

The "how to" for motions to compel

Motions to compel are powerful tools to educate opposing counsel on – and enforce – discovery obligations

By Taylor R. Porter

One of the most frustrating situations I come across in my practice is when little-to-no effort is made to respond to written discovery. Nearly everything required to oppose a motion for summary judgment or make your case at trial will need to be obtained during discovery. For that reason, the Legislature and courts have crafted particular discovery rules to guide this exchange of information. Too often, however, parties fail to make meaningful efforts to respond to written discovery. Motions to compel are powerful tools to educate opposing counsel on, and enforce, discovery obligations.

When motions to compel are necessary

A discovery motion may be required whenever a party is seemingly withholding information. Here are some of the most common problems/objections that I see in written discovery responses that signal a motion to compel may be required:

- Failure to timely respond to discovery (See, e.g., Code Civ. Proc., § 2030.260 [responses to interrogatories are due within 30 days];
- Failure to make a reasonable and good-faith inquiry and respond to all parts of an interrogatory, even if part of it is objectionable (*Id.* §§ 2030.220, 2030.240);
- Failure to identify with particularity the documents to which an objection is made, including the production of a privilege log (*Id.* § 2031.240);
- Failure to identify the specific request to which the documents respond (*Note*: I will typically identify the Bates numbers of the responsive documents in the response itself) (*Id.* § 2031.280);
- Failure to identify the extent of partial admissions (*Id.* § 2033.220);
- Use of the same boilerplate objections in each response such that it is impossible to know what objections the responding party is relying on (See *Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516 [boilerplate objections are sanctionable]);
- Refusing to produce responsive documents because they are equally available (See Code Civ. Proc, § 2030.230; *Bunnell v. Superior Court* (1967) 254 Cal.App.2d 720, 724 [the "equally available" objection only applies to interrogatories: "There is statutory precedent in California for placing the burden of research on the propounder of the interrogatory where the records from which the research is to be done are equally available to him"].);
- Arguing that a response is not required because the request calls for a legal conclusion (See *Grace v. Mansourian* (2015) Cal.App.4th 523, 528-529, citing Code Civ. Proc., § 2033.010 ["[A] request may ask a party for a legal conclusion."]; *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1261 ["An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation."];
- Objecting that the request is vague and ambiguous (See *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 430 [an objection that is vague and ambiguous is inappropriate unless the interrogatory is so ambiguous that the responding party cannot in good faith frame an intelligent reply]).

If these or other similar issues exist in written discovery responses, your next step should identify when and what kind of motion should be filed.

Motions to compel responses vs. motions to compel further responses

The two most common discovery motions are motions to compel responses and motions to compel *further* responses.

California Code of Civil Procedure sections 2030.290 (interrogatories) and 2031.300 (requests for production) authorize motions to compel responses where no responses have been provided within the 30-day timeframe during which responses are due. Similarly, section 2033.280 of the Code of Civil Procedure allows a party to move for an order that requests for admission be deemed admitted if the responding party fails to provide a timely response. These motions do not have any time limits. (See *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1584; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406.)

Code of Civil Procedure sections 2030.300 (interrogatories), 2031.310 (requests for production), and 2033.290 (requests for admission), allow a party to file a motion to compel further responses where the responses are evasive or incomplete, or if an objection is without merit or too general. Notice of a motion to compel further responses must be made within 45 days of the service of the "verified response." (See Code Civ. Proc., §§ 2030.300, subd. (c) [interrogatories], 2031.310, subd. (c) [requests for production], 2033.290, subd. (c) [requests for admission].)

Unfortunately, the motion required in a particular instance is not always clear when responses are received without verification. It becomes less clear when

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objections are served with, or in place of, unverified responses.

Unverified responses without objections

Unverified responses are "tantamount to no responses at all," and a motion to compel responses may be filed where responses are not verified and contain no objections. (*Appleton v. Superior Court*, (1988) 206 Cal.App.3d 632, 635-636.) A party also waives any objections in this scenario. (See *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 906 ["Where no objections have been made within the statutorily permitted time, they are deemed waived"].)

Unverified objections without responses

A Court of Appeal recently held that a motion to compel further responses is required whenever timely objections without responses are asserted. (*Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84 Cal.App.5th 127, 136.) However, it declined to state whether any such motion to compel further responses should be subject to time limitations. (*Id.* at p. 136, fn. 5 [deferring the discussion regarding the possibility of an "absurd result" if there is no time limit on a motion to compel involving objections].)

Parties should nevertheless "serve the motion within 45 days of service of the unverified objections" to avoid the risk of an untimely motion because objections alone do not need to be verified. (Weil, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter Group 2023), ¶ 8:1150.8.) Notably, timely asserted objections in an unverified response are not waived. (See *Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal.App.4th 651, 657.)

