

# California Civil Litigation and Discovery

(Litigation By The Numbers®  
Substantive Companion)

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## CHAPTER 3

### OUR COURT SYSTEMS AND SOURCES OF LAW

This chapter provides some background on various aspects of our court system, including the sources of law and the hierarchy of legal authority within that system. It outlines many of the differences between the civil law and the criminal law systems. A bullet point list at the end of the chapter describes small claims court and its many pros and cons.

#### Our Court Systems

In order to enforce the laws or rules governing conduct, people have to go to court. We have two court systems: (1) the federal court system, which deals with U.S. Constitutional issues, federal statutes, and regulations of federal agencies, and (2) the state court system, which deals with state statutes and local regulations. The California paralegal needs to know about the hierarchy of the system as well as the hierarchy of laws applied within the system, because this affects the organization of legal research, and determines whether heavier emphasis is placed on statutes or case law in a particular case.

FEDERAL COURT	CALIFORNIA STATE COURT
U.S. Supreme Court	California Supreme Court
Federal Circuit Court of Appeals 13 Federal Circuits (CA is 9 <sup>th</sup> Circuit)	California Appellate Court
Trial Courts:  (1) Federal District Court (limited jurisdiction -- hears federal question and diversity cases); 4 courts within CA  also  (2) Tax Court; Federal Claims Court (limited jurisdiction courts -- Tax Court hears IRS <b>tax deficiency</b> disputes; Fed. Claims Court hears private claims against U.S.)	Trial courts:  (1) Superior Court ( <b>general jurisdiction</b> -- handles all kinds of cases, including civil, criminal felonies, and juvenile civil and criminal issues)  (2) Municipal Court (formerly handled limited jurisdiction and lesser civil and criminal lawsuits like misdemeanors or civil cases under \$25,000; California abolished the municipal courts in 1998 and merged them into the Superior Court system.)  (3) Small Claims Court (limited jurisdiction-- handles civil complaints <b>up to \$10,000</b> for <b>individuals</b> (\$5,000 for <b>corporations</b> and <b>governmental entities</b> ); <b>certain auto accident cases limited to \$7,500</b> ; no criminal or family law)

and are further defined and molded by society's trends through case law. In ruling on cases, the courts refer to authoritative secondary sources of law (such as the Restatement of Torts, the Restatement of Contracts, and various treatises) which summarize existing common law and suggest what the law should be under the circumstances of a particular case. For example, based on prior similar cases, how much money should be awarded for damages in a case where someone lost the use of their legs?

The parties in a civil action are private parties, not the government (unless a private person is suing the government). In civil litigation, the plaintiff seeks **remedies**. Remedies may be in the form of money **damages** (to compensate for losses), or in the form of **equity** (e.g., injunctions to stop certain actions from continuing; reformation of a contract because it contains a mistake; specific performance; or a determination of rights and obligations of the parties). The burden of proof standard in a civil case is **preponderance of the evidence**<sup>5/</sup> or **clear and convincing evidence**,<sup>6/</sup> depending upon the causes of action and remedies sought. Clear and convincing evidence, a higher burden of proof, must be met where the plaintiff wants the defendant to be punished for his/her actions by being forced to pay punitive damages.

### Small Claims Court

Small claims court is a special court where disputes are resolved quickly and inexpensively. The rules are simple and informal.

Civil complaints by individuals cannot exceed \$10,000, however, claims for bodily injury in auto accident cases where the defendant is covered by an automobile insurance policy that includes a duty to defend cannot exceed \$7,500. In the case of corporations and governmental entities, claims cannot exceed \$5,000. No party may file more than two claims each year demanding more than \$2,500. Small Claims Court has many disadvantages and limitations:

- Neither party has a right to jury trial.
- Neither party may be represented by an attorney, except on appeal.
- Neither party has the right to formal discovery at trial or appellate level.
- Hearsay evidence is permissible.
- Defendant has no right to change venue.
- Defendant is not entitled to bring a subsequent action for malicious prosecution.

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<sup>5/</sup> "Preponderance of the evidence" means that the proof or facts presented establish that it is more likely than not that the defendant committed the civil wrong.

<sup>6/</sup> The "clear and convincing evidence" burden requires a finding of high probability, leaving no substantial doubt, that the defendant committed the civil wrong (California Evidence Code § 115).

- Defendant may file a cross-complaint (in small claims court it is referred to as a **counter claim**), but if the defendant's claim exceeds the **applicable monetary limit**, the defendant must file his/her action in a court of competent jurisdiction.
- Losing plaintiff may not appeal.
- Only defendant may appeal.
- Appeal is **trial de novo** to Superior Court.
- Court may award either party up to \$150 in attorney fees and up to \$150 for loss of earnings to appear and travel expenses; if appeal is found to be without merit and for harassment purposes, then the court can award up to \$1000 instead of \$150 for each.
- Judgment on appeal is final and not appealable.

