



Motion to compel, or motion to compel further?

HOW TO DETERMINE WHETHER A MOTION TO COMPEL DISCOVERY RESPONSES OR A MOTION TO COMPEL FURTHER RESPONSES IS THE PROPER MOTION BASED ON THE CIRCUMSTANCES

The law providing a basis for a motion to compel regarding written discovery requests that have been rightfully propounded but not responded to within the 35-day deadline to respond is as follows:

Pursuant to Code of Civil Procedure, sections 2030.290 (interrogatories), 2031.300 (demand for production), 2033.290 (requests for admission), if Defendant fails to serve timely responses to discovery propounded by Plaintiff (30 days + five days if requests were mailed), (b) Plaintiff may move for an order compelling responses to the discovery propounded.

The court shall award (d) sanctions to the prevailing party unless it finds that the one subject to sanctions acted with substantial justification or other circumstances that would make imposition of sanctions unjust.

There is no meet and confer requirement for filing a motion to compel discovery responses.

Motion to compel further discovery responses

Where responses have been provided to propounded discovery requests, but those responses are deemed insufficient, the following law provides a basis for a motion to compel further responses:

Pursuant to Code of Civil Procedure, sections 2030.300 (interrogatories) 2031.310 (demands for production), 2033.290 (requests for admission), (a) upon receipt of Defendant's verified discovery responses, Plaintiff may move for an order compelling further discovery responses if the responses (1) are evasive/incomplete; (2) documents produced pursuant to Code of Civil Procedure, section 2030.230 is unwarranted/inadequate; or (3) objection is without merit/too general.

If Plaintiff files the forgoing motion, (b) it must be accompanied by a *meet and*

confer declaration pursuant to Code of Civil Procedure, section 2016.040, which provides that facts shall be stated which show a reasonable and good faith attempt at an informal resolution.

Notice of said motion (c) must be served within 45 days of the service of the verified response (five extra days if mailed pursuant to C.C.P. § 1013) or by a specific date agreed upon in writing by both parties; else the right to bring the motion is waived.

The court shall (d) award sanctions to the prevailing party, unless it finds that the one subject to sanctions acted with *substantial justification* or other circumstances that would make imposition of sanctions unjust.

Notably, for a motion to compel further discovery responses, there is a strict 45-day deadline to serve notice of motion to compel further discovery responses; as well as a strict meet and confer requirement prior to filing of the motion.

Relevance of verifications – *Appleton v. Superior Court* (1988), 206 Cal.App.3d 632

In *Appleton*, Plaintiff propounded discovery on Defendant. Defendant served (1) objections to the discovery; (2) without substantive answers; and (3) without a verification to the response.

Generally, the Court held that a motion to compel *further* discovery responses is the proper motion to be brought when the Defendant *serves incomplete verified responses*. However, where the Defendant *serves responses*, but those responses were *unverified*, then a motion to compel discovery responses is the proper motion because unverified responses are "tantamount to no responses at all" as set forth by the court in *Appleton*.

Ambiguous scenarios – clarified

Pursuant to Code of Civil Procedure, section 2030.250, *objections to discovery are*

distinct from responses to discovery. If a discovery response includes an objection, the responding party's attorney must sign the response due to the presence of the objection. Similarly, if a response is composed solely of objections, only the responding party's attorney is required to sign it. Inversely, if substantive responses are provided on behalf of the responding party, then those responses must be signed under oath regardless of whether objections are present.

As a point of clarification, *if objections, without substantive discovery responses*, are served by Defense counsel in response to Discovery propounded by Plaintiff, then, although Defense counsel has preserved their objections to discovery, *technically no responses were provided to discovery, and a motion to compel Defendant's discovery responses should be the correct motion to file* (not a motion to compel Defendant's Further Discovery Responses).

However, this is a draconian point of law, and some judges may or may not agree. Adding to the confusion, the code sections providing for when a motion to compel further discovery responses may be brought, include the scenario where: "An objection to [a discovery request] is without merit or too general." (Code Civ. Proc., §§ 2030.300(c) (Interrogatories); 2031.310(c) (Inspection Demands); 2033.290(c) (Requests for Admission).) Therefore, it could also be argued that when a party serves only objections to propounded discovery, without substantive verified responses, then a motion to compel further discovery responses would be proper (creating the duty to meet and confer and serve notice of motion to compel further discovery responses within 45 days from the date that the discovery responses were served).

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On the other hand, *if objections, as well as unverified substantive discovery responses* are served by Defense counsel in response to Discovery propounded by Plaintiff, then a motion to compel Defendant's discovery responses should be the proper motion to file because per *Appleton*, *an unverified or unsworn response is tantamount to no response at all*. Again, due to the draconian distinction that *Appleton* created, a Judge may or may not agree that a motion to compel is the appropriate motion where some form of a response or objection was provided.

Therefore, to avoid the risk of allowing the stringent 45-day deadline to serve notice of motion to compel further discovery responses elapse, it is advised

that the procedure for filing a motion to compel further discovery is followed, which includes meeting and conferring to the fullest extent prior to serving notice of motion.

Inversely, if Defense counsel served Defendant's *verified discovery responses, with or without objections*, to Discovery propounded by Plaintiff, but Defendant's substantive responses are deemed incomplete or insufficient by Plaintiff, then the proper motion to file *would clearly be a motion to compel further Discovery responses*.

Conclusion

To avoid the Judge denying the motion to compel on procedural

grounds, if any form of response, including just objections, or unverified responses, are served; to avoid inadvertently allowing the statutory deadline to file a motion to compel further discovery responses to elapse, one should meet and confer and serve notice of motion to compel within the 45-day deadline to preserve the right to the discovery.

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