

When and How to File a Motion for a Protective Order

DISCOVERY ALLOWS PARTIES to focus on the issues in dispute, facilitates dispositive pretrial motions, permits meaningful settlement negotiations, and prepares the parties for trial.¹ Under Code of Civil Procedure Section 2017.010, material that falls within the broad definition of “relevant to the subject matter” is discoverable if it relates to any claim or defense of a party.² Admissibility is not the sole criterion,³ and even “fishing expeditions” are allowed.⁴ If discovery becomes unreasonable, however, the responding party has several remedies, including a request for an immediate protective order. Courts have the authority to limit the scope and exchange of discovery—written and deposed—if “the burden, expense, and intrusiveness involved in the discovery clearly outweigh the likelihood that the information sought will lead to the discovery of admissible evidence.”⁵ A party can (and should) consider filing a protective order when requests for discovery become unreasonably cumulative, burdensome, or oppressive.⁶

A party seeking a protective order must first show there is good cause for the court to bar or limit the discovery propounded. Therefore, an initial analysis is required to determine whether discovery propounded by a party is unreasonably cumulative and duplicative of discovery already responded to, or whether the discovery is largely related to undisputed or stipulated issues.⁷ When cases involve multiple parties and multiple claims, some attorneys may attempt to relitigate claims or issues that have already been dismissed or addressed by the parties through other discovery. This creates an undue burden and expense to the party, and a protective order may be appropriate. A protective order may be granted to restrict any discovery method that is “unreasonably cumulative or duplicative.”⁸ Regardless of relevance, the statute allows courts to bar discovery that is too expensive or inconvenient, or simply unnecessary.⁹ For example, interrogatories that request a party to identify every individual who ever interacted with an employee, without any limitation on the time period requested, would likely be considered unreasonably cumulative.¹⁰

The standard for an objection to discovery requests based on burdensome and oppressive grounds is distinct from that of being cumulative. The showing required to sustain these types of objections is that the intent of the party was to create an unreasonable burden, or that the burden created does not weigh equally with the stated purpose for trying to obtain it.¹¹ For example, in *Mead Reinsurance Company v. Superior Court*, the objecting party showed that responding to the interrogatories would require the review of over 13,000 claims files by five claims adjusters working full time for six weeks.¹² The *Mead* court, citing *West Pico Furniture Company v. Superior Court*, held that “[oppression] must not be equated with burden, [all discovery imposes some burden on the opposition] to support an objection of oppression there must be some showing...that the ultimate effect of the burden is incommensurate with the result sought.”¹³ In *West Pico*, the trial court had denied a motion to compel the production of documentary information that would have required a search of the records in 78 branch offices of Pacific Finance. The writ petitioned for by West Pico Furniture Company was granted because



Pacific Finance had not made a factual showing to the trial court of the nature and extent of the trouble and expense that would have been entailed in responding to the request for discovery. The trial court was directed to vacate its order denying the discovery sought and to reconsider the matter in light of the court’s power under Section 2019(b)(1) of the Code of Civil Procedure, conditioning discovery on just and reasonable terms, including the allocation of expenses.¹⁴

Applying the *West Pico* rationale, and in view of the specific details facing Mead in its efforts to comply with the order, the *Mead* court found there was no question that the order by the trial court was oppressive. Mead had made a showing to the trial court of the massive extent of the burden that the request entailed, and the order made no provision at all to mitigate that burden.¹⁵ Therefore, any request for a protective order should include a detailed description of the extent of the burden on the party requesting protection.

A court is authorized to fashion a unique protective order that addresses issues of oppression as well as privilege. The court in *Mead* found that compliance with the requirements of an order would require Mead “to engage in only a limited evaluation of what names

Jennifer Weidinger is an associate at the Los Angeles office of Pettit Kohn Ingrassia & Lutz whose practice focuses on employment and retail litigation.

to disclose.... At the end of one year from the date the letters are sent, Mead will be authorized to open the files of those claimants who have consented to it.”¹⁶ The appellate court specifically found that the disposition prescribed a procedure that first addressed the privilege problem and then resolved the oppression issue. The trial court is vested with wide discretion to prevent oppression, which is not disturbed on appeal unless it can be established that the trial court has abused its authority.¹⁷

