Study J-506 February 17, 2006

First Supplement to Memorandum 2006-11

Civil Discovery Improvements: Failure to Substantively Respond to Discovery Request; Comments on Issues in Main Memorandum (Discussion of Issues)

This supplement addresses a suggestion made by civil litigator John Armstrong for a new statutory consequence when a party fails to substantively respond to a discovery request. Mr. Armstrong's suggestion somewhat parallels and expands on a suggestion made by civil litigator Mark Storm and discussed in Memorandum 2006-11, relating to requests for admission.

This supplement also discusses comments submitted by Richard Best, a former discovery commissioner in San Francisco, on the issues covered in Memorandum 2006-11: (1) time for hearing a discovery motion in an unlawful detainer action, (2) factual basis for a response to a request for admission, and (3) consequences for failure to timely respond to a request for admission.

Mr. Armstrong's comments (presented as an excerpt from a longer email communication sent to the Commission) and Mr. Best's comments are attached as follows:

Exhibit p.

- John Armstrong, Irvine (2/18/05) 1
- Richard Best, San Francisco (2/15/06) 3

CONSEQUENCE FOR FAILURE TO PROVIDE SUBSTANTIVE RESPONSE TO DISCOVERY REQUEST

Mr. Armstrong's email indicates a frustration (likely shared by most civil practitioners) with the practice of "stonewalling" in response to a discovery request. It is Mr. Armstrong's experience that a recipient of a discovery request will often either intentionally fail to respond to the request, or respond only with unmeritorious objections. This "make them fight for it" attitude (as characterized by Mr. Armstrong) forces a propounding party to make a motion to compel in conjunction with every discovery request, simply to obtain a substantive response to the request. Mr. Armstrong says this conduct is inconsistent with the

"self-executing" nature of the discovery statute intended by the Legislature. See Exhibit p. 1; see also *Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1434, 72 Cal. Rptr. 2d 333 (1998).

Mr. Armstrong suggests that a propounding party who does not receive a substantive response to a discovery request should be permitted to seek as an initial remedy an evidentiary or issue sanction against the responding party. He further suggests the propounding party should be permitted to seek this sanction for the first time just before trial, in an in limine motion.

The two scenarios to which Mr. Armstrong would apply this remedy — a discovery response consisting solely of objections, and a complete failure to respond to a discovery request — warrant slightly different evaluations. In both cases, however, the staff's ultimate conclusion is the same.

Analysis

The problem Mr. Armstrong identifies certainly exists, at least to some extent. However, the corrective solution Mr. Armstrong proposes is drastic. It would dramatically alter the detailed sanctions scheme that was worked out through extensive debate in the Civil Discovery Act of 1986. The Commission has previously decided not to reexamine the area of sanctions.

Further, in any discovery scheme ("self-executing" or otherwise), determination of the appropriate consequence for failing to substantively respond to a discovery request requires the balancing of several competing considerations. The scheme has to be flexible enough to contemplate the myriad possible explanations *why* no substantive response has been provided.

For example, a respondent's objection to a discovery request might be *meritorious*. A scheme which provided for a judicial determination of the merit of a discovery objection for the first time just before trial — and with a potentially dispositive sanction, to boot — would appear to be unworkable. Respondents might be reluctant to object to a discovery request, lest their case be lost on the eve of trial due to a questionable in limine ruling by a judge possibly unfamiliar with the nuances of discovery law. As a result, propounding parties may be unrestrained in serving discovery requests, and responding litigants without sufficient resources may be overwhelmed.

In addition, if a respondent did raise an objection, the trial judge might be forced to choose between two poor alternatives. The judge might have to either eviscerate the respondent's case with an issue or evidentiary sanction based on a

close but ultimately incorrect legal judgment made by the respondent's counsel, or deny the propounding party any meaningful relief at all, since it was now too late to use any compelled response.

Similarly, a failure to respond to a discovery request might have been due solely to inadvertence, or even non-receipt of the request itself. Once again, however, the proposed remedy would potentially require a trial judge to either effectively grant judgment against a respondent based on a document lost in the mail, or alternatively deny the propounding party any effective remedy, since by then it would be too late to use the responsive information to prepare for trial.

Prior to 1986, California's statutory discovery scheme actually did allow a court, based on a finding a party had willfully failed to respond to certain types of discovery, to initially impose *any* sanction (including judgment by default). See former Code of Civil Procedure Section 2034, subdivision (d), repealed by 1986 Cal. Stat. ch. 1334, § 1. However, the Civil Discovery Act of 1986 specifically deleted this provision. The State Bar—Judicial Council Joint Commission on Discovery (the group that proposed the 1986 statute) found that a determination of "willfulness" had typically proved problematic, and that any severe sanction was rarely imposed, as a court would be "courting reversal" for imposing such sanction based on a mere failure to respond. State Bar—Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986, Reporter's Note to Sections 2025(j) & 2030(k), pp. 44, 72, *reprinted in* 2 Hogan & Weber, *California Civil Discovery*, app. C (1997).