General jurisdiction cases include:

- Criminal felony cases
- Civil cases involving civil disputes with claims of damages of more than \$25,000, including personal injury, and contract and business disputes (“**Unlimited Civil Cases**”)
- Juvenile cases involving dependent minors who have been abused or neglected, minors who are accused of crimes, infractions or incorrigible behavior; and adoption proceedings
- Family Law cases involving divorce, legal separation and paternity
- Mental Health cases involving the treatment and custody of mentally ill persons
- Probate cases involving the estates of deceased persons as well as the guardianship and Conservatorship of estates for those unable to care for themselves
- Appellate cases

Limited jurisdiction cases include:

- Criminal misdemeanors, infractions, preliminary hearings in felony cases
- Civil cases involving civil disputes with claims of damages up to and including \$25,000 (“**Limited Civil Cases**”)<sup>32/</sup>
- Small Claims cases involving civil disputes with claims of damages no more than \$10,000 for individuals, \$7,500 for certain automobile cases, and \$5,000 for corporations and other entities
- Traffic cases

Each county court is divided into separate divisions or departments for the various types of cases it hears (e.g., criminal division, civil division, juvenile division, family law division), each division or department only being able to hear the particular type of case assigned to it. Thus, a judge in the civil division cannot hear a family law case (and vice-versa), and a judge in the criminal division cannot hear a probate case (and vice-versa).

Often a county court has several different branch courts -- different physical locations where a particular division might be located. For example, in Orange County, family law, juvenile, mental health, and probate matters are all heard in a single courthouse designated for those types of cases only. You must keep this in mind when filing your case, as you cannot file a civil case at that courthouse, nor could you file a probate case at any other courthouse.

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<sup>32/</sup> As discussed in more detail below, there are different procedural rules governing Unlimited Civil Cases and Limited Civil Cases. These rules involve filing fees, allowable pleadings, limitations on formal discovery, etc., and have nothing to do with jurisdiction. For now, remember that within the category of limited jurisdiction cases there are “limited civil cases” and that there is significance to that distinction.

- The plaintiff is more likely to be questioned at deposition or trial about the allegations in the complaint. Because the complaint is drawn in legal language, it is possible that the plaintiff may get confused and give inappropriate responses.
- It precludes pleading inconsistent facts.

As noted above, the California Rules of Court have strict rules regarding the format of the complaint. Please refer to the Procedural Guide for details, as the court clerk may refuse to file the complaint if it does not comply with the rules.

Once the complaint is finished and signed, there are certain other documents (including a check for the plaintiff's appearance fee), which must be prepared and submitted to the clerk along with the complaint. Again, details may be found in the Procedural Guide, but you need to know the following:

- If exhibits are referred to in the complaint, be sure to attach them to the complaint, and to mark them as required.
- A summons (a mandatory Judicial Council form)<sup>56/</sup> must be submitted to the court and served on the defendant. The summons is discussed below.
- A Civil Case Cover Sheet (another mandatory Judicial Council form) must be submitted to the court with the **complaint in cases other than those filed under the Probate, Family, or Welfare & Institutions Codes**, but **it** is only served in certain instances.
- Some local rules may require additional forms, i.e., in Los Angeles County, a Civil Case Cover Sheet Addendum must always be prepared and submitted to the court.<sup>57/</sup>

Please refer to the Procedural Guide for details on the above requirements, as the court clerk may refuse to file the complaint if the required accompanying forms are missing, or if they are not 2-hole punched, or if there are insufficient copies, or if there isn't a check for filing fee, etc.

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<sup>56/</sup> Remember, Judicial Council forms are accessible through the court's web site.

<sup>57/</sup> The Civil Case Cover Sheet and the Civil Case Cover Sheet Addendum are used for statistical purposes. The Civil Case Cover Sheet also ensures that the case is correctly assigned and that the correct procedural rules are applied.

## CHAPTER 8

### DEFAULT BY DEFENDANT

Unless an extension of time is obtained from opposing counsel (via stipulation) or granted by court order, the defendant has 30 days from the *effective date of service* of the summons and complaint to plead or otherwise take steps to defend against the action.<sup>63/</sup> When the defendant fails to do so, the plaintiff *must* start the process to enter the defendant's default and obtain a **default judgment** against the defendant, or risk the imposition of sanctions.

The first step the plaintiff must take is to request that the defendant's default be *entered*, as it does not happen automatically. This is done by filing a Request for Entry of Default, a mandatory Judicial Council form, which prevents the defendant from filing a late response, or otherwise participating in the case (absent court order relieving them from the default). **Entry of default requires proof that:**

- The defendant was properly served with the summons and complaint.
- The time for responding has run.
- The defendant failed to respond or appear.

