

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Response to Demand for Production  
of Documents in Discovery

March 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

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March 19, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation would extend the time for a response to a demand for production of documents in civil discovery to 30 days from the present 20 days. This will tend to reduce frequent motions or requests for an extension of time, will conform the California time period to that in Rule 34 of the Federal Rules of Civil Procedure, and will make it the same as the 30-day period in California for a response to written interrogatories and requests for admission.

This recommendation is submitted pursuant to Resolution Chapter 102 of the Statutes of 1997.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS IN DISCOVERY

In discovery in a civil case, a party may demand that another party produce and permit inspection and copying of a document.<sup>1</sup> The demand must specify a reasonable time for the inspection that is at least 30 days after service of the demand.<sup>2</sup> Within 20 days after service of the demand, the other party must respond in writing to each item or category of items in the demand by stating either that the party will comply, that the party lacks the ability to comply, or that the party objects to the demand.<sup>3</sup>

These provisions were enacted in 1974<sup>4</sup> to replace the former procedure for obtaining documents by noticed motion and court order with the present extra-judicial method of simply serving a demand.<sup>5</sup> The 1974 legislation brought California substantially into line with the 1970 revision of Rule 34 of the Federal Rules of Civil Procedure.<sup>6</sup> However, in adopt-

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1. Code Civ. Proc. § 2031(a).

2. Code Civ. Proc. § 2031(c).

3. Code Civ. Proc. § 2031(f), (h). Special time periods apply in unlawful detainer cases — five days after the demand for the written response, and a minimum of five days after the demand for inspection. *Id.* § 2031(c), (h). These time periods are extended for service by mail or facsimile transmission. Code Civ. Proc. §§ 2019(e), 1013; R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

4. 1974 Cal. Stat. ch. 592. The 1974 legislation permitted the demand to specify a reasonable time for inspection of the documents, with no minimum time. The minimum 30-day period for inspection was adopted in 1991, but the 20-day period for the written response was not changed. 1991 Cal. Stat. ch. 1090.

5. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975); 2 B. Witkin, *California Evidence Discovery and Production of Evidence* § 1516, at 1479 (3d ed. 1986).

6. Witkin, *supra* note 5.

ing a 20-day period for the written response, California departed from the 30-day period in federal Rule 34.<sup>7</sup>

The Commission is informed that, when faced with a demand for production of documents, parties routinely request an extension of the 20-day period for the written response, often resolving the matter by agreeing with the demanding party that both the response and inspection of the requested documents shall be done on the same day.<sup>8</sup> The result of having two different time periods — 20 days for the response and a minimum of 30 days for the inspection — appears to be that motions for extension are often necessary, even though the purpose of the 1974 legislation was to keep these proceedings out of court whenever possible and to bring the law into line with practice.<sup>9</sup>

The 30-day period for a response to a demand for production of documents under federal Rule 34 appears better designed to reduce unnecessary discovery motions than the California rule. Moreover, adopting a 30-day period in California for a response to a demand for production of documents would make that time period the same as the 30-day

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7. A possible justification for having a shorter time for the response than for inspection is that the party in possession of the document may object to producing it. In such a case, a short time for the response will avoid unnecessary delay in discovery. However, the Commission believes that any possible benefit of a short response time is outweighed by the benefit in most cases of avoiding unnecessary motions for extensions of time. See generally R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

8. Communication from attorney Richard E. Guilford to California Law Revision Commission (October 28, 1996) (attached to Memorandum 97-77, on file with California Law Revision Commission).

9. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975).

period for a response to written interrogatories<sup>10</sup> and requests for admission.<sup>11</sup>

The Commission recommends replacing the present 20-day period for a response to a demand for production of documents with the 30-day period of federal Rule 34.

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10. A response to written interrogatories must be within 30 days after service of the interrogatories unless otherwise provided by the court. Code Civ. Proc. § 2030(h).

11. A response to requests for admission must be within 30 days after service of the request unless otherwise provided by the court. Code Civ. Proc. § 2033(h).

## PROPOSED LEGISLATION

### **Code Civ. Proc. § 2031 (amended). Inspection of documents, things, and places**

SECTION 1. Section 2031 of the Code of Civil Procedure is amended to read:

2031. (a) Any party may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, by inspecting documents, tangible things, and land or other property that are in the possession, custody, or control of any other party to the action.