Unverified responses with objections

Similarly, unverified responses that also contain objections require a motion to compel further responses. (See *Golf & Tennis Pro Shop, Inc.*, *supra*, 84 Cal.App.5th at pp. 137-139 [rejecting the argument that separate motions are required when the responding party provides both objections and responses].) Importantly, there is no deadline to file a motion to compel further responses where unverified responses are mixed with objections. (*Id.* at pp. 135-137.) However, the 45-day clock will begin ticking if verifications are subsequently served for the originally unverified responses. (*Id.* at p. 136.)

Other written discovery motions

In addition to the motions discussed above, a party may also move for an order compelling compliance where the responding party had stated that it would produce documents but then later fails to do so. (Code Civ. Proc., § 2031.320.) There is no time limit for a motion compelling compliance. (See *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 903.)

A party may also move to have requests for admission deemed admitted if the responding party fails to obey an order compelling further responses. (See Code Civ. Proc., § 2033.290, subd. (e).) Similarly, a party may file a motion for sanctions where the responding party has failed to comply with the prior court's order compelling discovery. (See Code Civ. Proc., § 2023.050, subd. (d); *Duggan v. Moss* (1979) 98 Cal.App.3d 735, 742 [invalidating a court order to the extent it imposed additional sanctions if the responding party failed to comply with the order].)

Meet and confer in good faith

There is no requirement to meet and confer before filing a motion to compel responses. (*Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 906 ["Where no objections have been made within the statutorily permitted time, they are deemed waived. There is thus nothing to 'resolve' . . . ."]. (But see Weil, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter Group 2023), ¶ 8:1143 [recommending that counsel meet and confer before filing a motion to compel to save the time and expense of a motion].)

A party seeking to compel further responses to interrogatories, requests for production, or requests for admission is required to submit a "meet and confer declaration" with the motion. (Code Civ. Proc., §§ 2030.300, subd. (b)(1), 2031.310, subd. (b)(2), 2033.290, subd. (b)(1).) The meet and confer declaration must demonstrate that the party seeking to compel further responses made a "reasonable and good faith attempt at an informal resolution." (*Id.* § 2016.040.) This must be done "in person, by telephone, or by letter." (*Id.* § 2023.010, subd. (i).)

To determine whether the moving party attempted to meet and confer in "reasonable and [in] good faith," courts will look at a variety of factors: history of the litigation; nature of the interaction between counsel; nature of the issues; type and scope of discovery requested; and prospects for success. (See *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.) Courts may also consider the parties' willingness to grant extensions to response and filing deadlines. (*Id.* at p. 429.) Additionally, the court in *Obregon* noted, "[j]udges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances." (*Id.* at p. 429.)

Although not required by statute, most judges will find failing to meet and confer over the phone or in person to be unreasonable. Notwithstanding, it is good practice to document every attempt to confer with opposing counsel and to explain your position in writing. I find it is most effective to send a detailed letter to opposing counsel explaining why further responses are required. In that letter, I will invite opposing counsel to speak over the phone to request that further responses be provided by a specified date. I will also express my willingness to agree to extend the motion to compel deadline to allow additional time for supplemental responses. If I do not receive a response, I will follow up over the phone and in writing before both the deadline I provided and the motion to compel deadline.

Because efforts to meet and confer do not automatically extend the deadlines, be sure to make these efforts well in advance

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of the motion deadline. In addition, assume the judge will read all written communications (which should generally be attached as an exhibit to a declaration in support of a motion to compel). (See Code Civ. Proc., § 2016.040.)

Drafting the motion

All discovery motions should include a notice of motion and motion. In addition, motions to compel further responses must include a separate statement and meet and confer declaration. (See Cal. Rules of Court, rule 3.1345 (a)(1)-(3), (b).) Motions to compel responses do not require a separate statement or meet and confer declaration (although they should still include a declaration establishing proper service of and failure to respond to the discovery at issue). (See *Sinaiko Healthcare Consulting, Inc.*, *supra*, 148 Cal.App.4th at p. 404.) Discovery motions should also request sanctions if any are sought (discussed in a separate section below).

In many instances it might appear more efficient to combine various types of written discovery in a single motion, or to compel responses from multiple parties where the discovery sought is similar, but this is likely improper. (See Weil, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter Group 2023), ¶ 8:1140.1, citing to Cal. Rules of Court, rule 3.20(a) [preempting all local rules].)

Notice

The notice of any motion to compel must state the following: 1) when and where the hearing will take place; 2) the grounds for the motion, including the specific discovery sought, the statutory authority, and reasons the response is deficient; and 3) the supporting papers (which must also be filed with the motion). (Code Civ. Proc., § 1010; *Golf & Tennis Pro Shop, Inc.*, *supra*, 84 Cal.App.5th at pp. 137-139.) The notice must be given in accordance with Code of Civil Procedure section 1005. It should also include a request for sanctions if one is being made.

