed.

Oppositions, Replies and Proposed Orders

a. Make sure they are timely filed and served. Generally, see CCP §§ 1005, 1013. (Check the applicable law for your specific motion; it may disclose different requirements than the general authority cited here.)

b. Address your adversary's argument and then bring up new argument.

c. Replies: provide only new material that is responsive to the opposition. Don't repeat what's in your moving papers.

d. With some motions, proposed orders are mandatory. Regardless of the foregoing, a proposed order should be submitted by you as the moving or responding party. The proposed order must also be served upon all parties that have entered an appearance in the action. California Rules of Court, Rule 3.1113(n).

Types of motions

a. *Demurrer [CCP §§ 430.10, et seq.] and motion to strike [CCP §§ 435-437].* Read the appropriate statutes, and California Rules of Court, Rules 3.1112, 3.1113, 3.1320, and 3.1322; there are special rules regarding the timing of filing such documents and notice requirements.

If you're the plaintiff and intend to amend the complaint in advance of the hearing pursuant to CCP § 472, timely notify the department in which it is set, as well as your adversary.

Do not offer evidence in conjunction with these motions. Don't challenge the facts.

See above comments re requests for judicial notice.

b. Anti-SLAPP *motions*. CCP § 425.16 is a powerful weapon for defendants,

which may secure their dismissal from a case early in the litigation. When you, as defense counsel, are provided the complaint, review it to determine whether any cause of action falls within the ambit of CCP § 425.16.

Be sure to research cases each time you prepare this motion; it is not uncommon for the appellate courts to issue opinions on SLAPP motions on a fairly frequent basis.

Beware that the burden of proof on these motions is not the typical burden of proof in a civil action.

c. *Provisional remedies:* Provisional remedies, i.e., a preliminary injunction, writ of attachment or writ of possession, are frequently sought early in the litigation.

If the defendant has not made a general appearance in the action when you seek such relief, the moving papers must be personally served on the defendant, as well as the summons and complaint. Check the statutes regarding the burden of proof on these motions. Where mandated, use the proper Judicial Council forms.

Be specific as to what you want and why you are entitled to it through declarations by persons with personal knowledge.

d. *Discovery:* Try to work out all discovery disputes before resorting to the court. Be civil and professional with your adversary. Don't present petty arguments to the court—it reflects not only on you for that motion, but for the case in general.

Read the discovery statute that is involved to ensure that you do what is required, not only in attempting to informally resolve the dispute, but also as to what is required in your moving or opposing papers, i.e., evidentiary showing by the moving party for an order for production of documents pursuant to a request to produce documents. CCP § 2031.300.

Check California Rules of Court, Rule 3.1020 to determine whether you must file a Separate Statement in addition to the standard components of a motion.

If you want to have the plaintiff examined for a mental condition, a motion is required unless you can get the plaintiff to stipulate to same.

e. *Continue trial:* Read California Rules of Court, Rule 3.1332. Note that continuances of trial are disfavored. A special fee is assessed on granting a motion for continuance. Gov. Code § 26830(d)

f. *Summary judgment/summary adjudication of issues.* The time requirements for this motion differ from other motions. See CCP § 437c(a). The wording of your notice and your Separate Statement issues, if any, is particularly critical, as it can serve to defeat your motion if improperly done.

Whether you are the moving or opposing party, you must file a Separate Statement. California Rules of Court, Rule 3.1350.

The court will scrutinize the motion very carefully to ensure that it is procedurally and substantively correct.

If you seek adjudication of a cause of action, an affirmative defense, damages or punitive damages, your Separate Statement must be properly framed, with each item sought to be adjudicated identified and undisputed facts set forth thereunder. See California Rules of Court, Rule 3.1350. Know the difference between a fact and a conclusion.

If voluminous materials are provided, make sure you highlight the portions which are to be considered by the court.

Beware of offering new evidence or authority in Reply. *San Diego Watercrafts, Inc. vs. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316

g. *CCP § 473:* This is an important statute to know in the event that you miss a deadline. The statute provides for discretionary and mandatory relief from default, default judgment, and dismissal.

Timeliness in filing this motion is critical; act promptly once you determine that such relief is necessary. Declarations are particularly important here.

h. *Post-trial motions:* There are special timelines for filing these motions, which include motion for new trial, motion for judgment notwithstanding the verdict, motion to tax costs, motion for attorney fees. Check the statutes for the applicable grounds for the motion.

i. *There are many other types of motions.* If you believe court relief is necessary, but don't know if there is authority for it, check a treatise, i.e., Weil & Brown, *California Practice Guide: Civil Procedure Before Trial,* or Continuing Education of the Bar, *Civil Procedure Before Trial,* however, do not cite only the treatise in your papers as the authority for your motion. The California Code of Civil Procedure and California Rules of Court are also helpful starting points.

Internet rulings:

Before you file a motion directed to a particular department, check the court's website to determine whether the department has information posted as to its law and motion calendar. You may be able to determine the dates and times on which the department hears law and motion matters, as well as securing a tentative ruling in advance of the hearing.

If, after filing your motion, you determine before the hearing that the motion is no longer required, call the department to request that the motion be taken off-calendar. Do not delay in informing the court of the foregoing.

Should you file a motion?

Before filing a demurrer or motion to strike, make certain that doing so will truly aid your client. In many instances, the result of filing these pleading motions may be to allow plaintiff to fine-tune his/her case and correct overlooked deficiencies in the complaint, rather than benefit your client.

There are occasions when attacking the pleading may be of benefit, i.e., where there is an incurable defect on the face of the pleading, as where the dates pled in the complaint in conjunction with the cause of action confirm that the cause of action is barred by the statute of limitations; or where the complaint is so poorly worded that, in the event defendant intends to file a summary judgment motion, a motion which is grounded in the pleadings, its content may impede granting of summary judgment.

Summary judgment motions entail a significant investment of time and expense for all concerned. Before filing this type of motion, carefully consider whether it should be filed. If you just want to "flush out" your adversary's evidence and do not have a realistic expectation of success, propound discovery to determine such evidence and forget filing the motion. In certain instances, the filing of the motion may alert your adversary to defects in his/her pleading, which allows them an opportunity to cure the defects before trial and judgment.

If you file a summary judgment motion and then receive opposition which evidences that there is at least one triable issue of material fact, take the motion off-calendar and save everyone, including the court, unnecessary wasted time.

Discovery motions can be costly and time-consuming. Make sure that you really need to file a motion to compel discovery. If the defects in discovery responses are not significant, a motion to compel further responses may not be in your client's best interests. Sometimes deficient discovery responses may inure to the benefit of your client and are better left alone.

As to discovery motions which require a meet-and-confer process before filing the motion, make sure that you have made a reasonable and good faith attempt to resolve all issues before filing the motion.

Before filing other motions, consider whether you can accomplish what needs to be done informally with your adversary; your mutual clients may benefit from this and you can focus your time and efforts the many other litigation issues that arise.

Finally, consider "the big picture": will filing the contemplated motion ultimately aid in the successful resolution of the case for your client at trial or in settlement? There are times when a party is successful in law and motion, however, evidence or rulings regarding that motion are ultimately used against that party later in the case.

General Observations:

To properly prepare a motion, you must follow the specific procedures required in statutes and the California Rules of Court and read the cases which you cite. Don't underestimate the opposition.

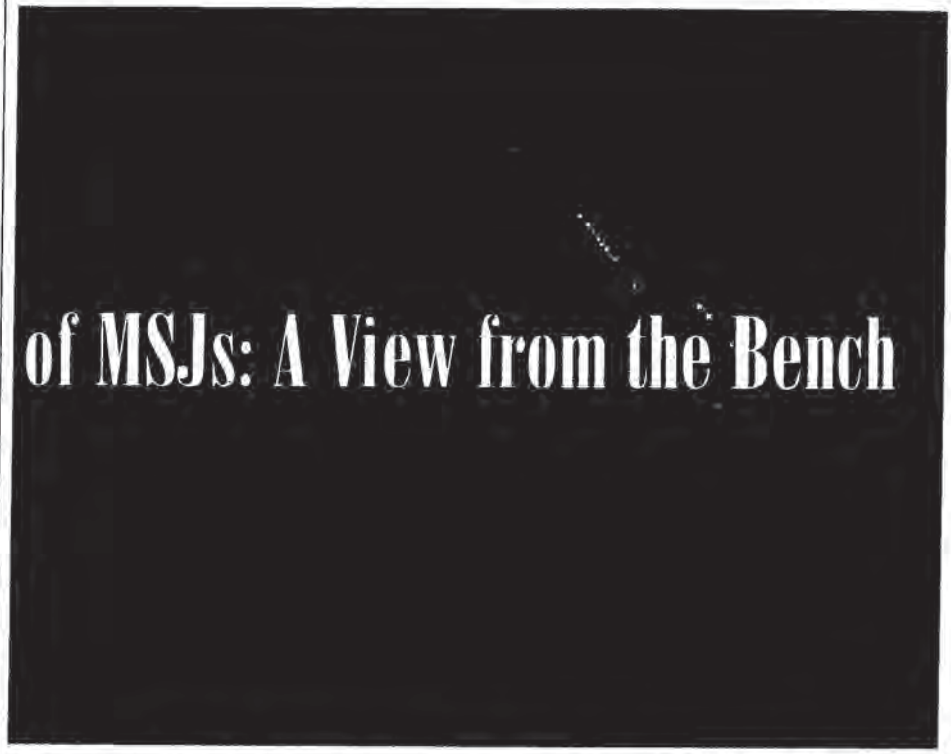
When preparing your Memorandum of Points and Authorities, try to find the authority which applies to your facts and cite it. Finding a case which is on point and analyzing that case alone is much more effective than offering numerous cases which are only tangentially relevant.

Beware of the time requirements for each motion. They are not the same for all civil motions.

Include a brief statement of the facts in your motion to familiarize the court with the case, even if you have filed prior motions in the action.