After the default is *entered*, **default judgment may be sought from the court clerk or the court.** The court clerk may enter the default only where: (1) the case is one arising from a contract or judgment and seeks recovery of money or damages only in a fixed or determinable amount, and (2) the summons was not served by publication.<sup>64/</sup> Where damages are not ascertainable from the complaint (e.g., in a **personal injury** case where the complaint seeks damages "*in an amount to be proved at trial*"), only the court may award a default judgment upon a **showing of proof of damages.**

Default judgments may not be entered against defendants in the military, involuntary plaintiffs, or against DOE defendants. The default judgment may only be granted on claims included in the complaint, and is limited to the amount of damages requested in the **complaint, or, in non-contract cases, in a statement of damages.**

Defaults are rarely fatal. The defendant may move the court to set aside the default judgment against him/her on the following grounds and within the specific time limitations:

- Based on *inadvertence, mistake, surprise, or excusable neglect* on the part of the defendant within *six months* after the entry of default.

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<sup>63/</sup> See Chapter 7 for the effective date of the particular method of service.

<sup>64/</sup> The default judgment may be entered by the clerk for that specific amount -- no additional costs may be added to the claim amount other than what is stated in the plaintiff's complaint. The default judgment is requested right on the Request for Entry of Default form.

## Rules Applicable to All Responses to Formal Discovery

- Responses to written discovery demands (interrogatories, requests for admission, and requests to produce) are due within 30 days of service.
- C.C.P. §§ 1013 and 1010.6 extend the time to respond if the discovery was not personally served. (See Procedural Guide, Chapter 2)
- Responses must be signed by the attorney.
- Unless the response contains only objections, all responses must be verified *by the client*. The client does so by signing, under penalty of perjury, a “verification” declaring that they have read the responses, and that they either know that they are true, or, with respect to those responses stated on “information and belief,” they believe them to be true. (See the sample in Chapter 1 of the Procedural Guide (“The Verification”) By inserting the title of the discovery response, the same verification form may be used to verify discovery responses.)
- Objections not timely asserted are waived.
- A claim of privilege is typically asserted by objecting to the discovery request and stating the specific privilege that bars discovery.<sup>103/</sup> The onus is then on the requesting party to move to compel a response to the discovery. Once the motion to compel is filed, the burden is on the party claiming the privilege to establish preliminary facts showing that the information is privileged, e.g., that it is a protected attorney-client communication because the attorney-client relationship existed when the communication took place. (Remember that communications between an attorney and client are presumed confidential.) The burden then shifts back to the party seeking discovery of the information to disprove the existence of the attorney-client relationship or prove that some statutory exemption applies, e.g., the privilege was waived.
- ***False, evasive, incomplete, or unsatisfactory answers may be grounds for a motion to compel further responses and sanctions.***
- Motions to compel further responses must be made within 45 days after the responses are served. (See “Motions to Compel Further Answers - in General” in Chapter 5 of the Procedural Guide)
- Discovery responses may be used at trial, but are only admissible against the responding party.
- Discovery responses are not filed with the court; they are only served on the parties to the lawsuit.

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<sup>103/</sup> Although the responding party could instead move for a protective order, this is rarely done.

§§ 1013 and 1010.6 extend the time to respond if the discovery was not personally served. (See Procedural Guide, Chapter 2)

***Failure to respond timely waives all rights to object to the interrogatories or claim privileges, including work product and attorney-client privileges, i.e., the interrogatories must be answered!***<sup>111/</sup>

The rules provide that the responding party must:

- Identify the responding party and propounding party and the set number of the interrogatories (as is required of the interrogatories themselves). If you are responding to a supplemental interrogatory, the title must so indicate, e.g., “*Defendant Wrongdoer’s Supplemental Responses to Plaintiff Wronged’s Second Set of Interrogatories.*”
- Respond to each question separately. Do not repeat the text of the interrogatory.
- Exercise due diligence to obtain the requested information, which may include searching through files, or asking others for information, unless the information sought is “*equally available*” to the propounding party.
- Number each response consecutively to correspond with the interrogatory it answers.
- Provide complete and straightforward answers. It is impermissible to reference other documents such as a deposition transcript in an interrogatory response or to deliberately evade clear interrogatories. False or evasive responses are grounds for sanctions.
- The responding party must personally sign under penalty of perjury a verification attached to the responses (“verify” the responses) unless the responses contain only objections (in which case there are no facts to verify). If the responding party is a corporation, its authorized agent must sign the verification. Verification by the attorney is only proper if the attorney is the authorized agent for the party, such as corporate counsel.<sup>112/</sup>

### Hints for Responding to Interrogatories

A party may respond to interrogatories in the following ways: (a) answer any or all of the interrogatories; (b) object to any or all of the interrogatories or object to and answer any or all of the interrogatories; or (c) seek a protective order with respect to any or all of the interrogatories.

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<sup>111/</sup> The party might avoid this result by filing a motion showing the court that late responses were served and giving a justifiable excuse for their being late.