A party may also request a protective order under the burdensome or oppressive standard to prevent a party’s serving voluminous, unfocused discovery on the eve of trial.¹⁸ In *Day v. Rosenthal*, the court issued a protective order barring both the noticed depositions and written discovery as well. The court found that the boiler plate questions referred to a “whole series of lawsuits,” many of which remained unchanged from the original pleadings. Also, the information sought related to documents generated by Rosenthal that were still in his possession, and it would have required more than 1,600 hours of preparation time in order to answer the first of the nine sets of interrogatories. The court observed that the interrogatories came very late in the proceedings, were voluminous and unfocused, and required so much time to answer that the trial would inevitably have to be postponed. Moreover, the interrogatories were largely inquiries concerning allegations that had been in the pleadings for as long as five years. Upholding the trial court’s ruling, the court of appeal found it difficult to imagine “a scenario in which a court would be more justified in saying, ‘Enough!’” Therefore, the trial court’s exercise of discretion was found to be reasonable.¹⁹

Privacy Rights

There are certain types of information and documents that are private and in some circumstances will be protected under the law from disclosure. Distinguished from information or documents protected by a privilege, such as the attorney-client privilege, privacy rights cover such matters as personal finances,²⁰ employee personnel files,²¹ medical records,²² and sexual relations.²³ California’s state constitution affirms that all people have an “inalienable right” to pursue and obtain privacy.²⁴ A party should begin to plan for a written stipulation limiting the disclosure of this information, or a formal protective order, as soon as there is an indication that an adversary intends to procure protected information or documents. For example, employers have a duty to protect nonparty employee information (addresses, telephone numbers, etc.) from disclosure, and a well-crafted protective order can main-

tain privacy rights for these employees. Courts have frequently recognized that individuals have a substantial interest in the privacy of their home.²⁵ If a party agrees to represent and produce an individual for deposition, there is no need to disclose a witness’s home address and contact information, as the opposing side should not contact a represented party.

The court has authority to craft a specific protective order, pursuant to Code of Civil Procedure Section 2031.060(b), in the interests of justice, including to maintain an individual’s safety. In the recent case of *Ibarra v. Superior Court*, the appellate court found that the trial court had abused its discretion when it compelled the disclosure of the service photographs of guards who allegedly beat a former inmate.²⁶ The photographs should not have been produced to counsel but rather, in order to protect the guards from an unreasonable risk of harm from display to inmates, they should have been produced to a neutral third party under the court’s supervision and made available only at a secure location to identified potential witnesses.

For matters falling within the right to privacy, a court must grant a protective order unless disclosure is found to further a compelling state purpose and that the purpose could not be achieved through less intrusive means.²⁷ As with other privacy considerations, the court will balance the need to obtain the discovery with the party’s privacy rights.²⁸ If the party is seeking to limit the scope of discovery, the burden or intrusiveness of that discovery must clearly be shown to outweigh the likelihood that the information sought will lead to the discovery of admissible evidence.²⁹ In *Schnabel v. Superior Court*, for example, the appellate court allowed disclosure of the appellant’s personal financial and payroll records and general corporate documents because the appellee was entitled to ascertain the value of shares, but the court prohibited the disclosure of payroll and tax records of corporate employees because the employees’ financial data contained information that infringed their privacy rights.³⁰

The balancing test applies to records sought from third parties as well. In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause. For example, the third party may demonstrate that public disclosure of confidential information would damage its competitive position or embarrass persons not involved in the litigation. On the other hand, an overbroad protective order, or an order granted without good cause, is vulnerable upon appeal. In a recent action by

tenants who were displaced following foreclosure, the appellate court found that it was an abuse of discretion to issue a sweeping order protecting the documents of a home mortgage servicing company from dissemination. The company made no factual showing that the documents that it had been ordered to produce contained confidential commercial information or information in which it had any protectable interest or that dissemination of the documents to the public would result in injury.³¹

Upon request, the court can review the information in camera before production to assess its value to the requesting party and the harm that disclosure might cause to the third party. Any discovery order should be carefully tailored to protect the interests of the requesting party in obtaining a fair resolution of the issues while not unnecessarily invading the privacy of the third party.³²