Be civil and professional in your papers and at the hearing; remember that you should have your client's best interests at heart – they are generally not served by demeaning your adversary.

Use and Abuse of MSJs: A View from the Bench



by Hon. Michael J. Brenner and Jeremy G. March

"[Code of Civil Procedure] section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party....Any arbitrary disregard of the statutory commands in order to bring about a particular outcome raises procedural due process concerns...The success or failure of the motion must be determined ... by application of the required step-by-step evaluation of the moving and opposing papers."

- Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal. App. 4th 1466, 1476-1477.

RECENTLY, some of the civil departments in the Orange County Superior Court have seen an increase in unwarranted Motions for Summary Judgment or Motions for Summary Adjudication (collectively, MSJs) that fall far short of the procedural or substantive requirements of the summary judgment statute – Code of Civil Procedure Section 437c – or with the applicable Rules of Court. At a minimum, these motions are expensive and time consuming for the moving party to draft, for the other party to oppose, and for the court to review, and do not benefit the parties who bring them. In more egregious cases, such motions may even lead to sanctions against the moving party or their counsel.

This article is not intended to discourage attorneys from bringing MSJs where they can do so in good faith and otherwise have a basis for doing so. It is, however, intended to point out, in ascending order of seriousness, certain fatal errors and other problems that we have recently encountered and that will prevent a court from granting an MSJ. The article then briefly discusses sanctions that an attorney – or a party – may face where an MSJ is brought (or opposed) in bad faith.

MSJs exceeding the 20-page limit for Points and Authorities.

MSJs often involve complicated fact patterns and issues of law. Many counsel try to pack all details and legal arguments supporting (or opposing) the MSJ into the Memorandum of Points and Authorities. However, for best results, the memorandum should be concise and well-organized. Keep in mind that California Rule of Court 313(d) imposes a 20-page limit on Memoranda of Points and Authorities accompanying or responding to an MSJ. Under CRC 313(e), a memorandum that exceeds 10 pages must include a table of contents and a table of authorities. A memorandum that exceeds 15 pages must also include an opening summary of argument. A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper. Unless a party previously obtains leave of court to file a longer memorandum, a memorandum of points and authorities exceeding these page limits will be accepted for filing by the court, but it will be considered in the same manner as a late-filed paper. (CRC 313(e).) This means that the court, in its discretion, may refuse to consider the memorandum if the court so indicates in its minutes or order. (CRC 317(d).) To avoid these problems, the detail should be contained in the Separate Statement, the supporting declarations, and other supporting documents, and referenced in the Memo of Points and Authorities.

MSJs (or oppositions) with inadmissible supporting declarations.

Every so often, a party bringing (or opposing) an MSJ will require a declaration from an out-of-state witness. This witness declaration may contain crucial evidence and be of great interest to the court. However, the court will be unable to accept such a declaration if it does not have proper jurats. As is commonly known, CCP Sec. 2015.5(a) requires declarations signed within the State of California to bear the following jurat: "I certify (or declare) under penalty of perjury that the foregoing is true and correct." Occasionally, however, attorneys forget that CCP Sec. 2015.5(b) requires a slightly different jurat for declarations executed outside of the State of California: "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct" (emphasis added). Although this may seem like a technical difference, the courts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws. (Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal. 4th 601, 612.) While a

defective jurat in a supporting declaration will probably not cause a court to deny (or grant) an MSJ, it could well result in delays and extra expense while the court continues the hearing and requires the attorney to obtain a new declaration with a proper jurat.

MSJs with defective separate statements.

Under CCP Sec. 437c(b)(1), the papers supporting an MSJ must include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The separate statement must also comply with the requirements of California Rule of Court 342. CRC 342(d) requires that the separate statement separately identify each cause of action, claim, issue of duty or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense. In a two-column format, the statement must state in numerical sequence the undisputed material facts in the first column and the evidence that establishes those undisputed facts in the second column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

Separate statements may be difficult to properly prepare. However, attempts to circumvent the requirements may lead (or force) the court to deny an otherwise meritorious MSJ. CCP Sec. 437c(b)(1) explains that failing to comply with the separate statement requirement in the supporting papers may constitute a sufficient ground, in the court's discretion, for denying an MSJ. Similarly, under CCP Sec. 437c(b)(3), failure to comply with the separate statement requirement for oppositions may constitute grounds, in the court's discretion, for granting an MSJ. As the Zimmerman court explained, "[s]eparate statements in particular 'are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for [summary adjudication] and summary judgment to determine quickly and efficiently whether material facts are disputed.'" (131 Cal. App. 4th at 1476 (citing United Community Church v. Garcin (1991) 231 C.A.3d 327, 335).)

Also keep in mind that the Separate Statement is the link between the points and authorities and the "raw" evidence of the case. Unless your Separate Statement is sufficiently detailed (i.e., specific undisputed facts, supported by specific citations to the evidentiary record), the court cannot confirm whether, and if so how, the evidence supports your position.

Thus, a separate statement that contains only broad legal arguments rather than specific undisputed facts (for example, "Defendant exercised due care in inspecting the products before selling them") may sink an MSJ. So may separate statements containing only vague citations to the evidence (for example, references to "TT's Deposition Transcript," with no page or line numbers).

MSJs (and oppositions) that do not reference specific evidence.

Just as Separate Statements should contain specific citations to the relevant evidence, the Memorandum of Points and Authorities should contain specific references to facts in the Separate Statements. A Memorandum of Points and Authorities that "generically" asserts, without specific citations, that a triable issue of fact does or does not exist is of limited use to the court. One recent MSJ repeatedly stated that the "evidence shows a triable issue of fact" with respect to this or that issue. Such statements require the court to carefully compare the facts in the separate statement with the arguments in the memorandum to ensure that they match. To enable the court to quickly validate your arguments, each topic or subtopic addressed in your Memorandum of Points and Authorities should reference, at a minimum, specific numbered facts in your Separate Statement.

"Non-dispositive" MSJs.

A motion for summary adjudication may be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (CCP Sec. 437c(f)(1).) For example, although a trial court has the power to interpret a contractual provision as a matter of law, where such interpretation of contractual duties does not fully dispose of any portion of the action, it is not a proper subject for summary adjudication. (Regan Roofing Co. v. Superior Court (1994), 24 Cal. App. 4th 425, 437.)

MSJs that do not specify the issues for which summary adjudication is sought / MSJs that confuse summary judgment with summary adjudication.

Summary judgment is a device for narrowing issues for trial, not a trap for an unwary opponent. If a party desires adjudication of particular issues or subissues, that party must make its intentions clear in the motion. In other words, the court may not summarily adjudicate issues or subissues that are not specifically raised in the Notice of Motion. (Homestead Sav. v. Superior Court (1986) 179 C.A.3d 494, 498.) This is consistent with CCP Sec. 1010's requirement that a Notice of Motion specify the grounds upon which it is made.

A corollary of this rule is that, when a notice of motion says that it seeks only summary judgment, the entire motion must be denied if the opposing party presents any triable material issue of fact. Where the notice requests only summary judgment, the court cannot assume that the moving party wants summary adjudication of individual causes of action or issues if summary judgment on the complaint as a whole is denied. (Weil & Brown, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, Sec. 10:88.) A safer approach might be to draft a notice that seeks summary judgment or, in the alternative, summary adjudication of specified issues.

Untimely (or hastily and inadequately prepared) MSJs.

Very strict timelines govern the filing and hearing of MSJs. Section 437c(a) requires that notice of the MSJ and all supporting papers be served on all other parties to the action at least 75 days before the time appointed for hearing (or 80 days if served by mail). The court may not shorten this 75-day notice period without the parties' consent. Section 437c(a) gives the court the power to shorten time on other summary judgment requirements, but not on the 75-day notice of hearing. (Weil & Brown, CALIFORNIA PRACTICE GUIDE : CIVIL PROCEDURE BEFORE TRIAL, The Rutter Group, 2004 Ed., Section 10:80.5 (citing McMahon v. Sup. Crt. (American Equity Insurance Co.) (2003) 106 C.A.4th 112, 116).) Under Section 437c(a), the motion must be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise.

Thus, a party wishing to file an MSJ must

begin preparing it as soon as possible, and should tailor their discovery to build their case for an MSJ. If a party waits too long before filing an MSJ, they will not have proper supporting evidence, or the time to prepare proper arguments. The court may then be confronted with (and confounded by) a very short MSJ whose points and authorities contain only very broad statements of principle; and whose supporting evidence consists largely of declarations containing conclusory statements (often repeating verbatim the broad legal conclusions in the points and authorities). An MSJ such as this is easy to oppose.

MSJs brought in cases with clear triable issues of fact.

An MSJ will only be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (CCP Sec. 437c(c).) The moving party has the initial burden of making a prima facie showing that there are no triable issues of material fact. If the moving party does so, the burden then shifts to the opposing party to show that a triable issue of fact exists. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.)

An attorney bringing an MSJ should always ask whether, in view of the depositions and other discovery conducted thus far, there is truly a triable issue of fact in the case. If so (for instance, if both sides have amassed opposing evidence on key issues, such as an employer's possible motivation for terminating an employee or whether someone properly performed their contractual obligations), an MSJ will likely be defeated. Remember that all inferences in the evidence must be read in favor of the opposing party and against the moving party. (Hannoka v. Pivko (1994) 22 C.A.4th 1553, 1558.)

MSJs that attempt to "hide" triable issues of fact.

Naturally, an MSJ should never cite evidence out of context in an effort to conceal a clearly triable issue of fact. Anyone considering doing this should keep in mind that the opposing party need only show the court the rest of the evidence to defeat the motion. In one recent sexual harassment case, a plaintiff accused a supervisor of showing the plaintiff sexually explicit material on the job. The supervisor and the employer moved for summary judgment and supported their motion with extensive excerpts from the plaintiff's deposition at which the plaintiff testified that the supervisor had shown the plaintiff nothing more than some pictures on a website dedicated to a fairly common hobby that by itself has no sexual connotations. The plaintiff, in opposing the motion, attached other pages from the deposition transcript in which the plaintiff testified that the photos in question were themselves sexually graphic. In another case, an employer defending against a wrongful termination case offered declaration testimony that, in the last few years of the plaintiff's employment, the plaintiff's performance had fallen far below acceptable standards. The plaintiff's opposition included the plaintiff's entire personnel file, which included sterling performance evaluations for those same years.