<sup>112/</sup> Unverified responses are no responses! The respondent will have waived all objections, and the propounding party may bring a motion to compel answers.

## Serving Responses to Interrogatories

Original responses, with verification and proof of service attached, are served on the propounding party, and copies are served on all other parties. (See the Procedural Guide, Chapter 5 (“Response to Interrogatories”))

## Challenging Responses to Interrogatories

Upon receipt, the propounding party must review the responses to determine whether they are adequate. Inadequate responses include:

- incomplete or evasive responses
- documents not described with sufficient specificity
- any objection that is without merit or too general

If the propounding party receives what they believe are inadequate answers or improper objections, they may be forced to bring a motion to compel *further* answers to interrogatories.<sup>114/</sup> Before bringing a motion, however, counsel are required to *meet and confer* to try to resolve the dispute. Failure of either party to meet and confer will result in sanctions against that party.

Notice of the motion to compel further answers must be given within 45 days after service of the responses if the responses were served personally.<sup>115/</sup> If the motion to compel is not served within the time limit, the right to do so is waived.<sup>116/</sup>

The court is required to award sanctions to the prevailing party on a motion to compel, unless the court finds that the losing party acted with substantial justification or that circumstances make the imposition of sanctions unjust. If an order compelling responses or further responses is not obeyed, the propounding party may make another motion to compel, requesting that the court award issue sanctions or terminating sanctions.

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<sup>114/</sup> Note that there is a significant difference between a motion to compel *answers* and a motion to compel *further answers*. A motion to compel *answers* is when the deadline for response has passed, and no answers have been received. A motion to compel *further answers* is when *inadequate answers* have been received. Only the latter requires the parties to meet and confer, and is subject to the 45-day deadline.

<sup>115/</sup> As more fully explained in the Procedural Guide, C.C.P. §§1013 and 1010.6 extend the time to give notice of the motion to compel further answers if the discovery response were not personally served. (See Procedural Guide, Chapter 2)

<sup>116/</sup> See Procedural Guide, § 5.7, “Motions to Compel Further Answers - in General” for details.

## Rules re Noticing Depositions in General (Party and Non-Party)

The rules discussed in Chapter 11 - "Discovery in General," are applicable to depositions, so be sure to familiarize yourself with them.

- Parties and non-parties, natural persons and business entities, nonprofit organizations, and governmental agencies may be deposed.<sup>127/</sup>
- A party may only depose a natural person once, although the deposition may be taken in separate sessions.<sup>128/</sup> There is no limit on the number of depositions which may be taken of a party which is an entity.
- Natural persons must be deposed: (1) within 75 miles of their residence, or (2) in the county where the action was filed and within 150 miles of their residence.
- Corporations must be deposed: (1) within 75 miles of their principal office, or (2) within 150 miles of their designated offices.
- The notice of taking deposition,<sup>129/</sup> which must contain the name of the deponent, and the date, time and place of the deposition, must be served *at least 10 days prior to the deposition* (C.C.P. §§ 1013 and 1010.6 extend that time if the deposition notice is **not personally served**. (See Procedural Guide, Chapter 2))<sup>130/</sup>
- If the deposition is going to be audiotaped or videotaped, the notice must say so.
- Any specific documents to be produced must be described with reasonable particularity in an attachment or included in the notice of deposition. Where a category of documents is sought, the description should be narrowly drafted, with the categories of documents identified clearly.
- When the deposition of an entity is being taken, the deposing party might not know who at the entity has the necessary knowledge to testify. In that event, the notice should

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<sup>127/</sup> Even opposing counsel may be deposed if they have knowledge of relevant facts, but protective orders are freely given by the court.

<sup>128/</sup> However, if a deposition is taken before all parties have appeared in the action, the new parties may re-take the deposition of a natural person.

<sup>129/</sup> The requirements for, and a sample of, a notice of taking deposition may be found in Chapter 5 of the Procedural Guide ("Notice of Taking Deposition")

<sup>130/</sup> Interestingly, in state court, the same 10-day notice period applies even when the opposing party is requested to bring documents to the deposition. However, it is good practice (and more considerate) to give more than 10 days notice (perhaps 20-30 days) for a deposition not requesting documents, and even more time (at least 30 days) if documents are requested. If the deponent is not given enough notice to locate and produce documents, they may appear at the deposition with very few documents, and claim they had insufficient time to locate and produce more.

Example:

*“Produce all estimates, bills, invoices, and receipts relating to repair of YOUR Nissan Maxima, license plate number WRNGDR, including, but not limited to, the repair of the brakes completed on or about December 15, 2007.”*

- If you are demanding ESI, be sure to specify the format in which you want it produced.

Serving the Inspection Demand

The attorney signs the inspection demand. Copies must be served with a proof of service on all parties to the action, not just the party to whom they are directed. They are not filed with the court. The propounding party retains the original, and will be served with the original responses. Please refer to the Procedural Guide for detailed instructions on preparing and serving the inspection demand.

