

Compelling discovery

You must be fully prepared to bring a motion when meet-and-confer efforts are unfruitful

By Jamie Goldstein

Written discovery allows lawyers to develop their cases, obtain necessary evidence and prepare for depositions and trial. Unfortunately, various roadblocks can arise, making it difficult to obtain important discovery. These include the inability to obtain complete verified responses either due to the lack of compliance with deadlines, an evasive opposing counsel or concerns regarding privacy. There are several ways to handle these issues, often without the need for court intervention. If these efforts fail, motion practice should be utilized to ensure you obtain the evidence you are seeking. Be prepared to file motions as early as possible to avoid delays in litigation, including trial continuances.

The meet-and-confer process

Motion practice is a necessary component of obtaining evidence and moving litigation forward, however, it should not be the intended outcome. Filing a motion is costly, time-consuming, and causes delays in the discovery process. When the meet-and-confer process is started early enough, and done in good faith, it is the most efficient means of obtaining the end result you are seeking. Exhibiting a thoughtful and reasonable approach to meeting and conferring with the defense can achieve the desired outcome and garner mutual respect that may come in handy when the tables are turned. Think of meeting and conferring as the carrot, and the motion to compel as the stick. If the carrot works, you don't need to spend your energy using the stick.

There are various situations in which motions to compel are contemplated:

- Failure to provide any responses.
- Failure to provide verified responses.
- Failure to provide complete responses.
- Use of boilerplate objections.
- Failure to produce documents.
- Failure to provide a privilege log as to documents withheld.
- Failure to identify documents responsive to a particular request.

Depending on the above, you will decide whether you need to file a motion to compel responses or a motion to compel further responses. The type of motion sought determines whether meeting and conferring is required.

Motion to compel responses

If the party to whom interrogatories were directed fails to serve a timely response, the propounding party may

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move for an order compelling responses and for monetary sanctions. (Code Civ. Proc., § 2030.290, subd. (b); see also *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th at p. 404.)

Moreover, Code of Civil Procedure (CCP) section 2030.290 contains no time limit for a motion to compel where no responses have been served (i.e., no objections or answers of any kind). (See also *Sinaiko Healthcare,* 148 CalApp.4th at pp. 410-411.) All that is required to be shown in the moving papers is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no responses of any kind have been served. No meeting and conferring is necessary when filing a motion to compel responses where none have been provided. (*Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905.)

While not required, meeting and conferring before filing a motion can save both time and expense. Simply advising the other side that they have failed to respond and giving them a brief deadline of one to two weeks to provide objection-free responses will hopefully achieve the desired result and save you time and money in drafting, filing and appearing for a motion.

Motion to compel further responses

Pursuant to CCP sections 2030.300, 2031.310, and 2033.290, upon receipt of verified discovery responses to interrogatories, production requests or admissions, Plaintiff may move for an order compelling further discovery responses if the responses are dodging or incomplete; if documents produced are inadequate; or if the objections made are boilerplate and without merit.

The pre-requisite to filing this motion is a reasonable and good-faith effort at seeking an informal resolution of the discovery dispute. Section 2016.040 requires a motion to compel further responses to include a meet and confer declaration stating facts describing the efforts made by counsel to resolve the dispute prior to requesting court intervention.

Essential components of meeting and conferring which illustrate good faith involve the timing of initiating the meet and confer as well as the number of attempts made. The court may also look at the complexity of the particular case, the burden or expense that the requests may pose to the responding party, and balance that against the nature of the discovery sought and its relevance to the case. In some cases, you can illustrate good faith in your meet-and-confer letters by agreeing to limit the scope of certain requests. Keep an open mind that objections may sometimes be valid and require concessions on your part. A hardline approach may not get you the results you need.

A party's deadline for filing a motion to compel further responses is generally 45 days from the service of a verified response (with time added depending on the means used to effectuate service pursuant to CCP § 1013). In light of this strict deadline, it is best practice to review verified responses as early as possible once they are served.

A meet-and-confer letter should be drafted outlining each specific response and setting forth the basis for why plaintiff considers them deficient. While a long initial letter may seem like overkill, it will assist you in not having to re-review all the responses down the line when preparing the required separate statement if motion practice becomes necessary.

The letter should be prepared in the format of a Separate Statement of Discovery in Dispute and should detail each interrogatory or request for production that is deficient, including the number, the type of question (FROG, SROG or RFP) and specifically what makes it deficient. California Rules of Court, rule 3.1345 sets forth the format of discovery motions and explains that separate statements must accompany most motions to compel, with the exception being those situations where no response at all has been provided to the requested discovery.

A separate statement must contain the full text of each request and the corresponding response including objections, along with a statement of the factual and legal reasons to compel. A brief letter that does not describe the deficiencies with particularity does not constitute a good-faith effort to resolve the dispute. (*Obregon v. Superior Court* (1998) 61 Cal.App.4th 424, 432.)