Sanctions for gross abuse.

The summary judgment statute itself contains language allowing the court to sanction a party for filing a frivolous declaration in connection with an MSJ. Specifically, if the court determines at any time that any declarations supporting or opposing an MSJ were presented in bad faith or solely for purposes of delay, the court must then, after a noticed hearing, order the party presenting the declarations to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. (CCP Sec. 437c(j).) Also bear in mind that if the court concludes that any pleading signed by an attorney and filed with the court was made in bad faith, the court may impose sanctions on the attorney, law firm, or party responsible under CCP Sec. 128.7. Courts generally do not want to impose either 437(c)(j) or 128.7 sanctions on a party, and usually with not do so if they believe that the party has merely made a mistake. However, an attorney, whether at the behest of their client or on their own initiative, who crosses the line from zealous advocacy to abuse of process may find themselves the target of such sanctions.

Hon. Michael J. Brenner is a Judge of the Orange County Superior Court. Jeremy G. March is a Research Attorney with the Orange County Superior Court

LAW AND MOTION PRACTICE: From the Perspective of Superior Court Legal Research Attorneys

William P. Gray Legion Lex Inn of Court
May 9, 2007

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II. Motions in General

A. *Filing and Service Requirements*

1. Filing

   a. Moving Papers -- Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be filed at least *16 court days* before the hearing. (Code Civ. Proc., § 1005, subd. (a).) Be careful not to count court holidays as court days. (See court's holiday schedule on the court's public website under general information.) For example: For a hearing set on 2/23/07, the last day to timely file the motion will be 1/30/07 because there are 2 court holidays that are not counted as court days.

   b. Opposition Papers -- Must be filed at least *9 court days* prior to the hearing. (Code Civ. Proc., § 1005, subd. (a).) Again, be careful not to count court holidays as court days.

   c. Reply Papers -- Must be filed at least *5 court days* prior to the hearing. (Code Civ. Proc., § 1005, subd. (a).) Again, be careful not to count court holidays as court days.

2. Service

a. Who Must Be Served -- Moving and supporting papers should be served on *all* parties who have appeared in the action, whether or not the motion seeks relief against such parties. (See Code Civ. Proc., § 1014, indicating that "[a]fter appearance, a defendant or the defendant's attorney is entitled to notice of all subsequent proceedings of which notice is required to be given.")

b. Personal Service

1) If the moving papers are personally served, the hearing on the motion can be noticed 16 *court* days or more after the papers are served and filed. (Code Civ. Proc., § 1005, subd. (a).)

2) A declaration of personal service is required by the person *actually delivering* the documents. Thus, for example, if a messenger service is used to serve documents, the proof of service must be signed by *the messenger*. It is not proper for the proof of service to be signed by someone, such as a secretary, who merely gives the papers to the messenger. Similarly, it is insufficient for the declaration regarding service to indicate that the person signing the proof of service "caused" the documents to be personally delivered. Again, the person who actually served the papers must sign the proof of service.

c. Mail

1) When service is made by mail in California to another location within California, an additional 5 *calendar* days are added to the filing dates noted in the section above under *Filing*. (Code Civ. Proc., § 1005, subd. (a).) There is some confusion and disagreement over whether the court days for filing are counted forward from the date of service, or backward from the hearing date, before adding the additional calendar days. The difference in calculation can make a difference as to whether the papers are deemed timely served. In the absence of any authority directly addressing this issue with respect to Section 1005, it is has been the procedure of the court's Legal Research Department, which is currently under review, to count the requisite number of court days backward from the hearing date, and then count back the additional calendar days. (For example, the necessary service date for a motion

served by mail with a 7/20/07 hearing date would be calculated as follows: (1) first count back 16 *court* days from the hearing date, excluding court holidays, which would be 6/27/07; (2) then count back 5 *calendar* days, which would render 6/22/07 as the last day to timely serve the papers by mail.)

2) Service of opposition and reply papers by mail is generally improper. (See Code Civ. Proc., § 1005, subd. (c), stating that all opposition and reply papers must be served by personal delivery, fax, express mail, or other means reasonably calculated to ensure delivery to the other party no later than the close of the next business day after the papers are filed.)

d. Fax Service

1) When service is made by fax (or express mail or other method of overnight delivery), an additional 2 *calendar* days are added to the filing dates noted in the section above under *Filing*. (Code Civ. Proc., § 1005, subd. (a).) The same method of calculation discussed in the above section under *Mail* applies to fax and overnight delivery.

2) Service by fax is permitted *only* where the parties have agreed to this method of service, and a written confirmation of the agreement is made. (Code Civ. Proc., § 1013, subd. (e); Cal. Rules of Court, rule 2.306, subd. (a).) It would be helpful if the parties noted on the proof of service that service by fax is being made pursuant to a confirmed agreement between the parties.

e. Filing Proof of Service -- Pursuant to California Rules of Court, rule 3.1300, subdivision (c), proof of service of the moving papers must be filed with the court no later than *5 court days* prior to the date set for the hearing. (Note: This is a change from prior Rule 317, which required 5 calendar days.) It is a good idea, if possible, to try to file proof of service along with the moving papers, or immediately thereafter. Failure to file proof of service as required may result in the motion being taken off calendar by the court. (Do not forget to *sign* the proof of service.)

B. *Motion Content*

1. Introduction -- Depending on the length of the motion and number of issues raised, consider starting with a *brief* introduction (usually no longer than one page) that provides a brief synopsis of the arguments in the order they are presented in the paper. An introduction should provide a roadmap to the reader to let the reader know the issues being addressed, and the order in which they are being addressed.

2. Statement of Facts and Procedural Posture

   a. Provide a brief, *accurate* statement of facts, including any procedural facts, that are *relevant* to the motion being brought and which will help the court understand what the case and issues are about. Although one may summarize facts in the light most favorable to one's client, do not misstate or exaggerate the facts, as this will destroy one's credibility as to the motion in general. (See Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 9:71.)

   b. Do not assume the court is familiar with the facts of the case or remembers everything that occurred procedurally before the motion at issue was filed. Although, generally, a case will be assigned to the same legal research attorney each time a new motion is filed, the research attorneys read numerous motions everyday. Provide enough facts so that the reader can place the issues in context. Identify any prior orders relevant to the present motion, and briefly explain the facts leading up to the filing of the motion or the context in which the motion arises.

   c. Consider starting the statement of facts with a sentence or two explaining the nature of the case. For example, "This action arises out of an alleged breach of contract, personal injury, wrongful termination, etc."

   d. When the outcome of a motion turns on particular facts or evidence, cite to (and attach) evidence supporting those facts. (See *Smith, Smith & King v. Superior Ct.* (1997) 60 Cal.App.4th 573, 578, indicating that matters set forth in an unverified statement of facts are not evidence and cannot provide a basis for granting, or denying, motion.)

   e. Conclude the statement of facts with a brief explanation as to precisely what relief or order the court is being asked to make, and the grounds for same. (See Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 9:72.)

3. Use Headings

   a. Good headings help to organize a paper and make it easier to read and follow.

   b. A heading should be a one-sentence *summary* of the underlying argument, as opposed to merely a title. For example, instead of a heading reading "The Demurrer to the First Cause of Action for Breach of Contract Should Be Sustained," it should provide a summary of the argument, such as "The Demurrer to the First Cause of Action for Breach of Contract Should Be Sustained Because, Based on the Exhibit Attached to the Complaint, the Statute of Limitations has Run."

4. Argument

   a. Good organization is key! Make it easy for the reader. Consider creating a brief outline of the issues and argument before actually writing the paper. Papers that ramble, jumping from issue to issue, with no structure, are extremely difficult to follow, and there is a great likelihood that issues will be missed by the reader.

   b. If an introduction is included in the paper, the argument should follow the issues raised in the introduction in the same order.

   c. Focus on the strongest arguments first, and fully develop each argument before moving on to the next. Avoid jumping back and forth.

   d. Check citations for accuracy and make sure that the authority cited actually stands for the proposition for which it is being cited. Be careful not to take portions of cases out of context. Many times attorneys cite to a particular sentence or paragraph in a case for a particular proposition without actually reading the case and realizing that either it does not stand for the proposition cited, or it actually stands for the opposite. Failure to accurately cite authority negatively impacts one's credibility with respect to the argument as a whole.

   e. It is better to cite to one or two good cases on point and discuss those cases in a little detail rather than merely string citing.

   f. When opposing a motion, do not avoid issues raised in the moving papers. Address each of the issues raised by the opponent in a

separate section, and either explain why the issue is without merit or irrelevant, or whether the issue is conceded.

C. *Tips to Bringing Motions in General*

1. Keep motions as brief as possible.

2. Tone/Civility/Professionalism -- Keep the tone of the moving and opposing papers professional and civil, and avoid insulting the opposing party or opposing counsel. Hyperbole, exaggeration, disrespect, and arguments belittling one's opponent does nothing to advance a client's position, and, in fact, is more likely to diminish the persuasive force of the moving or opposing papers and hurt one's own credibility. The most persuasive papers present temperate, well-reasoned arguments. (Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeal & Writs (The Rutter Group 2005), ¶9:29.)

3. Check the California Rules of Court for additional requirements regarding the content of certain motions (e.g., motions to be relieved as counsel [Cal. Rules of Court, rule 3.1362], motions for leave to amend pleadings [Cal. Rules of Court, rule 3.1324], motions for continuance [Cal. Rules of Court, rule 3.1332], etc.). (**NOTE:** There are a number of significant changes to the California Rules of Court that took effect January 1, 2007, including a re-numbering of all the rules. Make sure you are review and cite to the new rules.)