Rules re Responding to Inspection Demand

The responding party must respond in two steps: (1) prepare and serve a written response, and (2) produce the documents or things requested. We focus first on the written response.

Of utmost importance is the deadline for serving the written response. Unless otherwise agreed in writing or extended by the court, the response must be served within 30 days after service. As more fully explained in the Procedural Guide, in superior court, C.C.P. §§1013 and 1010.6 extend the time to respond if the discovery was not personally served. (See Procedural Guide, Chapter 2)

***Failure to serve the written response timely waives all rights to object to the inspection demand or claim privileges, including work product and attorney-client privileges, i.e., everything must be produced!***<sup>135/</sup>

There are strict rules relating to the format and the contents of the written response:

- The format of the written response is the same as the response to interrogatories in that each response has the same number as the demand, and is listed in the same order, and each demand must be answered individually. The response should not repeat the request.

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<sup>135/</sup> The party might avoid this result by filing a motion showing the court that late responses were served and giving a justifiable excuse for their being late.

- Be sure your responses are thorough and well thought out.
- Avoid evasive, overbroad, and vague answers.
- The responding party must personally sign under penalty of perjury a verification attached to the responses (“verify” the responses) unless the responses contain only objections (in which case there are no facts to verify). If the responding party is a corporation, its authorized agent must sign the verification. Verification by the attorney is only proper if the attorney is the authorized agent for the party, such as corporate counsel.

### Protective Orders

In addition to answering a particular request by agreeing to comply, explaining an inability to comply, or objecting, the responding party, or any party affected by the demand, may seek a protective order relieving them of the obligation to produce certain documents, categories of documents, or other tangible items on the grounds that production would cause unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. For example, if a category of documents includes confidential or otherwise privileged information, or if a tangible item is too fragile for the proposed testing, the responding party might seek a protective order. These grounds apply equally to inspection demands seeking ESI. In addition, a specific ground applicable only to ESI is that the ESI *“is from a source that is not reasonably accessible because of undue burden or expense,”* e.g., backup tapes which must be retrieved, restored, and translated before they can even be searched.

The motion for protective order must be noticed within 30 days of service of the inspection demand. (C.C.P. §§ 1013 and 1010.6 extend that time if the inspection demand is not personally served.) (See Procedural Guide, Chapter 2))

In ruling on a motion for protective order, the court may order that:

- Some or all of the items or categories of items need not be produced.
- The time to respond to a set of demands, or to a particular item or category in the set be extended.
- The place of production be other than that specified in the demand.
- The inspection be made under specified terms and conditions.
- Trade secrets or other confidential information need not be disclosed, or disclosed only to particular persons in a particular way.
- The items produced be sealed and only opened by court order.

With respect to ESI, if the responding party is successful in establishing inaccessibility, but the demanding party shows that good cause exists for the discovery, the court may order the

- Documents are indexed by making a written log of each document and its relevant features. The master index is usually made of the master file, since it is possible that seemingly unimportant documents may be initially discarded from the issue, witness, and chronological files. The index may contain any number of variables that are suggested by the issues in the case. Documents appearing in more than one index usually develop into the key documents of the litigation. Computer document organization is conceptually the same as manual organization.
- Keep a document collection log and an interview log to track who has what and where you obtained the information. This will help you later when specific questions come up about interview material or documents.
- Before producing documents to the opposition, place control numbers on all responsive documents.
- Determine whether any documents are protected by privilege, protective order, or are confidential. You may label them with color code tags, e.g., red for privileged documents, yellow for important documents to copy and put in chronological order later, blue for confidential or sensitive documents covered by protective orders.

### Challenging Responses to Inspection Demand

The demanding party may bring a motion to compel further responses to a demand for inspection and for monetary sanctions. In state court practice the motion must be made within 45 days of service of the response. (C.C.P. §§ 1013 and 1010.6 extend that time if the response to the inspection demand is not personally served. (See Procedural Guide, Chapter 2)) If the motion is not noticed by that time, the demanding party waives his/her right to compel further responses. As is the case with all types of motions to compel further discovery, the moving party must meet and confer with the respondent *before* bringing the motion.<sup>137/</sup>

### The Production

- The evidence must be made available to the demanding party for the purpose demanded. If the respondent refuses to make the evidence available to the demanding party for the purpose demanded, the demanding party must make a motion to compel. There is no time limit on the motion, and no meet and confer requirement.

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<sup>137/</sup> Note that there is a significant difference between a motion to compel *answers* and a motion to compel *further answers*. A motion to compel *answers* is when the deadline for response has passed, and no answers have been received. A motion to compel *further answers* is when inadequate answers have been received. Only the latter requires the parties to meet and confer, and is subject to the 45-day deadline.

## Rules re Responding to Requests for Admission

Typically, the paralegal will work with the client to draft responses. There are several rules for drafting responses to requests for admission (involving the format of each set of responses to requests for admission as well as the content of the responses to individual requests for admission), presented in detail in the Procedural Guide.