Preparing the Motion

Prior to producing sensitive documents, the parties can enter into a written stipulation—not filed with the court, but still binding—or a stipulation for a protective order, which can then be submitted to the court for entry. A written stipulation can effectively define the procedure and terms of a document production, including the 1) designation, 2) access, 3) use, and 4) disposal of the confidential documents. The stipulation and order should comply with the California Rules of Court 2.550 and 2.551, and include a provision for challenges to claims of confidentiality.³³

If a party contends that any documents or information designated as confidential by another party are not entitled to protection, a motion to change the designation may be filed, providing adequate notice and an opportunity for the proponent of confidentiality to respond.³⁴ The burden is on the proponent of confidentiality to demonstrate good cause, usually via a formal protective order. Notably, in *Stadish v. Superior Court*, the court found that the trade secret privilege could be waived if not timely asserted in response to document requests.³⁵ The court also found that upon a proper showing a party may seek a protective order restricting dissemination of the documents, even after it has waived its right to object to the production of documents and produced most of the documents requested.³⁶

If a written stipulation cannot be reached, or opposing counsel has requested protected documents that should not be produced even with a stipulation, a protective order is required. Motions for protective order, like many discovery motions, require a good faith meet-and-confer attempt that is also timely. Failure to bring the motion within 30 days could result in a waiver. Attorneys can extend the timeline with a written stipulation from the

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other side, but they must be prepared to file the motion rather than rely on opposing counsel's verbal promise.³⁷ While the motion and supporting documents need not be lengthy, they should be sufficiently detailed to demonstrate to the court why a protective order is warranted and that all meet-and-confer efforts between the parties have failed.³⁸

The meet-and-confer requirement is paramount. Parties are required to "confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery."³⁹ The request for a protective order must include a declaration stating "facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion."⁴⁰ The court carefully reviews the motion papers to ensure that this requirement has been met. The court will discern whether there was more than a cursory attempt to persuade the other side that protection is warranted.⁴¹

If the venue of a case is in the personal injury departments in Los Angeles County, a moving party should be prepared to request an informal discovery conference with the department judge. The informal conference can force an objecting party to face the discovery issues that were glossed over during meet-and-confer attempts. The conference also provides a neutral's opinion on the dispute, which can prompt more compromise between opposing counsel prior to a formal order or ruling, and is an effective way to avoid sanctions.

Discovery requests propounded long after discovery has closed are untimely and improper. Also, discovery of unreasonably duplicative requests are usually an outright attempt to unnecessarily burden a party with additional discovery. Such conduct constitutes misuse of the discovery process and may merit an award of sanctions pursuant to Section 2030.090 of the Code of Civil Procedure. Following settlement of a class action, the appellate court recently found that the trial court had properly awarded a defendant \$165,000 in sanctions, pursuant to Section 2023.010 of the Code of Civil Procedure, from the plaintiffs' lawyer on the basis that the lawyer 1) disobeyed a court order to allow forensic computer inspections as part of the manufacturer's discovery relating to the lawyer's request for attorney fees, and 2) failed to meet and confer in good faith regarding the court-ordered inspections.⁴² The plaintiffs' lawyer claimed the lack of a "detailed protocol" constituted "substantial justification" for the failure to obey the discovery order.⁴³ However the court found there could be no reliance on the absence of a protocol when the attorney's

own conduct in failing to meet and confer had led to the failure to produce a protocol.⁴⁴ An attorney should respectfully request via the motion (or waive the request) that sanctions be issued against the propounding party and its attorney, jointly and severally, for the time spent preparing the motion for protective order and attending the hearing.