   To download a copy of a rule conversion table, go to the following website and look under rules: www.courtinfo.ca.gov/courtadmin/aoc/

4. Proofread papers before filing them.

5. *Use exhibit tabs* to mark and separate exhibits to make it easier for the court to find the exhibits. Do *not* merely insert a marked cover page in front of each exhibit. *Highlight* relevant portions of exhibits.

6. Exhibits must be properly authenticated by declarations, based on personal knowledge, or other evidence establishing that the writing is what it purports to be. (See Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 9:53a.) Often when submitting exhibits, attorneys attempt to authenticate same merely by submitting a declaration stating that a true and correct copy of the exhibit is attached thereto. Such statement, by and of itself, is insufficient.

7. In addition to attaching a copy of a proposed amended pleading as an exhibit to a motion for leave to amend (see Cal. Rules of Court, rule

3.1324, subd. (a)(1)), make sure to *lodge* the signed original with the court.

8. If a proposed order is submitted, it must by *lodged* with the court and *served* with the moving papers. (Cal. Rules of Court, rule 3.1113, subd. (n).) Do *not* attach proposed orders to the moving papers.

9. The Rutter Group guides are a great source of practical information.

D. ***Notices of Motion***

1. Take Care with the First Paragraph -- Set forth the nature of the order sought and the ground(s) for the motion in the *opening paragraph*. (Cal. Rules of Court, rule 3.1110, subd. (a).) For example: "Pursuant to Code Civil Procedure section 473, subdivision (b), defendants A and B move this court for an order vacating and settings aside the defaults entered against them on June 6, 2006. Said motion is made based upon counsel's sworn affidavit attesting to his mistake, inadvertence, surprise, or neglect."

2. Make Proper Sanctions Request -- Because of due process concerns, it is very important to make a sanctions request in the notice of motion, including the type and amount of sanctions sought, and to whom the sanctions request is directed (i.e., attorney, client, or both). (*See Jansen Associations, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1170 ["[C]ase law is clear that in order to impose sanctions against an attorney acting on behalf of a named party, the notice itself must clearly provide that sanctions are being sought against the attorney."].) Thus, a plaintiff giving notice that it is seeking sanctions "against defendants" in conjunction with its motion to compel discovery cannot successfully argue for imposing sanctions against defense counsel.

3. Use Quotes When Moving to Strike -- California Rules of Court, rule 3.1322 requires the moving party to quote the portions sought to be stricken unless the entire paragraph, cause of action or defense is sought to be stricken. Although not required, often it is a good idea to go ahead and quote the entire portions sought to be stricken even if it is to an entire paragraph.

    a. Also, the specifications *must* be numbered consecutively. (Cal. Rules of Court, rule 3.1322, subd. (a).) Numbering often helps because the court can more easily organize and deal with each portion sought to be stricken. For example, the court can state that the motion to strike Nos. 1, 4, and 6 are granted; and the motion to strike Nos. 2, 3 and 5 are denied.

b. For example: Pursuant to Code Civil Procedure sections 435 and 436, Defendants X, Y & Z move for an order striking the following portions of Plaintiff's Second Amended Complaint as follows:

1) Page 5, entire paragraph 22 ("The aforementioned conduct of the Defendants, and each of them, was despicable, willful, fraudulent, malicious and oppressive.");

2) Page 6, paragraph 28 at lines 4-6 ("Plaintiff therefore seeks exemplary damages according to proof."); and

3) Page 8, entire paragraph 7 of the prayer for judgment ("For exemplary damages according to proof;").

E. ***Case Citations***

1. **Avoid String Cites** -- Do not use more citations than needed. "String" cites are of little help and they suggest that the court must read all of the cases cited. Moreover, they are annoying and distract from the points being raised.

2. Use the California Style Manual or "Harvard Bluebook" -- Whichever you choose, make sure you remain consistent throughout the memorandum. (Cal. Rules of Court, rule 3.1113(i).)

3. Provide Pinpoint Cites -- Do not expect the reader to take the time to determine on its own which specific portion of the opinion stands for the proposition being made.

4. Take Care to Abbreviate Subsequent References -- When abbreviating citations, it is usually helpful to provide the reporter and volume number, although not required. Thus, for example: *Ehrenclou*, 117 Cal.App.4th at 366. And NOT: *Ehrenclou*, *supra*, at p. 366. Too often attorneys fail to provide the full cite anywhere in the points and authorities or the full cite appears numerous pages before the abbreviated reference.

5. Help the Court When Citing Recently Filed California Opinions or Computer-Based Sources: Although not required, when dealing with a recently filed california opinion, it is often helpful to provide a citation to the Daily Appellate Report, Westlaw, LexisNexis or similar source.

a. For example, "*People v. Massie* (July 7, 2006, S010775) ___ Cal.4th ___ [99 D.A.R. 12109; 2006 WL 99999; 2006 Cal.App. Lexis 4567]"

b. Also, you may want to provide both the Westlaw *and* Lexis cites since different research attorneys and different judges tend to prefer using one over the other.

6. Provide a Brief Parenthetical -- Or quote a passage if it is short and directly on point. Don't expect the reader to review each case cited and determine on its own how the case relates to the argument being made.

7. Take Care When Citing to Non-California Authorities -- Take the time to briefly explain why non-California authorities are being cited if not obvious — e.g., explain that there are no California cases dealing with the issue or on point.

8. Generally, Do Not Cite Unpublished Authorities -- Unless they meet the requirements of California Rules of Court, rule 8.1115, *do not* cite unpublished California authorities, even if you inform the Court that it is unpublished. There appears to be a recent trend in citing unpublished California cases as authority. Some attorneys appear to think that citing unpublished California cases is permissible so long as the attorney mentions that the case is unpublished. NOT SO.

9. Attach Recently filed California Opinions -- If a California case is cited before it is published in the Official Reports, attach a copy of the case tabbed as an exhibit. Although a case appearing in the Advance Sheets is not required to be attached, it saves time and avoids problems in obtaining a copy of the opinion.

10. Know When to Lodge Authorities -- The rules require that when "any authority other than California cases, statutes, constitutional provisions, or state or local rules" is cited, a copy must be lodged and tabbed as an exhibit. (Cal. Rules of Court, rule 3.1113(j).) Attorneys are generally pretty good about following this rule when it comes to non-California authorities, including federal authorities, but fail to recognize that **regulatory materials and municipal codes** must also be lodged. Thus, for example, please provide a copy of the Santa Ana Municipal Code and the California Code of Regulations if you cite them.

F. ***Requests for Judicial Notice***

1. Make Request in a Separate Document (Cal. Rules of Court, rule 3.1113(m).) Be certain, however, to also make the request in the points and authorities. (See Code Civ. Proc., §§ 430.70 [requiring request to be

specified in the demurrer or points and authorities] and 437(b) [same, except as to motions to strike].)

2. Provide a Copy of the Matter (Cal. Rules of Court, rule 3.1306(c).)

3. List the Documents and Tab Them

4. Provide a Declaration -- Provide a brief declaration authenticating that the copies of those documents sought to be judicially noticed are in fact "true" copies. Certified copies also are appropriate in certain situations, such as records from another court.

5. Specify Grounds -- Don't just cite generally to Evidence Code sections 452 and 453 and expect the court to determine for itself which subsection of those code provisions, if any, apply.

6. Specify Exactly of Which You Are Requesting the Court Take Judicial Notice (Cal. Rules of Court, rule 3.1113(m)) -- For example, are you asking the court to take judicial notice of the *existence* of a document, the *recording* of a document, or the *contents* of the document? Thus, for example, although it may be proper for the court to take judicial notice of a fact that a document was filed in a certain action, the court may not be able to take judicial notice of the facts presented within the body of the document filed. Remember, the hearsay rule still applies.

G. *Declarations*

1. Declaration Executed Out-of-State -- Such declarations must certify that they are being made under penalty of perjury "under the laws of the State of California." (Code Civ. Proc., § 2015.5, subd.(a); *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612, n.6.)

2. Personal Knowledge -- It is not enough for any declarant to simply state that he/she has personal knowledge of the facts contained in the declaration. The declaration must contain *facts* identifying the source of a declarant's personal knowledge. (See Evid. Code, § 702; *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851.) This is also true for authenticating documents.

3. Do Not Forget to Sign Declaration

H. *Taking Motions Off Calendar or Continuing Same*

1. Moving Party Must Request -- With the exception of the court on its own motion, only a moving party may take a motion off calendar or continue same.

2. Call As Soon As Possible -- If the moving party plans to take a motion off calendar or continue same, the moving party should contact the courtroom clerk as soon as possible to prevent the court from unnecessarily working up the motion and to prevent unnecessary appearances. Pursuant to California Rules of Court, rule 3.1304, subdivision (b), the moving party must *immediately* notify the court if a matter will not be heard on the scheduled date.

III. Common Problems with Specific Motions

A. *Summary Judgment/Adjudication*

1. Role of Pleadings

   a. The pleadings are the starting point for any motion for summary judgment/adjudication because they define what issues and facts are material for purposes of the motion. (See, e.g., *Government Employees Insurance Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98 n.4.)

   b. Defendants seeking summary judgment/adjudication must address all theories of liability alleged in the complaint.

   c. Opposition cannot defeat motion for summary judgment/adjudication based upon claim or defense not yet pled; leave to amend must be sought prior to the hearing on the motion. (See, e.g., *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699.)

   d. *Beware of amendments to pleadings* while motion for summary judgment/adjudication pending. Motion can be denied on grounds that it is no longer directed to the operative pleading. If leave to amend is sought while a summary judgment/adjudication motion is pending, indicate in the proposed order whether, and how, the amendment affects the pending motion for summary judgment/adjudication.

2. Amount of Notice

   a. 75 days plus additional time depending on means of service. (Code Civ. Proc., § 437c, subd. (a).) Court's website includes table of filing deadlines for all hearing dates.

   b. Absent written stipulation of the parties, the court lacks authority to shorten this time period. (*Urshan v. Musician's Credit Union* (2004) 120 Cal.App.4th 758, 763-66.)

   c. The court can allow hearing on motion less than 30 days before trial. (Code Civ. Proc., § 437c, subd. (a).)