Separate statement

California Rules of Court, rule 3.1345(c) requires that the separate statement in support of a motion to compel further responses provide "all the information necessary to understand each discovery request and all the responses to it that are at issue." It must also "be full and complete so that no person is required to review any other document in order to determine the full request and the full response." (*Ibid.*) The separate statement cannot incorporate any extrinsic document by reference – meaning every request, response, or communication relied on must be typed out.

Specifically, the separate statement must include: 1) the full text of each request (hereafter, "request" shall also include interrogatories); 2) the full response provided, including any objections or supplemental responses; 3) all facts and legal reasons for compelling the response; 4) any definitions or instructions needed to understand each discovery request and response; 5) if a response is dependent on the response to another request, that other request and response (an example of this is when a party seeks to compel a further response to Form Interrogatory 17.1, which seeks additional information regarding the responses to concurrently served requests for admission); and 6) a summary of any other pleadings or documents that are relevant to the motion. (*Id.* at rule 3.1345(c).) Each request and response should also be identified by set and number. (*Id.* at rule 3.1345 (d).) Accordingly, the factual and legal support to compel a further response should be separately stated for each request.

Importantly, there is no page limit to the separate statement. Because of the 15-page limitation imposed on the points and authorities in the motion, the separate statement is an opportunity to provide as much detail as necessary to support the motion. However, an unnecessarily long separate statement will make it more difficult for the court to review and can thus be detrimental.

There is no statutory requirement or rule that mandates the discovery in the separate statement to be numbered sequentially. To make it easier for the court, group the discovery by category and include a summary at the beginning of the separate statement explaining the categories and where each request falls. (See Weil, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter Group 2023), ¶ 8:1154 [group the disputed responses by subject matter].)

Practically, I find it is most efficient to draft the separate statement before the motion. I will then use the arguments in the separate statement for the motion.

Note that some courts will allow a concise outline of the discovery request and each response instead of a separate statement. (Cal. Rules of Court, rule 3.1345(b)(2).) Check the department rules to see if this is an option.

Declaration

The declaration should provide the entire history of discovery dispute. It should explain and attach as exhibits the discovery propounded, all responses provided, and all meet and confer communications. For motions to compel further responses, attach all emails and letters regarding the dispute, summarize all telephone calls, and provide any additional information supporting the reasonableness of your meet and confer efforts. (See Code Civ. Proc., § 2016.040 ["A meet and confer declaration in support of a motion shall state *facts* showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion], emphasis added to parenthetical.) The declaration may also include information obtained from other parties or non-parties that would support the relevance of the discovery you seek to compel.

The declaration must be filed with the notice. Failure to include the declaration will serve as a basis to deny a motion to compel further responses. (See *Golf & Tennis Pro Shop, Inc.*, *supra*, 84 Cal.App.5th at pp. 138, fn. 9.)

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Motion (points and authorities)

All discovery motions must comply with California Rules of Court, rule 3.1113, which requires a statement of facts, a summary of the law, and a legal argument. To succeed on a motion to compel responses or a motion for an order to deem requests for admission admitted, the moving party only needs to demonstrate that the discovery was properly served, and no responses were provided. (See *Sinaiko Healthcare Consulting, Inc.*, *supra*, 148 Cal.App.4th at p. 404 [a motion to compel does not require good cause to grant the motion or a meet and confer declaration].) This means that you do not need to prove the propounded discovery could withstand objections.

Motions to compel further responses require more organization and detail. It is good practice to include an introduction that identifies the requests at issue and the grounds for compelling a further response. The factual summary should include a summary of the allegations in the pleadings that are relevant to the discovery at issue. These allegations should also be detailed in the separate statement. (See Cal. Rules of Court, rule 3.1345(c)(3).)

The motion should also include a separate section summarizing your efforts to meet and confer with opposing counsel. Highlight any conduct by opposing counsel that makes it immediately clear there was nothing further you could have done, such as failure to respond to invitations to speak, meet reasonable deadlines, or acknowledge deficiencies in the responses. (See *Obregon*, *supra*, 67 Cal.App.4th at p. 430 [a court may assess attorneys' credibility and motivations when evaluating the reasonableness of meet and confer efforts].)

Although I will generally reserve a discussion of specific principles for the argument section, summarizing basic discovery rules or principles that the responding party failed to meet in a separate section can further the narrative that the responding party's conduct was unreasonable. This section should include an explanation of relevant discovery principles and cite to statutory or case law that demonstrate why the information sought is discoverable. (E.g., Code Civ. Proc., § 2030.220 [responses to interrogatories must be "complete and straightforward" and "answered to the extent possible"]; *Id.* § 2017.010 ["Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter . . . ."].)

