



Informal Discovery Conferences

AN EFFECTIVE AND EFFICIENT WAY TO RESOLVE MOST DISCOVERY DISPUTES

Few motions strike more fear (or at least boredom) into the hearts of attorneys than the dreaded Motion to Compel Further Responses to Discovery. These motions, brought under California Code of Civil Procedure (CCP) sections 2025.480, 2030.300, 2031.310, 2032.250, 2033.080 or 2033.290 are enormously time-consuming, technical and costly.

CCP section 2016.040 requires extensive “reasonable and good faith” attempts to meet and confer before filing such motions (usually involving multi-page “meet and confer letters” to which extensive responses must be prepared). If those efforts prove unavailing, the statutes require the preparation of seemingly endless, repetitive charts,

declarations and memoranda of points and authorities, with individual, sometimes almost identical, motions required for each discovery request, and require a filing fee for each such motion. Given the crowded calendars of our courts, the pendency of motions to compel further can stall discovery and settlement

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discussions, and the final result can be unsatisfying to both sides.

In an effort to address these problems, the Superior Courts have for years used Informal Discovery Conferences (IDCs) as a way to avoid the filing of motions to compel further discovery. Until January 1, 2018, however, the parties and the Courts lacked an established procedure for ordering IDCs and for extending deadlines for filing such motions.

For example, at times, parties would meet and confer in good faith in an attempt to resolve a discovery issue, but would be unable to reach a resolution by themselves. If the deadline for filing a motion to compel was approaching but the opposing party's lawyer was unavailable to grant an extension of time to file pending an IDC or refused to do so for strategic reasons, the moving party would often be compelled to file the motion to preserve the party's rights. Further, a party was not required to extend the statutory time to file such a motion while an IDC was being scheduled and held.

This situation eliminated much of the benefit of the IDC, since the motion and its attendant costs had already been incurred and the hearing time taken on the Court's calendar. This situation also could result in an unwarranted solidification of the moving party's position that was not conducive to settlement of the issues at the IDC.

In addition, before January 1, it was unclear whether a Court could compel a litigant to set or attend an IDC as a prerequisite to the filing of a motion to compel further. Therefore, no consequences other than a possible increase in sanctions awarded on the motion resulted from a party's failure to appear at a scheduled IDC.

A.B. 383 provides framework for the IDC

This situation changed when last year Governor Jerry Brown signed into law A.B. 383, sponsored by Assemblymember Ed Chau (D-Monterey Park) and based upon a proposal presented by the Women Lawyers

Association of Los Angeles through the Conference of California Bar Associations. This bill added Section 2016.080 to the CCP, providing that a court may conduct an IDC either upon request of a party or on its own motion "for the purpose of discussing discovery disputes between the parties." (Code Civ. Proc., § 2016.080(a).) This new law provides the possibility of the court giving protection against the deadlines for filing motions to compel further by allowing the court to "toll the deadline for filing a discovery motion or make any other appropriate discovery order." (Code Civ. Proc., § 2016.080(c)(2).) In my courtroom, the rules for IDCs posted on the court's website provide that the scheduling of an IDC automatically extends the deadline to file a motion to compel further by two weeks from the date of the IDC, as contemplated by that subsection.

The statute allows but does not mandate courts to conduct IDCs. (Code Civ. Proc., § 2016.080(a).) Attorneys should check the webpage for the department to which your case is assigned and, if that does not provide specific instructions on how to set up an IDC, contact the judicial assistant to inquire whether the judge does conduct IDCs and, if so, how they are scheduled. Section 2016.080 provides deadlines for the setting of IDCs by the Court, so that parties are not kept in limbo because of the Court's busy calendar.

Scheduling of IDC

In the Los Angeles Superior Court, IDCs are scheduled on the Court Reservation System (CRS). In my courtroom, attorneys are instructed that they may contact my judicial assistant if they cannot set an IDC on CRS, and he will try to accommodate the parties at an available time. Attorneys should work together to find some agreeable dates before going to CRS or contacting the judicial assistant. Because my courtroom instructions require that an IDC be held before a motion to compel further is filed, and further provide the automatic extension of the deadline to file such motions contemplated by CCP Section

2016.080(c)(2), we will always find a time to hold an IDC, even if it is before or after regular courtroom hours. In the long run, I find that such flexibility results in the resolution in most if not all motions to compel further and other discovery motions.

As a caveat, attorneys should be aware that each judge handles (or doesn't handle) IDCs in a different way. Moreover, judges generally do not conduct IDCs where there are self-represented litigants or where no response at all has been received to a discovery request (motions to compel). In cases where the attorneys are having difficulty agreeing on a discovery schedule, I am happy to attempt to resolve such issues at an IDC, provided that everyone has brought their calendars and those of the proposed witnesses to the session. In my courtroom, it is mandatory that the attorneys attending an IDC come prepared with authority to resolve all pending discovery issues. It is a waste of everyone's time to send an attorney with no authority or, worse yet, no knowledge of the case at all, to an IDC, and doing so certainly will not endear you to the judge.

A party seeking an IDC is required to file a CCP Section 2016.040 declaration, describing previous meet and confer efforts. (Code Civ. Proc., 2016.080 (b).) I also encourage attorneys to continue meet and confer efforts even after such declarations have been filed.

Brevity needed on required form

The Los Angeles Superior Court has a form, LACIV094, which each party to a discovery dispute must complete and file. This form is available on the Court's website and requests from each party a *brief* description of the nature of the discovery dispute from that party's point of view. In too many cases, the limited space available on this form to describe the dispute is used to detail the recalcitrance of the other party rather than the nature of the dispute and why the discovery should be ordered or not ordered. Try to create categories for the requested information so that more than one item can be discussed at the same time.