Of utmost importance is the deadline for responding to the requests for admission. Unless otherwise agreed in writing or extended by the court, the response to requests for admission must be served within 30 days after service. As more fully explained in the Procedural Guide, in superior court, C.C.P. §1013 and 1010.6 extend the time to respond if the discovery was not personally served. (See Procedural Guide, Chapter 2)

***Failure to respond timely waives all rights to object to the requests for admission or claim privileges, including work product and attorney-client privileges, and allows the propounding party to move for an order deeming the requests admitted!***<sup>141/</sup>

The rules provide that the responding party must:

- Identify the responding party and propounding party and the set number of the requests for admission (as is required of the requests for admission themselves).
- Respond to each request separately.
- Number each response consecutively to correspond with the request it answers.
- Each answer must do one of the following:
  - *Admit* any part of the request that is true, either exactly stated by the propounding party or as reasonably and clearly qualified by the responding party.
  - *Deny* any part of the request that is untrue.
  - Specify any part of the request about which the responding party *lacks sufficient information or knowledge* to respond, and in addition, state that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.
  - *Object* to the request.
- The responding party must personally sign under penalty of perjury a verification attached to the responses (“verify” the responses) unless the responses contain only objections (in which case there are no facts to verify). If the responding party is a

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<sup>141/</sup> The party might avoid this result by filing a motion for relief from the waiver showing the court that late responses were served, and providing a justifiable excuse for the untimely service.

## Challenging Responses to Requests for Admission

Upon receipt, the propounding party must review the responses to determine whether they are adequate. Inadequate responses include incomplete or evasive responses, and objections that are without merit or too general. If the propounding party receives what they believe are inadequate responses or improper objections, they may be forced to bring a motion to compel further responses to the requests for admission. Before bringing a motion, however, counsel are required to meet and confer to try to resolve the dispute. Failure of either party to meet and confer will result in sanctions against that party.

Notice of the motion to compel further answers must be given within 45 days after service of the responses if the responses were served personally.<sup>144/</sup> If the motion to compel is not served within the time limit, the right to do so is waived. (See Procedural Guide, § 5.7, “Motions to Compel Further Answers - in General” for details.) The court is required to award sanctions to the prevailing party on a motion to compel, unless the court finds that the losing party acted with substantial justification or that circumstances make the imposition of sanctions unjust. If an order compelling responses or further responses is not obeyed, the propounding party may make another motion to compel, requesting issue sanctions or terminating sanctions.

## Untimely or No Response

If no answers are received, the propounding party may move the court for an order deeming the requests admitted for all purposes in the litigation. There is no time limit for bringing this motion. The court must grant the order unless, prior to the hearing on the motion, the responding party serves the propounding party with a proposed response in substantial compliance with the C.C.P. requirements. In any event, the court must levy monetary sanctions against the responding party whose untimely response necessitated the motion.

## Notes on Federal Practice

- RFA's are limited in number to 25 to 35, depending on local rules, and a court order is required to exceed the maximum number.
- Federal local rules may require that the request be repeated before the response.
- ***A failure to respond to a request for admission in federal court practice means that admission is automatically admitted.***
- There is no time limit for a motion to compel further answers in federal court.
- The response need not be verified.

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<sup>144/</sup> As more fully explained in the Procedural Guide, C.C.P. §§1013 and 1010.6 extend the time to give notice of the motion to compel if the discovery response was not personally served. (See Procedural Guide, Chapter 2)

## Rules re IME's of Personal Injury Plaintiffs/Cross-Complainants

- Each defendant or cross-defendant in a personal injury case is entitled to one physical IME of the plaintiff so long as:
  - the exam does not include any diagnostic test or procedure that is painful, protracted, or intrusive, and
  - the exam is conducted within 75 miles from the examinee's residence.
- A court order must be obtained to require the second examination of the plaintiff, the examination of someone other than the named party, or the examination of a defendant by a plaintiff. A court order must also be obtained to conduct the examination more than 75 miles from the examinee's residence, and would be conditioned upon the examining party advancing the reasonable cost for the examinee to travel to the examination.
- A demand for IME is made in writing served on all parties who have appeared in the action.
- A defendant or cross-defendant may serve the demand immediately after they are served with the summons and complaint.
- The demand must be served at least 30 days prior to the date of the examination, unless a court order to shorten the time is obtained. C.C.P. §§1013 and 1010.6 extend the notice period if the demand is not personally served. (See Procedural Guide, Chapter 2)

### Service of a Demand for IME

The defendant serves a copy of the demand with a proof of service on all parties who have appeared in the action. The defendant retains the original.