Because all factual and legal support for the motion is set forth in the separate statement, most of the work for the legal argument section has already been done. The arguments in each subsection should mirror those made in the separate statement. Each subsection in the legal argument should correspond with the categories that have already been identified in the introduction and separate statement. Organize these sections in the same way they are organized in the separate statement – starting with the strongest categories that are most likely to be compelled. Be sure to tailor this section to establish a concise, clean, and organized argument.

Any conclusion should be brief and straightforward. Clearly state for the court exactly what you are seeking, including the specific requests to be compelled and sanctions, if you are seeking any.

Sanctions and enforcing discovery orders

Code of Civil Procedure section 2023.010 lists the various grounds for sanctions, such as the failure to respond, making unmeritorious objections without substantial justification, or disobeying court orders to provide discovery. Sanctions come in various forms: monetary, issue, evidence, and terminating sanctions. However, when and which sanctions are available will vary depending on the nature of the dispute.

Practically, courts have wide discretion on when to impose monetary sanctions. (See Code Civ. Proc., §§ 2030.290, subd. (c); 2031.300, subd. (c), 2033.280, subd. (c) [the "court shall impose a monetary sanction" when a motion to compel further responses is made or opposed without substantial justification or in other circumstances that would make the sanctions unjust].) Notwithstanding, "the court shall impose monetary sanctions . . . [on] any party or attorneys who fails to [meet and] confer." (Code Civ. Proc., § 2023.020.)

A court may only impose issue, evidence, or terminating sanctions if a party fails to obey court's prior order compelling responses or further responses. (E.g., Code Civ. Proc., §§ 2030.290, subd. (c), 2030.300, subd. (e).) Thus, a party seeking discovery should only request monetary sanctions in a motion to compel. If the responding party then fails to comply with the court's prior order, the propounding party may file a motion for issue, evidence, and/or terminating sanctions. (See *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1103 [terminating sanctions granted after responding party repeatedly failed to provide substantive responses and ignored meet and confer efforts, and after the court had granted two separate motions regarding the discovery at issue].)

Parties seeking sanctions must include the request for sanctions in the notice of motion. (*Id.* § 2023.050, subd. (d).) The motion itself should also explain the grounds for the sanctions and cite to applicable statutory or case law.

Although there is nothing that prohibits a party seeking to compel responses from seeking sanctions in any given context, you should give considerable thought to whether any such request should be made. Courts may not look favorably on a request for sanctions where there is a good-faith dispute governed by conflicting or ambiguous authority, or where the

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utility of the information sought is questionable.

Alternatives to the motion to compel

In addition to the statutory requirement that a party meet and confer in good faith before filing a motion to compel, some courts will require the parties to attend an informal discovery conference ("IDC"). The IDC process can be beneficial in that it provides the opportunity to hear from the court without the time and expense of a motion. Unfortunately, it also can cause months-long delays because of courts' inability to schedule the IDC within a short period of time.

Section 2016.080 of the Code of Civil Procedure had previously allowed either a party or the court itself to request an informal discovery conference. Section 2016.080 provided a detailed procedure on how to request an IDC, when it had to be scheduled, and provided for automatic tolling of the discovery motion deadline. However, California Legislature recently repealed the statute, effective January 1, 2023.

The Los Angeles Superior Court's Personal Injury Hub had also previously required parties to attend an IDC before filing any motion to compel further responses (there was no requirement for motions to compel responses). With the IDC statute repealed, and the closing of the Personal Injury Hub, parties seeking to compel discovery will need to look at department rules to see if an IDC is required or available before filing a motion to compel.

Parties may also consider stipulating to have discovery disputes resolved by a discovery referee. A referee may be useful if the disputes involve complex issues, or if both parties intend to file motions to compel.

Where one party is unwilling to stipulate to a discovery referee, the other party may also file a motion requesting the court appoint a referee. (Code Civ. Proc., § 639, subd. (a)(5); Cal. Rules of Court, rule 3.922.) Courts also have the option to unilaterally order that a discovery dispute be heard by a referee without the consent of either party. (*Ibid*.) When the court appoints a discovery referee by way of an order, it may do so for all discovery purposes (i.e., general reference) or for only a limited purpose (i.e., specific reference). Notably, when the order is for general reference, and the trial court treats the referee's decisions as final and binding, any orders by the referee are appealable to the Court of Appeal, instead of the trial court. (Code Civ. Proc., § 638, subd. (a)-(b); *Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1304.) Otherwise, any challenge to a decision by a referee appointed for a special reference would be reviewed by the trial court. (*Lindsey*, *supra*, 9 Cal.App.5th at p. 1304.)



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