3. Notice of Motion

   a. Summary adjudication cannot be granted if notice of motion seeks summary judgment only.

   b. If summary judgment is only relief sought, the existence of a triable issue on any cause of action defeats entire motion.

   c. Summary adjudication may be brought as to one or more causes of action, one or more affirmative defenses, one or more claims of punitive damages, or one or more issues of duty. (Code Civ. Proc.§ 437c, subd. (f)(1).) No other issues are appropriate for summary adjudication.

   d. When summary adjudication is sought, "the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, rule 3.1350(b).)

   e. Summary adjudication must *completely dispose* of the cause of action, affirmative defense, claim for punitive damage, issue of duty to which it is directed. (Code Civ. Proc., § 437c, subd. (f)(1).)

4. Separate Statement

   a. "The Separate Statement of Undisputed Material Facts in support of a motion must separately identify each cause of action, claim, issue of duty or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense." (Cal. Rules of Court, rule 3.1350, subd. (d).)

b. Care must be taken to carefully draft separate statement to provide all facts necessary to grant the motion on the grounds argued. For example, if fraud claim alleges that misrepresentations were made both orally and in writing, motion would be denied if separate statement simply states that defendant had no written communications with plaintiff.

c. The opposing party must state whether each fact is disputed or undisputed. (Code Civ. Proc., §437c, subd. (b)(3); Cal. Rules of Court, rule 3.1350, subd. (f).) Court has discretion to treat failure to comply with separate statement requirement as grounds for granting motion. (Code Civ. Proc., § 437c, subd. (b)(3).)

1. Do not simply object to other side's material facts.

2. In separate statement, do not simply state objections to other side's evidence. (See Cal. Rules of Court, rule 3.1354, subd. (b), indicating that objections *must not* be restated or reargued in the separate statement.)

5. Evidence

a. All evidence must be admissible evidence.

1) Make sure that declarations are from persons with personal knowledge and be sure to state facts showing such knowledge.

2) "All documentary evidence (e.g., contracts, correspondence, pleadings, etc.) must be presented in *admissible* form. Basically, this means that the evidence must be:
- Properly identified and *authenticated*;
- Admissible under the *secondary evidence* rule;
- *Nonhearsay*, or admissible under some exception to the hearsay rule." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 10:169

(Note: Do not fail to oppose a summary judgment/adjudication motion based on the moving party submitting otherwise inadmissible evidence. Although the evidence may be objectionable, the court may consider the evidence if no objection to the evidence is made. [Code Civ. Proc., § 437c, subd. (b)(5), indicating "[e]videntiary objections not made at the hearing shall be deemed waived.")

b. Note, if a party provides expert testimony on his/her own behalf in support of a motion for summary judgment/adjudication (such as in medical malpractice cases), the party may be deemed to have waived the attorney-client and attorney work-product privilege with respect to the matters discussed in the declaration. (See Evid. Code § 912; *Shooker v. Sup.Ct.* (2003) 111 Cal.App.4th 923, 930, indicating that if a party testifies as an expert witness the attorney work-product and attorney client privileges are waived.)

6. Evidentiary Objections

a. Written objections must comply with California Rules of Court, rule 3.1354, which includes significant changes to prior Rule 345. Failure to comply with the requirements may result in the court refusing to rule on your objections.

1) **Written objections are due earlier**. Unless otherwise excused by the court on a showing of good cause, written objections in support of or in opposition to a motion for summary judgment/adjudication must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed. (Cal. Rules of Court, rule 3.1354, subd. (a).) (**Note:** This a change from the prior rule, which required written objections to be filed and served no later than 4:30 p.m. on the third day before the hearing.)

2) **Written objections must be filed separately.** "All written objections to evidence must be served and filed separately from the other papers in support of or opposition to the motion." (Cal. Rules of Court, rule 3.1354, subd. (b).) (This was not a previous requirement under Rule 345.)

3) **Numbered consecutively.** "Each written must be numbered consecutively and must:
(1) Identify the name of the document in which the specific material objected to is located;
(2) State the exhibit, title, page, and line number of the material objected to;
(3) Quote or set forth the objectionable statement or material; and
(4) State the grounds for each objection to that statement or material." (Cal. Rules of Court, rule 3.1354, subd. (b).) (This too is a change from Rule 345.)

4) **Reference to objection is separate statement.** The objections *must not* be restated or reargued in the separate statement.

Objections on specific evidence, however, may be referenced by *the objection number* in the right column of a separate statement in opposition or reply to a motion. (Cal. Rules of Court, rule 3.1354, subd. (b).) (This was not a previous requirement under Rule 345.)

5) **Format of objections.** Written objection must follow one of two formats listed in California Rules of Court, rule 3.1354, subd. (b). (Refer to Rule 3.1354 for the two approved formats. This was not a previous requirement under Rule 345.)

6) **Proposed order.** A proposed order must be submitted with the objections, and must follow one of two formats, which include places for the court to indicate whether it has sustained or overruled each objection, and a place for the signature of the judge. (Cal. Rules of Court, rule 3.1354, subd. (b).) (Refer to Rule 3.1354 for the two approved formats. This was not a previous requirement under Rule 345.)

b. Use good judgment when making evidentiary objections. Do not make objections for the sake of making objections. If a particular fact is *undisputed*, do not make an objection to the evidence offered in support of the undisputed fact.

7. Burdens on Motion

a. The initial burden is on moving party to show that there is no triable issue of material fact. *Opposing party has no obligation to submit any declarations or other evidence if the moving party fails to meet initial burden* – i.e., the burden does not shift until, and unless, the moving party meets its initial burden. (See, e.g., *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) Thus, even an *unopposed* motion for summary judgment/adjudication will be denied if the moving party has failed to meet its initial burden.

b. Defendant can meet initial burden by showing that (1) plaintiff's claim cannot be established (i.e., negating an element of the claim), (2) plaintiff lacks evidence on a critical element of plaintiff's claim, or (3) defendant has a complete defense.

1) In attempting to show that plaintiff lacks evidence on a critical element, defendant cannot simply argue that plaintiff lacks evidence. Defendant must present evidence showing that plaintiff does not possess *and cannot*

reasonably obtain needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.)

2) In attempting to show that plaintiff cannot establish an element of his or her claim, defendant should first identify what the elements of the challenged claim are and then which element is being challenged.

c. Plaintiff can meet initial burden by producing admissible evidence on *each* element of a cause of action.

B. *Anti-SLAPP Motions*

1. Timing of Motion:

a. Generally, must be filed within 60 days after service of the complaint or amended complaint, though the court may accept later filing upon terms it deems proper. (Code Civ. Proc., § 425.16, subd. (f).)

b. Time is extended where amended complaint is served by mail. (Code Civ. Proc., § 1013, subd. (a).)

c. Filing an amended complaint reopens the 60 day time period in which to file an anti-SLAPP motion. (*Yu v. Signet Bank/Virgina* (2002) 103 Cal.App.4th 298, 314.)

d. Anti-SLAPP motion may be filed before *or after* the defendant answers the complaint or amended complaint. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:241.15.)

2. When is Anti-SLAPP Motion Applicable?

a. Written or oral *statements or writings* made *before* a legislative, executive, or judicial, or other official proceeding. (Code Civ. Proc., § 425.16, subd. (e)(1); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:208.)

1) Statement or writing need not concern issues of public interest

2) Statement or writing need not be made in a public forum.

3) No nexus required between the statement or writing and an issue under consideration by a public body.

4) Not limited to statements or writings concerning constitutional rights.

b. Written or oral *statements or writings* made *in connection with* an issue under consideration or review by a legislative, executive, or judicial body, or any other legally authorized official proceeding. (Code Civ. Proc., § 425.16, subd. (e)(2); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:208.)

1) Statement or writing need not concern issues of public interest.

2) Statement or writing need not be made in a public forum.

3) Nexus *is* required between the statement or writing and an issue under consideration by a *public* body.

4) Not limited to statements or writings concerning constitutional rights.

c. Written or oral *statements or writings* made in a *place open to the public* or in a public forum, in connection with an *issue of public interest*. (Code Civ. Proc., § 425.16, subd. (e)(3); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:208.)

1) Statement or writing *must* concern issues of public interest.

a) "Public interest" is broadly construed.

b) Advertising and commercial speech do not raise a public issue. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:234.15.)

2) Statement or writing *must* be made in a *public* forum.

3) No nexus required between the statement or writing and an issue under consideration by a public body.

4) Not limited to statements or writings concerning constitutional rights.

d. Any other *conduct* in furtherance of the exercise of the *constitutional right* of petition or right to free speech *in connection*

with an issue of public interest. (Code Civ. Proc., § 425.16, subd. (e)(4); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:208.)

1) Unlike other categories above, this category pertains to *conduct*, not oral or written *statements*.

2) Conduct *must* concern issues of public interest.

3) Conduct need *not* occur in a public forum.

3) No nexus required between conduct and an issue under consideration by a public body.

4) Expressly limited to the exercise of *constitutional* rights.

3. The Parties' Burdens

a. **Defendant's burden:** The only thing that defendant need show is that plaintiff's lawsuit arises from defendant's exercise of free speech or petition rights as defined in Code of Civil Procedure section 425.16, subdivision (e) – i.e., defendant must make a prima facie showing that one of the above categories apply. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:244.)

1) The motion must be supported by declarations stating facts upon which the defense is based. (Code Civ. Proc., § 425.16, subd. (b)(2); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:243.)

2) No intent to chill required.

3) Unless defendant makes the threshold showing, the burden does *not* shift to plaintiff to establish a probability of prevailing on the merits. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶¶ 7:244.1 and 7:245.)

b. **Plaintiff's burden:** Once defendant meets his/her threshold burden, the burden shifts to plaintiff to establish a *probability* that plaintiff will prevail on the causes of action asserted against the defendant. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:245.)