In addition to being thoughtfully written, a reasonable deadline must be provided for the defendant to respond. A next-day deadline does not demonstrate good faith Also, it will not result in obtaining what you need, which are the further responses and documents. In addition to providing a reasonable deadline to respond of one to two weeks, remember that the conclusion of your letter should also request an agreement to extend your deadline to bring a motion to compel because the act of meeting and conferring alone will not extend your 45-day deadline.

Sanctions

Courts have wide discretion on when to impose monetary sanctions relative to discovery disputes. (See §§ 2030.290, subd. (c); 2031.300, subd. (c), and 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].) Where meet and confer is a requirement, "the court shall impose monetary sanctions . . . [on] any party or attorney who fails to [meet and] confer" prior to filing a motion. (Code Civ. Proc., § 2023.020.)

Sanctions are not mandatory when filing a motion to compel and should be specifically requested and discussed within the body of the motion. A party requesting that sanctions be imposed on the other side must specifically include the request for sanctions in the notice of

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motion pursuant to CCP § 2023.050, subdivision (d). Further, within the motion itself, the party seeking an award of monetary sanctions should also explain the grounds justifying the sanctions and appropriately reference applicable statutory or case law. Be certain to keep track of your time so you can properly advise the court of the hours worked and your hourly rate in requesting the amount of sanctions for bringing the motion.

Thoughtful consideration should be given when drafting the request for sanctions. Reasonableness is key as inflating the amount sought for your time will not be viewed in a positive light by the court. Courts especially may specifically look with disfavor on a request for sanctions where there is a genuine dispute or where the relevance and scope of the information sought is questionable and burdensome.

One practice tip that may be useful to your sanctions request involves situations where a motion to compel is being filed requesting sanctions for the defendant's failure to respond entirely. Once your motion has been filed with the court, if the defense provides responses after the motion filing and before the hearing, avoid making any arguments as to the deficiency of the responses received during the hearing of the matter. That should be a motion for another day. Keep the hearing brief and request your sanctions for having filed a discovery motion due to the lack of any responses. Here, the granting of sanctions is likely depending on the court, and there is no danger that the hearing will be tainted by any arguments as to the quality of the responses received after the fact, which may persuade the Court to provide leniency to the defense.

Protective orders

During the meet-and-confer and the motion to compel process, you may need to consider entering into a stipulated protective order. Protective orders are often useful when one side refuses to provide certain pieces of evidence or information due to sensitive issues. If this comes up during the meet and confer process, suggesting a stipulated protective order may avoid motion practice. Additionally, during the motion to compel process, suggesting a protective order to obtain certain information the other side is refusing to provide, may provide the court with a solution to a difficult situation, and result in you appearing as a reasonable attorney.

Protective orders can be useful to keep private items like security procedures, trade secrets related to policies at large companies, privacy issues such as a person's name or medical information and many more confidential matters. However, when entering into a stipulated protective order, make certain that it is not overbroad or overreaching and addresses the concerns that one or both sides are facing. The California Northern District Court website offers a model stipulated protective order which can be modified for use in your state court actions. The stipulation and protective order should be submitted for filing with the court. The court should be contacted in the event the order is not timely entered as protective orders at times are not readily entered without follow-up with the courtroom clerk.

A protective order should not be a blanket order to keep all matters in the litigation confidential. It should specify a mechanism for marking an item confidential. It should also provide a step-by-step mechanism on how to challenge a confidential document. It should further set parameters for what the side that is requesting confidentiality has to show in order to allow an item to be marked and kept confidential.

The stipulated protective order should also contemplate who is able to view items that are subject to protection under the protective order including attorneys, staff, expert and non-expert witnesses and court reporters. Each person who receives confidential documents should sign an acknowledgment that they have reviewed and agree to uphold the protective order. These signatures should be kept on file by your office throughout the remainder of the action.

Additionally, your protective order should consider what will happen to the documents at the end of the litigation, which may include returning the documents or destroying them. If you have not entered into a stipulated protective order before, be certain to read it carefully and make sure it is narrowly tailored and does not burden the side that is not seeking confidentiality to remove the confidential marking. If this is not done, you will find yourself with an entire case full of confidential documents that have zero basis to be marked as such.

Conclusion

While the goal of these discovery enforcement processes is to provide you with informal resolution and the responses and documents you need to move your case forward, meet-and-confer letters should not be empty promises. To properly represent your client, you must be fully prepared to bring a motion where meet-and-confer efforts are unfruitful. Defense counsel will take advantage of situations where meet-and-confer letter deadlines pass and no motions are filed by continuing their bad behavior throughout the course of your case and in future situations where you find yourselves on opposite sides. Words of advice: Move forward with the carrot, but always keep your stick in hand.

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