When defending a request for sanctions, a party must demonstrate that sanctions would be inappropriate because he or she has acted, and continues to act, with substantial justification.⁴⁵ A party must demonstrate participation in discovery, including good faith meet-and-confer efforts. If the court has imposed monetary sanctions and the offending party again abuses discovery, the court may consider imposing “evidence sanctions” (barring a party from introducing evidence at trial) or “issue sanctions” (deeming facts established adverse to the offending party). The court also can cite a party for contempt of court and even impose “terminating sanctions” (dismissing the plaintiff’s case with prejudice or striking the defendant’s answer and entering a default).⁴⁶

Civil discovery rules are generally applied liberally in favor of granting discovery; however, a protective order is an important device that provides a shield to oppressive requests and a safeguard for important privacy rights. A successful protective order will 1) clearly

show good cause exists for the court to bar or limit the demanded discovery, 2) be narrowly tailored (not a sweeping order), and 3) outline extensive meet-and-confer efforts and a good faith attempt to reach an agreement. ■

¹ CODE CIV. PROC. §§2017.010 *et seq.*

² *People v. Gonzalez*, 33 Cal. App. 4th 1539, 1545 (1995).

³ *Davies v. Superior Court*, 36 Cal. 3d 291, 305 (1984) (citing *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 391 (1961)).

⁴ *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 391 (1961).

⁵ *Emerson Elec. Co. v. Superior Court*, 16 Cal. 4th 1101, 1110 (1997).

⁶ See CODE CIV. PROC. §§2030.090(b), 2031.060(b).

⁷ *Emerson Elec. Co.*, 16 Cal. 4th at 1108.

⁸ CODE CIV. PROC. §2019.010(a)(1).

⁹ *Rawnsley v. Superior Court*, 183 Cal. App. 3d 86, 91 (1986); *Doak v. Superior Court*, 257 Cal. App. 2d 825, 827-28 (1968).

¹⁰ *Emerson Elec. Co.*, 16 Cal. 4th at 1120.

¹¹ *Mead Reinsurance Co. v. Superior Court*, 188 Cal. App. 3d 313, 319 (1986).

¹² *Id.* at 318.

¹³ *Id.* at 320-21 (quoting *West Pico Furniture Co. v. Superior Court*, 56 Cal. 2d 407, 417 (1961)).

¹⁴ *Mead*, 188 Cal. App. 3d at 321.

¹⁵ *Id.*

¹⁶ *Id.* at 322.

¹⁷ *Cembrook v. Superior Court*, 56 Cal. 2d 423, 427 (1961).

¹⁸ *Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1171 (1985).

¹⁹ *Id.*

²⁰ *Valley Bank of Nevada v. Superior Court*, 15 Cal.

3d 652, 657 (1975).

²¹ *Eldorado Savings & Loan Ass’n v. Superior Court*, 190 Cal. App. 3d 342, 346 (1987).

²² *Heda v. Superior Court*, 225 Cal. App. 3d 525, 530 (1990).

²³ *Britt v. Superior Court*, 20 Cal. 3d 844, 863 (1978).

²⁴ CAL. CONST. art. I, §1.

²⁵ *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 359 (2000).

²⁶ *Ibarra v. Superior Court*, 217 Cal. App. 4th 695, 706 (2013).

²⁷ *Id.*

²⁸ *Schnabel v. Superior Court*, 5 Cal. App. 4th 704, 712 (1993).

²⁹ CODE CIV. PROC. §2017.020.

³⁰ *Schnabel*, 5 Cal. App. 4th at 712.

³¹ *Nativi v. Deutsche Bank Nat’l Trust Co.*, 223 Cal. App. 4th 261, 318 (2014).

³² *Id.* (citing CODE CIV. PROC. §2025(i)); *Harris v. Superior Court*, 3 Cal. App. 4th 661, 668 (1992).

³³ *Stadish v. Superior Court*, 71 Cal. App. 4th 1130, 1144 (1999).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL 8:1013 (2010).

³⁸ CAL. R. CT. 3.1110.

³⁹ CODE CIV. PROC. §2023.010(i).

⁴⁰ CODE CIV. PROC. §2016.040.

⁴¹ *Clement v. Alegre*, 177 Cal. App. 4th 1277, 1285 (2009).

⁴² *Ellis v. Toshiba Am. Info. Sys., Inc.*, 218 Cal. App. 4th 853, 879 (2013).

⁴³ *Id.* at 880.

⁴⁴ *Id.*

⁴⁵ CODE CIV. PROC. §2030.300(d).

⁴⁶ CODE CIV. PROC. §2023.030(a)-(e).

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