### Response to Demand for IME

- A written response to the demand must be served within 20 days after service of the demand. C.C.P. §§1013 and 1010.6 extend the time to respond if the demand was not personally served. (See Procedural Guide, Chapter 2)
- The response must indicate that the examinee will do one of the following:
  - Comply with the demand as stated.
  - Comply with the demand as specifically modified by the examinee.

- For a regular motion, the opposing parties must be given at least 16 court days notice of the motion. If service is made by electronic service, the notice period is increased pursuant to C.C.P. § 1010.6; if service is made by mail, fax, or overnight mail, the notice period is increased pursuant to C.C.P. § 1005(b). (This is different from the extensions in C.C.P. § 1013. See Procedural Guide, Chapter 2)
- In addition to the 16 court day notice requirement, many motions must be brought within a particular time period, or the right to bring them is waived. For example, a motion to compel further answers to discovery must be brought within 45 days of the service of the particular response.
- Motions for summary judgment and summary adjudication must be served at least 75 days in advance of the hearing, and must be heard at least 30 days prior to trial.
- The title of the notice of motion must list all of the attached documents, e.g., "Notice of Motion for Order Compelling Production of Documents and for Sanctions, Memorandum of Points and Authorities in Support Thereof, and Declaration of Joe Lawyer in Support Thereof."
- Immediately below the title must appear the date, time, and department of the court where the matter will be heard, the name of the judge, the date the action was filed (i.e., the date the complaint was filed), and the trial date, if set.
- The nature of, and the grounds for, the order must be stated and described in the first paragraph of the notice.
- Whenever sanctions are sought, whether monetary sanctions, issue sanctions, or evidence sanctions, the identity of the person against whom they are sought and the type of sanction requested must be stated in the notice. If the sanction is monetary, the amount must be stated as well.
- The notice also must identify the evidence and papers upon which the motion is based.

#### Memorandum of Points and Authorities

- The memorandum of points and authorities or "P's & A's" describe in depth what the motion is seeking, states the facts necessitating the requested relief, and cites the authority (typically, statutes and/or case law) which authorizes the court to grant the requested relief.
- It usually begins with an introduction or summary of argument describing the relief requested, then states the facts and the arguments in favor of granting the relief, ending with a conclusion reiterating that the relief requested is justified on the facts and the law cited in the P's & A's.
- The moving party's P's & A's state the issues and the rule of law that they want the court to apply in their favor, and then argue that the rule of law applies to the facts of

If there are no disputed facts as to a particular cause of action, a particular element of a cause of action, or to an affirmative defense, or claim for damages, but there are disputed facts left to adjudicate, neither party would be entitled to summary judgment, but one may be entitled to summary adjudication on the particular cause of action, element of the cause of action, etc., which is undisputed. For example, assume Mr. Wronged alleged two causes of action against Mr. Wrongdoer, one for negligence for speeding, and one for breach of statutory duty as owner of the vehicle for failing to fix the car's broken tail lights. If Mr. Wrongdoer is able to prove, and Mr. Wronged is unable to dispute, that he was traveling at the speed limit, Wrongdoer could file an MSA as to the cause of action involving speeding, but the statutory duty cause of action would remain.

An MSA may be brought by itself or in the alternative to an MSJ. For example, let's say one of the causes of action alleged in the complaint has four elements. If a party believes it can show that there are no disputed facts as to three of those elements, but realizes that there might be disputed facts as to the fourth, that party might move for summary judgment, and in the alternative for summary adjudication.

Generally, MSA's are only to be granted where they will completely dispose of a cause of action, affirmative defense, a claim for damages, or an issue of duty. However, as of January 1, 2012, summary adjudication of a single issue which does not dispose of an entire cause of action may be sought so long as the parties stipulate to bringing the motion, and the court allows the motion to be brought.

The moving party must establish in its motion that certain facts are undisputed. They do this in a "Separate Statement of Undisputed Facts," a required part of the motion which states facts and cites to the admissible evidence (deposition testimony, declaration, discovery responses)<sup>159/</sup> supporting the facts. The opposing party may defeat an MSJ or MSA by submitting an opposition containing a "Statement of Disputed and Undisputed Facts" which cites to evidence contradicting the evidence in the moving party's statement of undisputed facts. For example, if Wronged supports his MSJ or MSA by submitting a declaration stating that the light was green, Wrongdoer may defeat the motion by submitting a declaration stating that the light was red.

The court considers the motion and the opposition to determine whether any material facts are in dispute. In ruling on an MSJ or MSA, the court is not allowed to evaluate the evidence and make any decisions as to disputed facts. Those decisions must be left to the trier of fact at trial. Instead, if the court determines that there is a dispute as to one or more material facts, the court must deny the motion. When there is a doubt as to whether there is a disputed fact, the court is required to rule in favor of the non-moving party, and deny the motion. If, however, the evidence shows that there is no dispute as to any material facts, the court is supposed to grant the motion for summary judgment.