1) Plaintiff must show that the complaint is both legally sufficient and supported by sufficient facts to sustain a favorable judgment.

2) Plaintiff must establish, through admissible evidence, a prima facie showing of facts supporting a judgment in plaintiff's favor.

4. Select Issues Regarding Anti-SLAPP Motions

a. Discovery is stayed.

1) Unless the court orders otherwise, for good cause shown, all discovery proceedings are stayed *upon filing* of an anti-SLAPP motion, and the stay remains in effect until notice of entry of order ruling on motion. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:258.)

2) If plaintiff requires discovery to oppose the motion, plaintiff must move for an order allowing such discovery, and if necessary, a continuance of the hearing. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:258.1)

3) If the court permits discovery, it will be limited to the issues raised in the anti-SLAPP motion. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶ 7:

b. Amended pleadings not allowed.

1) Plaintiff cannot avoid an anti-SLAPP motion by filing an amended pleading while an anti-SLAPP motion is pending. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 CA4th 1049, 1055; Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:260.)

2) Moreover, if the anti-SLAPP motion is granted, the court may not grant plaintiff leave to amend any causes of action subject to anti-SLAPP motion. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073; Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:257a.)

5. Attorney Fees

a. Prevailing Defendant: A defendant prevailing on an anti-SLAPP motion is *entitled* to recover his/her attorney fees and costs. The award of fees is mandatory. (Code Civ. Proc., § 425.16, subd. (c); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:259.)

b. Prevailing Plaintiff: A plaintiff who prevails on an anti-SLAPP motion is entitled to attorney fees and costs if the anti-SLAPP motion is found to be "frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 425.16, subd. (c); Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:259.)

c. Effect of Dismissal:

1) Court-ordered dismissal: A court-ordered dismissal before the anti-SLAPP motion is heard (e.g., by granting of a motion for judgment on the pleadings or sustaining a demurrer without leave to amend), does not render moot a fee request under an anti-SLAPP motion. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:260.7.)

2) Voluntary dismissal: Where a plaintiff voluntarily dismisses and action prior to an anti-SLAPP motion being heard, the defendant might still be entitled to attorney fees and costs, if plaintiff's case is shown to be a "pure SLAPP suit." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2006), ¶7:260.5

C. *Motions to Withdraw as Counsel*

1. The most often *un*opposed motion which is denied!

2. Very technical motion - you *must* comply with *every element* of California Rule of Court, rule 3.1362.

3. If unable to locate client, must serve the clerk of court. (Code Civ. Proc., § 1011, subd. (b); Cal. Rules of Court, rule 3.1362, subd. (d)(2).)

4. Use mandatory Judicial Council forms. (Cal. Rules of Court, rule 3.1362, subd, (a), (c), and (e).)

5. Practice Tip: Be *very* careful what you put into your supporting declaration regarding your own client! (In your zeal to have your motion

granted, you do not want to in any way put the client in a compromise position regarding the still-pending matter.)

D. ***Demurrers***

1. Probably the most commonly misused and judicially disfavored motion.

2. Filing demurrers to answers *are especially disfavored.*

3. Timing for filing: 30 days after served with pleading (Code Civ. Proc., § 430.40), AND only *10 days* after served with complaint that has been amended after demurrer was sustained with leave to amend. (Cal. Rules of Court, rule 3.1320, subd. (j)(2).) (Failure to timely file demurrer may result in court overruling same as untimely without reaching the merits.)

4. Before filing - consider: What is it likely to accomplish of real significance?

5. Consider also the possible negatives; you may unwittingly:

   a. Educate your opponent on the law.

   b. Help your opponent correct pleadings.

   c. Annoy opposing counsel and/or the judge if your demurrer is not well taken.

6. Remember: Leave to amend (*at least* one time) is almost always going to be granted. Consider filing only if defect can't be remedied by amendment.

7. Before opposing demurrer, objectively evaluate your own pleadings and use the telephone. Often you can stipulate to amend and obviate the necessity of a formal opposition and ruling by the court.

   a. If going to be filing first amended pleading instead of opposing, do not wait until the last minute. Doing so, may result in the court having needlessly worked up the demurrer.

8. Remember, demurrer cannot be used to attack improper remedy (e.g., punitive damages) – need to file motion to strike.

9. No declarations are permitted in support of demurrer since a demurrer merely tests the sufficiency of the pleadings.

E. ***Motions to Strike***

1. Similar to demurrers but even more narrow in scope.

2. Use only if you have a real chance to get some specific allegation *permanently* eliminated from your case (i.e., a legally unsupportable prayer for punitive damages in a breach of contract or wrongful death case, or legally unsupportable prayer for attorney fees).

3. Can also remove offensive and totally irrelevant allegations, but only in cases of manifest pleading abuse.

F. ***Good Faith Settlement Motions***

1. Controlling authority is California Code of Civil Procedure sections 877 and 877.6, and *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.* (1985) 39 Cal.3d 488 and *Abbott Ford, Inc. v. Sup. Ct.* (1987) 43 Cal.3d 858. (Zerne, Haning, Flahavan, & Kelly, Cal. Prac. Guide: Personal Injury (The Rutter Group 2006) ¶¶ 4:191, et seq.)

2. Note the "ex parte" option. (Code Civ. Proc., § 877.6, subd. (a)(2).)

3. Burden of proof is on the opposing party.

4. Practical considerations will most often prevail over technical legal comparative liability analyses (i.e., if defendant has no significant assets and is paying full insurance policy limits, the motion will most likely be granted regardless of percentage of fault issues between co-defendants or any theoretical prorata share analysis for plaintiff's total economic/non-economic damages).

5. Plaintiffs beware - the granting of a good faith settlement is not determinative of Proposition 51 issues at trial.

G. ***Motions to Continue Trial***

1. Generally a disfavored motion in most trial courts.

2. *Must* be supported by affirmative showing of "good cause" (and consideration to the court's calendar). (Cal. Rules of Court, rule 3.1335; Code Civ. Proc., §595.2; *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 15.)

3. Know your judge! Each judge has broad discretion and variation of policy on the issue of continuing trials.

4. Practical considerations for greater success include:

a. Bring *as early as possible* before trial. (It is easier for court to re-adjust its trial calendar/case load when you bring the motion weeks vs. days before your scheduled trial date). (*Pham, supra,* 54 Cal.App.4th 11.)

b. Have parties in agreement on the need and new trial date requested whenever possible.

c. Be judicious of Code of Civil Procedure section 595.2 and *Pham* case; employ discretion and tact! (It's still going to be the judge's call 99.9% of the time. Always couch your motion or application in the form of a stipulation of the parties *and request* for an order granting continuance; since the court is not bound by the stipulation or agreement of the parties!)

H. ***Joinders***

Need separate and timely notice of motion seeking relief in the name of the party joining in the motion. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal. App. 4th 1382, 1390-91.)

J. ***Discovery Motions***

1. Burden on Motions

a. On a motion to compel further responses, the party asserting the objection has the burden of justifying the objection. (*Fairmont Insurance Co. v. Superior Court* (2000) 22 Cal.4th 245, 255 citing *Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-21.)

b. Motion to compel further responses to a document demand requires the moving party to set forth specific facts showing good cause justifying the discovery sought by the document demand. Hence, the initial burden is on the party making the motion and the party asserting the objections only has to justify the objections if good cause is shown. (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

2. Separate Statements – They need to be specifically tailored to each particular request. Do not simply restate 10 pages of points and authority for every single request with the expectation that what you need is in there somewhere. Instead, explain why the specific information is relevant and address only the specific objections that are asserted.

3. Sanctions Requests – Code of Civil Procedure section 2023.040 provides as follows: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. 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."

J. *Motions to Enforce Settlements*

a. Signed writing or oral stipulation in court by the parties (not counsel) is required for an enforceable settlement under Code Civil Procedure section 664.6.

b. Any agreement for the court to retain jurisdiction to enforce settlement must also be in a signed writing or oral stipulation in court by the parties (not counsel).

c. Agreement for court to retain jurisdiction, by itself, is not enough. The parties must request that the court retain jurisdiction. If dismissal is filed or ordered, the court lacks subject matter jurisdiction to enforce settlement. Parties must either set aside dismissal or file separate action. (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1009; *Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 21.)

IV. Law and Motion Procedures Unique to the Civil Complex Panel

A. *Law and Motion at the Civil Complex Center*

1. **Compute your *filing and notice deadlines* accurately:** Motions continue to be filed tardily, and often reflect provision of inadequate notice. Absent express or implied waiver by the 'other side', Court must deny (or continue) a motion in the face of filing/notice defects. The impact of filing/notice problems multiplies exponentially, where many attorneys/parties are involved - as in most 'complex' lawsuits.

a. **Basic Filing/Notice'** required for a motion is spelled out in AB 3078, enacted 7/15/04, and Code of Civil Procedure section 1005, subdivision (b) (*revised effective 1/1/05*) - that requires a motion to be *filed* at least 16 court days before the intended hearing date - and that requires 16 court days *notice*, increased by 5 calendar days if both place of mailing, and place of address, are within the State of California.

b. Code of Civil Procedure section 1005, subdivision (b), now requires that oppositions to be served at least 9 court days, and all reply papers served at least 5 court days, before the hearing.

c. **'Counting the days'** is explained in Code of Civil Procedure sections 12, 12a, and 12b.

d. **Examples of 'special filing/notice' requirements:**

Motion for Summary Judgment must be filed/served at least 75 calendar days before the hearing date - with 5 additional days notice, if served by mail from/to address in California = 80 calendar days notice required per Code of Civil Procedure section 437c, subdivision (a). Oppositions are due on such motions at least 14 calendar days before the hearing date (*earlier than the normal 9 court day deadline for most motions*) per Code of Civil Procedure section 437c, subdivision (b)(2) - and replies on such motions are due at least 5 calendar days before the hearing date (*oddly, later than the normal 5 court day deadline for most motions*) per Code of Civil Procedure section 437c, subdivision (b)(4).