The suggested approach thus has been previously considered and rejected, and does not appear to be a viable improvement to the current statutory scheme. The staff recommends that **the Commission take no further action on this suggestion**.

TIME FOR HEARING DISCOVERY MOTION IN AN UNLAWFUL DETAINER ACTION

In the main memorandum, the staff recommends that the Commission propose a new statute shortening the period of notice required for a discovery motion in an unlawful detainer action. Mr. Best agrees with the concept of that proposal, but offers a number of specific suggestions. Exhibit pp. 3-4.

Placement of New Statute

The staff proposed that the new statute be placed in the chapter of the Code of Civil Procedure containing provisions relating specifically to an unlawful detainer action. Mr. Best suggests that the new statute instead be placed in the Civil Discovery Act. Exhibit p. 3. He comments that "[o]ther unique UD discovery provisions are contained in the Discovery Act and the CRC provisions on discovery." *Id.* He appears to suggest that language specifying the notice period for an unlawful detainer discovery motion be added to each provision in the Discovery Act dealing with a motion to compel. *See id.*

There are, however, numerous provisions in the Discovery Act dealing with motions to compel, not just one such provision for each method of discovery. For example, Code of Civil Procedure Section 2030.290 authorizes a motion to compel for failure to serve a timely response to interrogatories, while Code of Civil Procedure Section 2030.300 authorizes a motion to compel a further response to interrogatories. None of the provisions in the Civil Discovery Act specifies the notice requirement for a motion to compel.

Rather, the notice requirement is contained in Code of Civil Procedure Section 1005, the section governing notice of a motion in general. If the proposed new language were to be placed in any existing statutory provision, the alternative placement would appear to be in or adjacent to Section 1005.

However, the staff continues to believe the best placement for the new language would be among other statutes specifically relating to unlawful detainer actions. A new statute governing the making of a discovery motion in an unlawful detainer action would be a logical and expected "fit" within this grouping, in a location most likely to be noticed by and helpful to people affected by it. The proposed new provision would go directly after the existing provision specifying a special notice period for a summary judgment motion in an unlawful detainer action (Code Civ. Proc. § 1170.7).

Putting the new language in this part of the code rather than in Section 1005 would also spare many civil practitioners from having to read and analyze a stated exception to a general rule that is very likely inapplicable to their situation. Notably, although there are many deviations from the general rule of Section 1005, none of them are stated in Section 1005 itself. See, e.g., Code Civ. Proc. § 437c (summary judgment motion).

Mr. Best's suggestion has, however, helped alert us to complexities that need to be considered with regard to the proposed new provision. Section 1005

contains extensive rules regarding the impact of various methods of service on the notice period. It may be necessary to provide similar guidance with respect to the proposed new notice period for a discovery motion in an unlawful detainer action. *Cf*. Section 437c. It might also be necessary to specify when an opposition to such a motion is due, and when a reply is to be submitted if at all (the proposed five day notice period may not be long enough to allow for a full briefing process). These points should perhaps be addressed not just with respect to the proposed new provision, but also with respect to the existing provision governing notice of a summary judgment motion in an unlawful detainer action. **Unless the Commission otherwise directs, the staff will discuss and analyze these matters further in a memorandum for a future meeting.**

Allowing Motion Only After Answer Filed

As proposed in Memorandum 2006-11, the new statute would provide that a discovery motion in an unlawful detainer action may be made "at any time after the answer is filed." Mr. Best suggests eliminating the restriction that a discovery motion may be made only after an answer has been filed. Exhibit p. 3. He explains:

> The time for making the motion should not be tied to the answer. This is generally not a requirement under current law and could add unnecessary delay.

Id.

This is a good suggestion. A party may serve a discovery request (in an unlawful detainer action or otherwise) before an answer is filed, which means that a party may need to move for a protective order or to compel discovery before an answer in an action is filed.

As Mr. Best points out, requiring an answer before a discovery motion may be made in an unlawful detainer action could also cause unnecessary delay in the prosecution of the action. That would contravene the Legislature's expressed preference that all unlawful detainer actions "be quickly heard and determined." Code Civ. Proc. 1179a. Intentionally or otherwise, a defendant served with a discovery request could effectively bar the plaintiff from moving to compel discovery by filing a pre-answer pleading such as a motion to quash the summons (Code Civ. Proc. § 418.10), or a demurrer (Code Civ. Proc. § 430.10 *et seq*.). In fact, in an extreme case, the new statute as proposed could actually have

the unintended effect of *delaying* the making of a discovery motion, rather than shortening the time within which it could be made.