(1) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(2) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

(3) A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.

(b) A defendant may make a demand for inspection without leave of court at any time. A plaintiff may make a demand for inspection without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions within five days after service of the summons on or appearance by, the party to whom the demand is directed,



whichever occurs first. However, on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make an inspection demand at an earlier time.

(c) A party demanding an inspection shall number each set of demands consecutively. In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party. Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

(1) Designate the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection that is at least 30 days after service of the demand, or in unlawful detainer actions at least five days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date.

(3) Specify a reasonable place for making the inspection, copying, and performing any related activity.

(4) Specify any related activity that is being demanded in addition to an inspection and copying, as well as the manner in which that related activity will be performed, and whether that activity will permanently alter or destroy the item involved.

(d) The party demanding an inspection shall serve a copy of the inspection demand on the party to whom it is directed and on all other parties who have appeared in the action.

(e) When an inspection of documents, tangible things or places has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order. This motion shall be accompanied by a declaration stating facts

showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That all or some of the items or categories of items in the inspection demand need not be produced or made available at all.

(2) That the time specified in subdivision (h) to respond to the set of inspection demands, or to a particular item or category in the set, be extended.

(3) That the place of production be other than that specified in the inspection demand.

(4) That the inspection be made only on specified terms and conditions.

(5) That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way.

(6) That the items produced be sealed and thereafter opened only on order of the court.

If the motion for a protective order is denied in whole or in part, the court may order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) The party to whom an inspection demand has been directed shall respond separately to each item or category of item by a statement that the party will comply with the particular demand for inspection and any related activities, a representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item, or an objection to the particular demand.

In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the demanding party. Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated.

(1) A statement that the party to whom an inspection demand has been directed will comply with the particular demand shall state that the production, inspection, and related activity demanded will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production.

Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand. If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.

(2) A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify

whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.

(3) If only part of an item or category of item in an inspection demand is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category. If the responding party objects to the demand for inspection of an item or category of item, the response shall (A) identify with particularity any document, tangible thing, or land falling within any category of item in the demand to which an objection is being made, and (B) set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Section 2018, that claim shall be expressly asserted.

(g) The party to whom the demand for inspection is directed shall sign the response under oath unless the response contains only objections. If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under Section 2018 during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response. The attorney for the

responding party shall sign any responses that contain an objection.

(h) Within 20 30 days after service of an inspection demand, or in unlawful detainer actions within five days of an inspection demand, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. In unlawful detainer actions, the party to whom the demand is directed shall have at least five days from the date of service of the demand to respond unless on motion of the party making the demand the court has shortened the time for the response.

(i) The party demanding an inspection and the responding party may agree to extend the time for service of a response to a set of inspection demands, or to particular items or categories of items in a set, to a date beyond that provided in subdivision (h). This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date for service of a response. Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any item or category of item in the demand to which the agreement applies in any manner specified in subdivision (f).

(j) The inspection demand and the response to it shall not be filed with the court. The party demanding an inspection shall retain both the original of the inspection demand, with the original proof of service affixed to it, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless

the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

(k) If a party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under Section 2018. However, the court, on motion, may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The party making the demand may move for an order compelling response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(l) If the party demanding an inspection, on receipt of a response to an inspection demand, deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling further response to the demand. This motion (1) shall set forth specific facts showing good cause justifying the

discovery sought by the inspection demand, and (2) shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by it.

Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the inspection demand.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(m) If a party filing a response to a demand for inspection under subdivision (f) thereafter fails to permit the inspection in accordance with that party's statement of compliance, the party demanding the inspection may move for an order compelling compliance.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification

or that other circumstances make the imposition of the sanction unjust.

If a party then fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

**Comment.** Subdivision (h) of Section 2031 is amended to permit 30 days for a response to a demand for production of documents. This conforms Section 2031 to Rule 34 of the Federal Rules of Civil Procedure, and makes the time period for a response to a demand for production of documents the same as the 30-day period in California for a response to written interrogatories and requests for admission. See Sections 2030(h), 2033(h).

If a party fails to respond to a request for production of documents, the court may prohibit the party from introducing the documents in evidence. Section 2023(a)(4), (b)(3).

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