Motion to Certify a Class, on the other hand, must be filed/served at least 28 calendar days prior to hearing, with any Opposition due at least 14 calendar days, and any reply due at least 5 calendar days, before the hearing date. (Code Civ. Proc., § 3.764, subd. (c)(1).)

While, technically, a class action settlement includes a request for "provisional certification" for purposes of preliminary settlement approval - said notice requirements are often "deemed waived" where it is clear that both sides are supporting the motion.

Motion for Reconsideration, authorized by Code of Civil Procedure section 1008, subdivision (a) - is subject to a 10 day deadline (*must be filed within 10 days after service of notice of entry of the challenged order*). Note: Court loses jurisdiction to rule on reconsideration motion if not heard before entry of judgment. (*APRI Insur. Co. v. Sup. Ct.* (1999) 76 CA4th 176, 181-182.)

Motion to Quash Service, authorized by Code of Civil Procedure section 418.10, subdivision (a) - must be brought on or before 'the last day to plead' (*i.e. within 30 days of 'service'*) - unless the Court, upon *good cause*, extends that deadline.

Motion to Tax Costs must be filed/served within 15 calendar days after service of Memorandum of Costs (*+ 5 days if served by mail to California address*) per California Rules of Court, rule 3.1700 and Code of Civil Procedure section 1013.

Notice of a Motion for New Trial must be filed/served before entry of judgment, or within 15 days of date of mailing of notice of entry of judgment (*by Clerk or any party*), or within 180 days after entry of the Judgment - whichever is *earliest*. (Code Civ. Proc., § 659.)

Motion for pre-judgment Attorney Fees must be filed on or before: 60 days after service of the Notice of Entry of Judgment or 180 days after entry of judgment, whichever is *earlier*. (Cal. Rules of Court, rules §§ 3.1702 and 8.104.)

Tip: while deadline for a Reply to some motions may fall 'later' than general Code of Civil Procedure section 1005 requirements - please note there **is no 'penalty' for early filing** of a Reply! In CX103, for instance, filing of a reply to a summary judgment motion at 4:59 pm on Wednesday before the hearing (*Monday law & motion calendars*) leaves the Judicial Officer with only 2 'actual' days to review your Reply (*and normally CX103 is 'in trial' during Thursday and Friday of each week*). Any delay in processing of 'e-filings' may leave the Judicial Officer with even less time (*sometimes a large stack of e-filings takes 1-2 days to 'separate' and distribute*). While many of our Judicial Officers do 'work on a Saturday or Sunday'- please do not rely on that fact.

Tip: absent ex parte authorization to file a 'late document' - it is improper to file 'supplemental oppositions', or 'sur-replies'.

2. **Check your 'proof of service':** Make sure it is attached to moving papers, or gets filed no later than 5 calendar days prior to your hearing, per California Rules of Court, rule 3.1300, subdivision (c). Proofread it! (*to make sure date of mailing is completed, place of mailing, complete/correct address of addressee(s), that verification language is there, and that it is signed!*). Best to attach your proof of service to your moving papers (*otherwise risk Clerk failure to recognize a later-filed proof of service, as pertaining to an upcoming law and motion matter*).

3 **Late papers may be disregarded!** Counsel too often file their papers (*even moving papers*) *late* - relying on Court's 'good graces' to consider everything filed. Court has *discretion* to disregard *late* papers - and will do so - particularly where offending attorney makes a habit of imposing on the Court, and opposing counsel, in that fashion. (Cal. Rules of Court, rule 3.1300, subd. (d).)

4. **Bring your motions in a *timely* fashion:** Remember, motions to compel 'further' discovery responses must be 'noticed' within 45 days of service of the existing discovery responses:

   a. Code of Civil Procedure section 2030.300, subdivision (c), as to further responses to interrogatories;

   b. Code of Civil Procedure section 2031.310, subdivision (c), as to further responses to demands for inspection;

   c. Code of Civil Procedure section 2033.290, subdivision (c), as to further responses to requests for admission.

5. Need 'writing' to confirm agreement between counsel, to extend those deadlines.

6. Also, keep in mind the 15-day cut-off for hearing of discovery motions before trial per Code of Civil Procedure section 2024.020, subdivision (a) - and fact that summary judgment motions must be heard no later than 30 days before trial per Code of Civil Procedure section 437c, subdivision (a) (*unless Court for good cause orders otherwise*).

7. Many attorneys miss fact that Demurrers must be set for hearing within 35 days of filing per California Rules of Court, rule 3.1320, subdivision (c) (*unless Court for good cause orders otherwise*). Similar mistake can be made with respect to motions to quash service (*need to be set for a hearing date within 30 days of filing*), per Code of Civil Procedure section 418.10, subdivision (b). Attorneys make 'mistake' when offered 'their pick' of law & motion dates. 'Blaming' the Clerk for the date scheduled is not recommended (*Court is aware that the moving attorney, is the one 'choosing the dates'*).

8. Please comply with all 'good faith meet and confer' requirements of the California Discovery Act of 1986 - and the California Code of Civil Procedure, as amended - and **Orange County's Civil Complex Department Guideline § III** (*available 'on line' at our Court website - requires meet/confer statement at least 10 calendar days before hearing of motion - and authorizes 'reasonable' sanction award where counsel unreasonably fails to resolve or settle a law and motion dispute*). Judge Bauer will periodically refer to the concept as 'knees under the table' conferencing. One letter, without any phone call to confirm the letter was received or a real attempt to resolve discovery differences (*genuinely considering the 'viewpoint' of the other side*), will not be deemed sufficient.

9. **Remember your 'Separate Statements'!** Code of Civil Procedure section 437c, subdivision (b), requires a separate statement from both moving and opposing parties, with respect to a summary judgment motion

(*if lacking - Court has discretion to deny motion on that basis alone*). Also, remember that summary adjudication motion requires separation of each 'issue' in the supporting separate statement. California Rules of Court, rule 3.1020, requires a separate statement to support motions to compel 'further' discovery responses.

10. **Watch your 'format' rules!** California Rules of Court, rule 3.1113, subdivision (d), limits 'points & authorities' to a maximum of 15 pages (*both moving and opposing*) - 20 pages for a summary judgment motion (Cal. Rules of Court, rule 3.1113, subd. (d)), or motion to certify a class (Cal. Rules of Court, rule 3.764, subd. (c)(2)). Violations of those limits may be treated as 'late papers' (i.e. Court has *discretion* to disregard them).

Tip: Can request leave to exceed those limits via ex parte application - but should be no reason pertinent issues cannot be addressed in any motion in fewer than 10 pages. Most motions will be determined based upon only 1 case or 1 statute. Do not waste everyone's time by offering meaningless references to authority, or by repeating your planned 'final argument', in each motion filed by your office.

Tip: Bringing 'one demurrer' (*15 pages of points & authorities*) challenging certain causes of action - and a concurrent, 'second demurrer' (*15 more pages of points & authorities*) challenging 'other' causes of action = effectively may be considered one 'combined' motion, that exceeds the maximum page limit permitted by California Rules of Court, rule 3.1113, subdivision (d). Court may choose to consider one motion, or the other, or take both motions off-calendar, in those circumstances.

California Rules of Court, rule 3.1112, requires motions that challenge pleadings (*eg. demurrer*), to state the specific portion challenged. Code of Civil Procedure section 430.60, permits Court to disregard a demurrer that fails to distinctly specify the grounds upon which it is brought.

Code of Civil Procedure section 2023.040, requires notice of any motion seeking discovery sanctions to identify, in the notice, the name of the party or attorney *against whom* the sanction is sought, and the *type* of sanction sought. Failure to comply with that requirement, may result in denial of your sanction request.

11. **As to some specific 'types' of motions:**

a. Applications to appear *Pro Hac Vice*: remember to comply with California Rules of Court, rule 9.40 - and include both residence and work address for applicant counsel - as well as description of any other such application in the preceding 2 years, in California.

Also, be sure proof of service reflects mailing to the San Francisco office of the State Bar of California - and that proof of payment of the related fee, to said office, is provided (*in declaration form, or other 'proof'*).

b. Motion to be relieved: California Rules of Court, rule 3.1362 requires use of notice, declaration, and order 'forms' *(MC-051, MC-052, MC-053)* - said forms are available 'on-line' at our Court website *www.occourts.org*. **Proof of service must reflect that a copy of said motion has been served on the client, as well** (*all too often, the client, is 'overlooked', despite fact it is required, per* California Rules of Court, rule *3.1362*. Remember, Court must evaluate whether client will suffer 'prejudice', as result of such a motion (*and withdrawal, a week before the start of a 3-month Trial, for instance - is likely to be deemed 'prejudicial'*).

c. Motions for final approval of class action settlements: should provide detailed explanation of the outcome of any 'notice to the class' (*confirming 'notice' effort completed - and degree to which completed - and describing any objections, 'opt-outs', and information necessary to determine whether settlement is 'fair, adequate, and in the best interests of the class'* - California Rules of Court, rule 3.769 (g)).

12. **Please set that motion for hearing *after* expiration of the 'opt-out/obj' period** - so motion will not need to be continued, to permit filing of 'supplemental reports'. Requests for 'enhancement' compensation to the plaintiff/class representative, should be supported by detailed description of work on the case by that individual (*detailed hourly breakdown if possible - estimates of hours invested at a minimum, in declaration form*). Attorney fee requests, likewise, should be supported by detailed hourly breakdowns, attached to a supporting declaration - as part of the multiple levels of analysis described in *Lealao v. Beneficial Calif., Inc* (2000) 82 Cal.App.4th 19, 39-41, 45-46, 53 (*consideration of numerous factors in making such an attorney fee award, including 'lodestar/hrly' analysis, application of any appropriate 'multiplier', comparison to '% of common fund' analysis, risk assumed, whether issues unique, level of attorney skill applied, outcome, and complexity of the litigation as a whole, among others*).