The proposed new statute should therefore **be revised along the following lines:**

> **Code Civ. Proc. § 1170.8 (added). Time for discovery motion**
>
> SEC. ____. Section 1170.8 is added to the Code of Civil Procedure, to read:
>
> 1170.8. In any action under this chapter, a discovery motion may be made at any time ~~after the answer is filed~~ upon giving five days notice.
>
> **Comment.** Section 1170.8 is new. The section provides for an expedited hearing on a discovery motion in a forcible entry or forcible or unlawful detainer case, consistent with the precedence for such cases expressed in Section 1179a.

Denial of Order Shortening Time

Mr. Best also reports that orders shortening time to make a discovery motion in an unlawful detainer action are *not* routinely granted, at least in the Bay Area. Exhibit p. 3. This contrasts with limited information related to the staff by other sources.

Mr. Best says that because an unlawful detainer litigant may not be able to obtain an order shortening time to make a discovery motion, it is all the more important that such a litigant be statutorily afforded the right to make a such a motion on shorter notice than the 16 court days required by Section 1005. *Id*.

However, if it is correct that courts do not routinely grant an order shortening time in this circumstance, it may be important to know why. It could be that some consideration militating against issuing an order shortening time also militates against the proposed new statute.

In addition, it would be helpful to learn the consequence of denial of a request for an order shortening time in this situation. For example, if a litigant is precluded from moving to compel discovery prior to a scheduled trial date, will this normally cause a trial court to continue the trial, is the litigant forced to proceed to trial without the discovery at issue, or do trial courts typically fashion some other remedy?

Comment on these issues would be beneficial to the Commission in evaluating the potential impact of the proposed new statute. **We encourage interested persons to share their knowledge** about current court practices in handling a discovery motion in an unlawful detainer action. Unless the

Commission otherwise directs, the staff will also **investigate this matter further, and incorporate findings in a future memorandum.**

FACTUAL BASIS FOR RESPONSE TO REQUEST FOR ADMISSION

The main memorandum discusses a suggestion to revise the Discovery Act such that a litigant could combine a request for admission with the substance of Form Interrogatory 17.1 — i.e., a requirement to identify all persons, documents, and facts supporting the response to the request for admission. In the memorandum, the staff recommends against that approach. See Memorandum 2006-11, pp. 4-5.

Mr. Best "agree[s] with the LRC staff that no change should be made at this time with regard to the interrogatory 17.1 that often accompanies requests for admissions ...." Exhibit p. 3. He suggests, however, that "further consideration be given to the proposal." *Id.*

He points to three circumstances that weigh in favor of exploring the proposal further:

(1) In the past, when a litigant was allowed to combine a request for admission with an interrogatory, the request for admission was sometimes overlooked with drastic consequences. The current prohibition against combining a request for admission with an interrogatory was enacted to prevent such harm. Mr. Best points out that the likelihood of a litigant overlooking a request for admission would be relatively low if that request was made in conjunction with an interrogatory requiring the litigant to identify all persons, documents, and facts supporting the response to the request. *Id.*

(2) A requirement to identify all persons, documents, and facts supporting a response to a request for admission "might encourage admissions unless there were a good faith denial based on some facts." *Id.*

(3) A "sometimes used ploy is to respond to interrogatories such as form interrogatory 17.1 before the response to request for admissions is due." *Id.* That enables the respondent to maintain that "the interrogatory is inapplicable since there is no response to the request." *Id.* Allowing a litigant to combine a request for admission with the substance of Form Interrogatory 17.1 "would eliminate that tactic." *Id.*

The Commission should **take these policy considerations into account in deciding whether to further investigate the proposal.** Mr. Best does not

comment on the staff's concerns regarding the different procedural rules applicable to a request for admission and an interrogatory (see Memorandum 2006-11, pp. 3-4).

He does, however, raise concerns about the interrelationship of Form Interrogatory 17.1 and the presumptive limit of 35 specially prepared interrogatories (Code Civ. Proc. § 2030.030). See Exhibit p. 3. Rather than considering his concerns about abuse of the interrogatory limit at this time, it may be more appropriate to **defer such consideration until the Commission examines interrogatory limits later in this study.**

POSSIBLE AMBIGUITY IN CODE OF CIVIL PROCEDURE SECTION 2033.280

The main memorandum also discusses a possible ambiguity in Code of Civil Procedure in Section 2033.280 and queries whether it is worth exploring further. See Memorandum 2006-11, pp. 6-8.

Mr. Best apparently considers the existing statutory language clear on the point in question:

> ... I do not believe a court would have discretion to deem matters admitted under subpart (c) if there were the requisite substantial compliance. At that point there would be full compliance with the law and full compensation for the efforts to obtain the proper response. The intent of the current version was to add this extra safeguard for responding parties and to fully protect the other side by requiring reimbursement.