Where a party moves for summary judgment, and in the alternative, for summary adjudication, and the court determines there is no dispute as to some aspects of the case, but there is a dispute as to others, the court may grant summary adjudication as to the undisputed facts, and the case would proceed to trial on the remaining issues.

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<sup>159/</sup> Neither party may rely on its own pleadings as evidence to support to oppose a motion for summary judgment or summary adjudication.

- If the defendant makes the offer to the plaintiff, and the plaintiff fails to do better at trial, then the defendant may recover from the plaintiff its post-offer costs and the cost of its experts, and the plaintiff will not be entitled to recover any costs from the defendant.<sup>164/</sup>
- If the damages to be awarded to the plaintiff exceed the costs owing by the plaintiff to the defendant, then the plaintiff's award is reduced by the costs the plaintiff owes to the defendant.
- If, however, the damages to be awarded to the plaintiff are less than the costs owing by the plaintiff to the defendant, then a judgment for the defendant's costs less the amount of damages to be awarded the plaintiff is entered in favor of the defendant.

Thus, the purpose of the C.C.P. § 998 offer is to pressure the other party into taking a hard look at the value of their case, and the very real, and perhaps quite significant, risk that they will have to pay the opposing party's costs of trial. C.C.P. § 998 offers are probably most often utilized by defendants in personal injury cases, to pressure the plaintiff to settle for a specific amount rather than risk not exceeding that amount and having the judgment reduced by the defendant's costs.

Strict rules govern the form and the timing of the offer and the acceptance:

- The C.C.P. § 998 offer must be served at least 10 days prior to the commencement of the trial or arbitration of the case.<sup>165/</sup> C.C.P. §§1013 and 1010.6 would require that the offer be served earlier than 10 days prior to the commencement of trial or arbitration if it is **not personally served**. (See Procedural Guide, Chapter 2)
- The offer must:<sup>166/</sup>
  - be in a reasonable amount
  - include a statement of the offer (that it is being made pursuant to C.C.P. § 998)
  - set forth the terms and conditions of the offer
  - contain a place to sign to indicate acceptance

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<sup>164/</sup> In the usual case, the "prevailing party" is entitled to costs of suit. However, when a party who would normally be the prevailing party (due to the fact that judgment was awarded in their favor), refuses a C.C.P. § 998 offer and does worse at trial, they are no longer entitled to costs.

<sup>165/</sup> For purposes of C.C.P. § 998, a trial or arbitration "commences" at the beginning of the plaintiff's opening statement, and if there is no opening statement, then at the time of administering the oath or affirmation to the first witness, or the introduction of any evidence.

<sup>166/</sup> There is an optional Judicial Council form Offer to Compromise. (See Procedural Guide, Chapter 8)

- It must be accepted in writing (or is deemed withdrawn) within 30 days after it is served or before the commencement of the trial or arbitration, whichever is earlier.<sup>167/</sup> C.C.P. §§1013 and 1010.6 extend the time to respond if the offer was not personally served. (See Procedural Guide, Chapter 2)

As is the case with all settlement offers, discussions, and ADR proceedings, the C.C.P. § 998 offer is not admissible at trial. However, it is admissible when determining which party is entitled to costs.

### When Settlement is Reached

No matter how a case is ultimately settled, be it through mediation, a settlement conference, a telephone call, or acceptance of a C.C.P. § 998 offer, the following must occur:

- The parties must draft and sign a formal settlement agreement. There is a sample settlement agreement in Chapter 8 of the Procedural Guide.
- The court must be notified of the settlement so that any pending hearings, conferences, and trial dates can be taken off calendar. See the mandatory Judicial Council form “Notice of Settlement of Entire Case” in Chapter 8 of the Procedural Guide, noting the difference between a “conditional settlement” and an “unconditional settlement.”
- Any neutrals assigned to the case need to know that the case has settled, and if any ADR appearances are scheduled, the neutral should be advised immediately so that they can take them off calendar. There may be penalties for failing to give sufficient notice of cancellation of an ADR appearance to a neutral.
- The case has to be dismissed. See the mandatory Judicial Council form “Request for Dismissal” and the “Notice of Entry of Dismissal” in § 8.2 of the Procedural Guide.

In addition, the court must approve any settlement in which a claim of a minor is involved. In that regard, the parent of a minor is allowed to settle on behalf of the minor, i.e., “compromise” the minor’s claim, but the court must approve the compromise. There is a mandatory Judicial Council form entitled “Petition to Approve Compromise of Pending Action,” which may be used either in the case of a minor or an incompetent. The form requires detailed information about the case so that the court can determine whether the compromise is fair. It also requires disclosures about the disposition of the settlement funds, so that the court can assure that the funds will be held for the minor’s benefit.

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<sup>167/</sup> However, the C.C.P. § 998 offeror is allowed to revoke the offer prior to the expiration of the acceptance period. There is a similar offer to compromise provision in federal court F.R.C.P., Rule 68, which does not allow the offeror to revoke the offer.