13. **Generally:** 'Form' of papers presented for filing is governed by California Rules of Court, rules 2.100-2.119, and general 'format' of 'noticed motions' is governed by California Rules of Court, rules 3.111 – 3.1116.

General rules for fax and electronic filing and service can be found in California Rules of Court, rule 2.300, et seq.

Restriction on oral testimony at law & motion hearing is addressed in California Rules of Court, rule 3.1306.

Ex parte relief requests, require showing of 'irreparable harm' (*unless all parties agree, and have waived notice - via written stipulation*).

All parties should cooperate in the adoption of a consistent proof of service 'list' in 'Complex' cases, whether alphabetical, or chronologically according to order of first 'appearance', in the case (*so that research attorney can verify such 'lists' are 'complete', at a glance*). Please continually update your proof of service 'list' (*all too often, said lists overlook new parties who made 'first appearances' in a case in most recent month or two*).

Moving party must immediately notify the Court if a matter will not be heard on the scheduled date, per California Rules of Court, rule 3.1304, subdivision (b). We appreciate that courtesy.

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ANOTHER CORP.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ONE CORPORATION, a California corporation, Plaintiff, v. ANOTHER CORPORATION, a California corporation, Defendants.	Case No. 07CC10000 Assigned for all purposes to Hon. Callum Likai Seaum, Dept. C100 **DEFENDANT ANOTHER CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF ONE CORPORATION AND FOR SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HUMBLE ASSOCIATE IN SUPPORT THEREOF** Date: April 1, 2009 Time: 9:30 a.m. Place: Dept. C100 Action filed: January 13, 2008 Trial date: September 29, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 1, 2009, at 9:30 a.m., or as soon thereafter as the matter can be heard, in Department C100 of the above-referenced Court, located at 700 Civic Center Drive West, Santa Ana, California 92701, Defendant Another Corporation (Another Corp.) will, and hereby does, bring this Motion to Compel Responses and Production of Documents from Plaintiff One Corporation (One Corp.).

The Motion will seek, and hereby does seek, an order compelling One Corp. to (1) serve responses without objections to the "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests), (2) produce all responsive documents, and (3) pay sanctions of $490 to Another Corp.

This Motion is made pursuant to California Code of Civil Procedure section 2031.300 on the ground One Corp. has failed to serve a timely response to the Requests. It is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Declaration of Humble Associate and accompanying exhibits attached hereto, the pleadings, papers, and other documents on file herein, and such further evidence or argument as the Court may properly consider at or before the hearing on this Motion. This Motion does not require a separate statement because "no response has been provided to the request for discovery." (Cal. Rules of Court, rule 3.1020(b).)

Dated: February 20, 2009

DEWEY, CHEATEM & HOWE LLP

By: _____
Humble Associate

Attorneys for Defendant
ANOTHER CORP.

MEMORANDUM OF POINTS AND AUTHORITIES

Months ago, Defendant Another Corporation (Another Corp.) served document requests on Plaintiff One Corporation (One Corp.). Another Corp. gave One Corp. ***two extensions*** to respond. One Corp. has served no response. ***None***. Another Corp. respectfully seeks an order compelling One Corp. to (1) serve responses to its document requests forthwith and without objections, (2) produce all responsive documents, and (3) pay sanctions.

FACTS

One Corp. alleges Another Corp. breached the 2007 Agreement by providing subpar webhosting services. Another Corp. contends it met the contractual terms and industry standards.

To prepare its defense, Another Corp. served its "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests) on November 1, 2008. (Declaration of Humble Associate (Associate Decl.), ¶ 2 & Ex. A.) The ten individual requests addressed material facts underlying One Corp.'s claims and Another Corp.'s defenses. (*Ibid*.) One Corp.'s response was initially due on December 1, 2008. (*Ibid*.)

At One Corp's requests, Another Corp. ***twice*** agreed to extend One Corp.'s deadline to respond to the Requests. (Associate Decl., ¶ 3.) As a result, the deadline to respond to the Requests became February 5, 2009. (See *id*. & Ex. B.) But One Corp. failed to serve any response at all. (*Id*., ¶ 4.) Another Corp.'s counsel sent an email to One Corp.'s counsel on February 12, 2009, asking One Corp. to serve responses forthwith and without objections. (*Id*., ¶ 5 & Ex. C.)

ANALYSIS

Discovery "expedite[s] and facilitate[s] both preparation and trial." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.) "One of the principal purposes of discovery [is] to do away 'with the sporting theory of litigation namely, surprise at trial.'" (*Ibid*.)

To avoid trial by ambush, the requesting party may move for an order compelling responses when a party fails to timely respond to requests for production of documents. (Cal. Code Civ. Proc., § 2031.300, subd. (b).) Moreover, "[t]he party to whom the inspection demand is directed waives any objection to the demand, including one based on privilege or on the protection for work product . . . ." (Cal. Code Civ. Proc., § 2031.300, subd. (a).) The requesting party need ***not*** try to resolve the matter informally before bringing a motion to compel when the responding party offers no response at all. (See Cal. Code Civ. Proc., § 2031.310, subd. (b)(2); see also Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial, § 8:1486.) And the Court "shall" impose monetary sanctions against the losing party on a motion to compel unless the party acted "with substantial justification" or sanctions are "unjust." (Cal. Code Civ. Proc., § 2031.300, subd. (c).)

One Corp. has failed to respond to the Requests at all. (Associate Decl., ¶ 4.) It has no justification for its stonewalling. For Another Corp. to prepare fully for a fair trial, One Corp. must respond to the Requests without objections and produce all responsive documents. (See Cal. Code Civ. Proc. §, 2031.300, subds. (a), (b).) And One Corp. should pay sanctions of $490 to compensate Another Corp. for its attorney fees and costs in connection with this motion. (Associate Decl., ¶ 6.)

CONCLUSION

For all these reasons, Another Corp. respectfully requests the Court grant this Motion and enter an order compelling One Corp. to (1) serve responses, without objections, to the Requests, (2) produce all responsive documents, and (3) pay sanctions to Another Corp. in the amount of $490.

Dated: February 20, 2009

DEWEY, CHEATEM & HOWE LLP

By: _____
Humble Associate

Attorneys for Defendant
ANOTHER CORP.

DECLARATION OF HUMBLE ASSOCIATE

I, Humble Associate, declare and state as follows:

1. I am an Associate in the law firm of Dewey, Cheatem & Howe LLP, counsel of record for Defendant Another Corporation (Another Corp.) in the above-captioned action. I am duly admitted to practice before all courts of the State of California. I am one of the attorneys responsible for representing Another Corp. in this action. I am familiar with the files and pleadings in this action and have personal knowledge of the facts stated herein. If called upon to do so, I could and would competently testify to the contents of this Declaration.

2. On November 1, 2008, Another Corp. served on Plaintiff One Corporation (One Corp.) its "Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation" (the Requests). The Requests contained ten individual document requests, each concerning material allegations underlying One Corp.'s claims and Another Corp.'s defenses. Based upon the service date, One Corp.'s response to the Requests was initially due on December 1, 2008. A true and correct copy of the Requests is attached hereto as Exhibit "A."

3. At One Corp.'s request, Another Corp. twice agreed to extend the deadline for the City to respond to the Requests. As a result, the deadline for One Corp. to respond to the Requests became February 5, 2009. A true and correct copy of a December 29, 2008 email from One Corp.'s counsel confirming the February 5, 2009 deadline is attached hereto as Exhibit "B."

4. To date, One Corp. has failed to serve any response to the Requests.

5. On February 12, 2009, I sent an email to One Corp.'s counsel demanding that One Corp. serve responses to the Requests forthwith and without objections. A true and correct copy of that email is attached hereto as Exhibit "C."

6. I am a seven-plus-year licensed California attorney, specializing in business and real estate litigation. I have devoted more than one-half hour to drafting and conducting research for the Motion and accompanying materials. I anticipate spending another one hour reviewing and analyzing any opposition to the Motion, drafting a reply in support of the Motion, and preparing for and attending the hearing on the Motion. My normal billing rate for Another Corp. is $300 per hour. Accordingly, the attorneys' fees incurred by Another Corp. in connection with the Motion will be in

excess of $450 (one and one-half hours at $300 per hour). In addition, Another Corp. will incur $40 in costs for filing fees in connection with this Motion. Total attorney fees and costs equal $490.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was made this ____ day of _____ , 2008, in Anytown, California.

_____
Humble Associate

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Attorneys for Defendant
ANOTHER CORP.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ONE CORPORATION, a California corporation,

Plaintiff,

v.

ANOTHER CORPORATION, a California corporation,

Defendants.

Case No. 07CC10000

Assigned for all purposes to
Hon. Callum Likai Seaum, Dept. C100

[PROPOSED] ORDER GRANTING DEFENDANT ANOTHER CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF ONE CORPORATION AND FOR SANCTIONS

Date: April 1, 2009
Time: 9:30 a.m.
Place: Dept. C100

Action filed: January 13, 2008
Trial date: September 29, 2009

Defendant Another Corporation's (Another Corp.) Motion to Compel Responses and Production of Documents from Plaintiff One Corporation (One Corp.) and for Sanctions came on regularly for hearing on April 1, 2009, at 9:30 a.m., in Department C100 of the above-referenced Court. The parties appeared as stated on the record.

The Court, having read and considered the papers in support of and in opposition to the Motion and the pleadings and other papers on file herein, and having heard and considered the arguments of counsel, and good cause appearing therefor, hereby ORDERS as follows:

The Motion is GRANTED.

1. One Corp. is hereby ORDERED to serve responses without objections to the Request for Production of Documents (Set One) Propounded by Defendant Another Corporation to Plaintiff One Corporation and to produce all responsive documents by _____, 2009; and

2. One Corp. is hereby ORDERED to pay a monetary sanction to Another Corp. in the amount of $_____ for attorney fees and costs it incurred in connection with this Motion.

IT IS SO ORDERED.

Dated:

By: _____
HONORABLE CALLUM LIKAI SEAUM
SUPERIOR COURT JUDGE