Exhibit pp. 3-4.

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF JOHN ARMSTRONG

From: John Armstrong <jarmstrong@mmnt.com>
Date: February 18, 2005
To: <bgaal@clrc.ca.gov>
Subject: Some Suggested Discovery Act Reforms

Dear Ms. Gaal:

As a trial attorney, I am pleased with the discovery reforms the Judicial Council has been able to get passed, including simplifying the Discovery Code.

However, I believe some additional substantive reforms would be helpful.

….

[I]f a party fails or refuses to an authorized method of discovery, this alone, without need for bringing a motion to compel, should be grounds for an order excluding the evidence and/or issuance of appropriate jury instructions against the non-producing party. Motions to compel would then be reserved for situations where there is truly a need for the requested information as opposed to being brought to prevent being sand-bagged at trial. Parties failing to provide discovery responses would run the risk of their claims or defenses being dismissed or limited for their failure to provide the requested information. We need to establish a culture of "disclose it or lose it" as opposed to "make them fight for it."

For example, assume A requests B to "state all facts" supporting B's negligence cause of action, to "identify all witnesses," and to "identify all documents or other tangible things" supporting B's negligence claim. B serves boiler-plate objections, states no facts, identifies no witnesses, and identifies no documents in response to A's requests, and further asserts that the only information relevant to the subject matter of A's requests is "privileged."

A should not be required to move to compel B to provide substantive responses before the pre-trial discovery motion cut off to trigger Code of Civil Procedure section 2023's and 2030's evidentiary and issue sanctions before trial. A should be able to make a trial motion in limine to seeking evidentiary/issue exclusion irrespective of the discovery law and motion cut off since discovery is supposed to be self-executing.

Many lawyers faced with the choice of "disclose it or lose it" would tend to error on the side of disclosure, saving the court and clients thousands of dollars. Put another way, the burden should [and is supposed to be] on the non-disclosing party to justify the objection. This policy may be furthered by requiring the non-disclosing party to provide answers to prior discovery requests 30 days before the initial trial date to prevent being sanctioned by a motion in limine seeking to prevent evidence of the requested but non-disclosed information, and imposing a "good cause" requirement for prior non-production to reduce gamesmanship.

….

Thank you for taking the time to consider the above. I cannot tell you how many pre-trial battles I've been involved that could have been eliminated with just a little more clarity in our Discovery Act.

Sincerely,

John Armstrong

_____

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Re Requests for Admissions

I agree with proposal to shorten the motion time for motions for UD actions. However, I suggest the change be made in the Discovery Act section rather than the UD section. Other unique UD discovery provisions are contained in the Discovery Act and the CRC provisions on discovery. As a minor point, I am advised by UD lawyers in the SF Bary area that an OST is not routinely granted to make such motions which adds to the importance of the change.

The time for making the motion should not be tied to the answer. This is generally not a requirement under current law and could add unnecessary delay. The same simple clause for timing of UD motions could be added to each of the motion sections for admissions

I agree with the LRC staff that no change should be made at this time with regard to the interrogatory 17.1 that often accompanies requests for admissions but suggest that further consideration be given to the proposal. Any change should apply to requests for admissions generally since the same arguments, needs and justifications apply.

The current requests for admissions provisions have a long history that basically involves the legislature enacting and the courts finding some inequity hardship that cries out for relief. In essence, admissions were "overlooked", matters deemed admitted and summary judgments granted based on the admissions. The prohibition on combining the two devices was to avoid someone overlooking the admissions. That problem would not occur if a requirement to provide reasons, facts, witnesses, and documents were added to the section that allows someone to deny a requested fact. Such a provision might encourage admissions unless there were a good faith denial based on some facts.

One technical though sometimes used ploy is to respond to interrogatories such as form interrogatory 17.1 before the response to request for admissions is due. At that point a person could and sometimes does respond that the interrogatory is inapplicable since there is no response to the request. Changing the rule would eliminate that tactic.

One common abuse of combining requests with 17.1 is to use the device to track allegation in the complaint and obtain an additional minimum of 35, 3 part, contention interrogatories. Often multiple parties are represented by one lawyer who takes the position that the limit of 35, as literally stated in the code, applies to each of the parties and will multiply those contention interrogatories by the number represented.

Another issue in 2033(c) is what constitutes "substantial compliance"

I will briefly state that I do not believe a court would have discretion to deem matters admitted under subpart (c) if there were the requisite substantial compliance. At that point there would be full compliance with the law and full compensation for the efforts to obtain the proper response. The intent

of the current version was to add this extra safeguard for responding parties and to fully protect the other side by requiring reimbursement.

Richard E. Best