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YOU NEED TO FILE A MOTION FOR A PROTECTIVE ORDER!!

By Katherine Gallo



Over lunch last week, a local attorney was complaining to me about his case that is going to trial in July. On the last day to serve written discovery, Plaintiff counsel had served each of his five clients, on behalf of each of her three plaintiffs, a separate set of 50 specially prepared interrogatories, 35 requests for documents, 70 requests for admissions and 17.1 of the Form Interrogatories for a total 750 specially prepared interrogatories and 525 requests for documents, 1050 requests for admissions and 4200 responses to Form Interrogatory 17.1 equaling 6525 discovery requests to be responded to 30 days before trial.

After his rant, I said to him that "You Need to file a motion for a protective order." It was clear to me that the discovery was retaliatory, either because the case didn't settle the week before at mediation, or that the opposing counsel was a nut job, or perhaps a little of both. Whatever the reason behind this absurd amount of discovery, he needed to file a motion for a protective order.

The lawyer then hemmed and hawed on how long it would take, the court may not grant it, there was so much to do in the case and on and on with the excuses. I again said in more stern voice **"YOU NEED TO FILE A MOTION FOR A PROTECTIVE ORDER!!"**

What I realized was that he really didn't know what was necessary to bring a motion for protective order. Nor did he know that, unlike motion to compel further responses, it is not that difficult or time consuming to prepare one. To bring (and succeed on) a Motion for Protective Order you must do four things:

I. REASONABLE GOOD FAITH ATTEMPT TO RESOLVE INFORMALLY

This discovery motion, like many of the discovery motions, require you to meet and confer in good faith. See C.C.P §2017.020. However, because you have to file the Motion for Protective Order promptly, it is best that you lay out your legal and factual arguments in this letter and drop it into your motion.

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Your meet and confer letter should offer a compromise to resolve the issue such as *"Let me know what information you are trying to obtain, and I will try to work with you."* or *"Because this is a difficult case with multiple parties, I suggest that we stipulate to a discovery referee to work with us"*

Unfortunately, in many cases like the above scenario, you are going to have to file a motion for protective order.

II. BRING THE MOTION PROMPTLY

You must bring the motion promptly and before the 30-day within which to respond to the written discovery, because otherwise the grounds for objection may be waived. See Weil and Brown, *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2010) ¶8:1013.

You can bring an *ex parte* application for an order to have the motion be heard on shortened time. See *California Civil Discovery Practice* (CEB 4th Ed. 2011) §15.11

III. FILE A NOTICED MOTION

A. NOTICE

The notice is to tell the court and opposing party not only the name, date, time and location of the motion, but the "nature of the order sought" as well. So make sure you state the exact remedy you're seeking in detail. Also, make sure to list the nature and title of all documents to be attached. If you are seeking sanctions it must be in the Notice. List the nature and title of all documents that will be attached (i.e., Memorandum in Support of Motion, Declarations, etc.). Make sure you comply with CRC 3.1110.

B. MEMORANDUM IN SUPPORT OF MOTION.

In order to obtain a protective order, a party must show that it needs to be protected from "unwarranted annoyance, embarrassment, or oppression or undue burden and expense." See C.C.P. §§ C.C.P. 2025.420(b), 2030.090(b), 2031.060(b) and 2033.080(b).

If the party is seeking to limit the scope of discovery, then you must show that the burden, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to do the discovery of admissible evidence. C.C.P Section 2017.020. A proper showing includes these elements:



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- **EITHER** the discovery sought is unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive; **OR**
- The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake. See *California Civil Discovery Practice* (CEB 4th Ed. 2011) §15.72 **AND**
- In this instance, the order is necessary to prevent a party's serving voluminous, unfocused discovery on the eve of trial. See *Day v. Rosenthal* (1985) 170 CA3d 1125, 1171.

Since a Motion for Protective Order is one decided primarily on facts, it is important that you provide a detailed explanation of the facts of the case as well as a detailed description of all the discovery that you have already responded to. Provide a discovery history regarding the motion in a time line laid out like the one below:

- 1/2/12** Each of the three plaintiffs served a separate set of 35 specially prepared interrogatories, and 75 requests for documents on each of the five defendants for a total of 1225 specially prepared interrogatories and 1125 requests for documents.
- 3/1/12** Each of the five defendants served verified responses.
- 3/5/12** Plaintiff served deposition notices with a request to produce 50 categories of documents on each of the defendants.
- 4/2-4/6/2012** All five defendants depositions were taken and completed.
- 5/1/2012** Mediation took place and the matter did not settle
- 5/9/2012** On the last day to hand serve written discovery, each of the three plaintiffs served a separate set of 50 special interrogatories, 35 requests for documents, 70 requests for admissions and 17.1 of the Form Interrogatories on each of the five defendants for a total of 750 special interrogatories, 525 requests for documents, 1050 requests for admissions and 4200 responses to Form Interrog. 17.1.
- 5/14/2012** Meet and confer letter
- 5/21/2012** Plaintiff counsel refusing to withdraw any of the 6525 requests for responses to written discovery.

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7/9/2012 Trial Date

DO NOT BE SHY when you argue for sanctions. You are entitled to sanctions pursuant to C.C.P §§2017.020 and 2023.010(c) as well as the other individual written discovery statutes for this type of discovery abuse.

C. DECLARATION

SPEND TIME ON YOUR DECLARATION outlining the discovery history in this case as well as the difficulty with opposing counsel. Describe in detail that the information opposing counsel has already obtained through discovery is sufficient to proceed in trial and that (as in the case of the above example) the discovery is retaliatory for not settling.

Authenticate all your exhibits including all the previous written discovery propounded and responded to.

Finally, describe your meet and confer with opposing counsel.

If there is a request for sanctions, state your hourly rate. Outline in detail the time spent on the motion and any future time you anticipate spending. Calculate the attorneys' fees and add the costs.

REMEMBER this declaration needs to be from the attorney who has personal knowledge of what has been happening on the discovery. Do not have a junior attorney sign the declaration unless he or she was the one in charge of the discovery.

D. PREPARE A PROPOSED ORDER

CEB Judges Perspective at §15.72 gives the best advice:

The proposed order is a means for the advocate to frame for the court exactly the relief the moving party wants., e.g., who be excluded from a deposition or which requests the moving party must answer when a challenge to a declaration of necessity is sustained. Submitting a proposed order is helpful because the court will likely sign it (modified or not) at the hearing, thus avoiding time-consuming and expensive post-hearing wangling about exactly what the order should say.

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IV. BE PREPARED TO ARGUE FOR YOUR PROTECTIVE ORDER

Hearings on motions for protective order can be quite heated. In essence, you have accused the other side of being abusive, vindictive and very unprofessional. In all likelihood, they are going to come out fighting. Be prepared to discuss the facts and keep your anger and ego out of it. You need to look like the reasonable one!!

GOOD LUCK!

HINT: See CEB California Civil Discovery Practice 4th edition Section 15.59 for an extensive discussion on Protective Order and CEB Section 6.142-6.144 for a sample motion for protective order.

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