

Second Supplement to Memorandum 2006-11

Civil Discovery Improvements: Failure to Substantively Respond to Discovery Request (Discussion of Issues)

The First Supplement to Memorandum 2006-11 analyzes civil litigator John Armstrong's suggestion for a motion in limine evidentiary exclusion when a party fails to substantively respond to a discovery request. Mr. Armstrong has provided some further comments in response to that analysis, which are attached as an Exhibit.

Mr. Armstrong thanks the Commission for considering his previous suggestion, and then provides a clarification. He indicates the intent of his suggestion was not to punish the making of a meritorious objection to a discovery request. He agrees that a discovery request can sometimes be overbroad or otherwise improper, and suggests that in such case a court should deny the proposed motion in limine.

Mr. Armstrong further reports that when evidence is improperly withheld in responding to a discovery request, the trial court will sometimes exclude the evidence pursuant to Evidence Code Section 352. Such a ruling provides the same relief as would the new in limine motion Mr. Armstrong proposes. In Mr. Armstrong's experience, however, it is often difficult to persuade a trial judge to make such a ruling under Section 352, absent a record establishing multiple attempts to obtain the information before trial and an affirmative showing of prejudice.

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF JOHN ARMSTRONG

From: John Armstrong <jarmstrong@mmnt.com>
Date: February 17, 2006
To: <bgaal@clrc.ca.gov>
Subject: Thank you

Dear Barbara:

Please thank the committee for taking the time to consider my proposal for improving the discovery process.

One point I apparently did not make clear was that if a meritorious objection were made, the court should sustain it and deny the motion in limine seeking evidentiary preclusion.

My point was deter unmeritorious objections and to punish improper discovery conduct that promotes sandbagging at trial; it was not to punish parties for making proper, meritorious objections or responses to discovery requests. Some requests are overbroad or otherwise improper.

In my experience as a trial attorney, a party's failure to disclose information requested in pre-trial discovery, if done without sufficient justification or excuse can result in exclusion under Evidence Code section 352, but there is a natural reluctance for trial courts to do this absent making an excellent record of past attempts to get the requested information before trial, and an affirmative showing of unfair prejudice.

Regardless, I greatly appreciate that there is system in place that considers the practicing bar's observations regarding how the system is and is not working.

Sincerely,

John Armstrong

John Armstrong
Murtaugh Meyer Nelson & Treglia LLP
2603 Main Street, 9th Floor
Irvine, CA 92614
Telephone: (949) 794-4000
Fax: (949) 794-4099
E-mail: jarmstrong@mmnt.com