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The limited space on the form should give a simple explanation of the case, stating only the facts that are relevant to the current discovery dispute. Next, the categories of discovery sought (e.g., telephone records) and the reasons why that information is discoverable or is not discoverable should be stated. It is unnecessary to set out either the general statutes or cases stating general rules on the scope of discovery. If there are specific cases and/or statutes relating to the discoverability of the specific information sought, however, those should be cited if they are not standard areas of inquiry. In addition, if there is a specific, unusual factual issue in the case that causes particular information to be discoverable or not, counsel should cite to it and be prepared to discuss it with the judge at the IDC.

Meeting in person

I find that face-to-face meetings at the courthouse while the attorneys are waiting for the IDC to begin – often the first the attorneys have held – can be very productive, and sometimes result in the entire matter being resolved before the IDC even begins! For that reason, I encourage pre-IDC meet and confer sessions to be held in person, if possible. Those long meet and confer letters, besides being time-consuming and expensive, can be polarizing and counter-productive on issues that might be capable of being resolved in the course of a conversation or meeting. We do ask that if the issue for which an IDC has been scheduled with the Court is resolved before the IDC is held, you contact the Court as soon as possible to so inform us, so that we do not prepare unnecessarily. Even if the matter is resolved in the hallway after we have completed our preparation, however, we are happy to hear that the IDC is no longer necessary, which leaves us with additional time to go on with our other Court work.

During the conference

As to the scope of IDCs, I encourage the parties to bring all pending discovery disputes before me at the IDC. Although

Motions to Quash, Motions for Protective Orders, Motions to Compel Depositions and Motions for Physical Examinations are not included in the statute so we cannot order that they be the subject of IDCs, I encourage parties to agree that they will be discussed at the same time as they are also more easily resolved thereby. Upon agreement of the parties, we can also discuss general discovery scheduling issues, to prevent future disputes from arising. Of course, these are my rules alone, and counsel should check with the individual department to determine whether the judge prefers to limit discussions at IDCs to specific motions to compel further.

Before the IDC, I will have reviewed the IDC form and the general state of motions, activity and proximity to trial in the case, although this depends upon my time availability. In the IDC, counsel may discuss any additional facts or circumstances that relate to the admissibility of the information sought. Again, counsel should guard against using the limited time available to launch into a diatribe against other counsel, as the purpose of the IDC is not to punish the party either seeking or refusing to provide discovery. I will steer such discussions immediately back to the basic issues of the discoverability of the information and the issues involved – i.e., why does the party seeking discovery need this and why does the opposing party believe it is not discoverable. Counsel should be prepared to discuss these issues in detail.

The purpose of the IDC is to provide an informal forum for the parties to inform and discuss with the judge outstanding discovery issues and for the judge to express her or his views on those issues. Judges have usually seen just about every combination and permutation of these discovery issues in the past, and have a general idea of how they will rule on a particular issue. That inclination may, of course, change depending upon the facts of a particular case. One area that is not generally helpful to a judge is information on how some other judge, either down the hall or in another state, has ruled on a similar issue in an unrelated case. Unless it is a reported

decision, and even then only if it is controlling on that court, it will probably have minimal if any influence on the judge's position. I have on occasion expressed to the parties that the issue involved is so unusual that briefing would be useful to the Court and set a briefing and hearing schedule.

After hearing the facts and argument of the attorneys at the IDC, judges will give their indication of how they would likely rule upon the motion, if brought. Often, judges will tell the attorneys that while it is possible that they could be persuaded to a different result by formal briefing, based upon past experience and the facts as they have been presented, it is not likely that on this particular issue they would do so.

Some judges then leave it to the attorneys either to reach agreement or to file a motion and proceed to the usual briefing of the issues, and the Court will take no further action on the IDC. The option of filing a motion to compel further after an IDC, regardless of the Court's indication at the IDC of its inclination on the issue, is expressly authorized by CCP Section 2016.080(e), which provides: "The outcome of an informal discovery conference does not bar a party from filing a discovery motion or prejudice the disposition of a discovery motion." In that case, the Court will review the papers and listen to oral argument at the hearing and reach its conclusion de novo. Attorneys should, however, listen carefully to the inclination stated by the judge, as it has generally been honed by years of practice and judicial experience.

Compromise can avoid a motion to compel further

My personal practice is after discussion by the attorneys and my expression of how I would likely rule on such a motion to compel further or other discovery issue, to ask if the parties can agree to a resolution of the issue(s). Often, this is a compromise of the parties' positions based upon a calculation of what is actually needed and what can actually be produced. If they are in

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agreement as to this solution, I ask the parties if they will agree to my issuing an order on the issues presented. If the parties do not so agree, then they may proceed to act voluntarily according to this resolution or to make a motion to compel further.

If they are agreeable to my issuing an order, I inquire as to workable deadlines and I fashion an order, which usually begins: "Following an Informal Discovery Conference attended by the parties, the parties agreed to the issuance of the following order:" I then set out exactly what has been agreed to by the parties, together with dates by which the agreed-upon actions will be taken. This gives the parties set deadlines and tasks to complete, thus providing both certainty and an order to enforce if necessary. I find that without such an order, the parties occasionally disagree about what they had agreed upon at the IDC, thus leading to even more discovery disputes to resolve.

I personally enjoy the unique opportunity which an IDC presents to sit down informally with counsel and discuss the issues off the record. On occasion, the question of settlement or trial preparation arises, and counsel and I are able to discuss whether there is anything the Court can do to assist in the resolution or scheduling of the case. It is also a good opportunity to just chat with counsel and get to know them and their case better outside of the courtroom.

Judges extoll benefits of IDCs

Those of my colleagues who conduct IDCs are also enthusiastic about their potential for streamlining discovery disputes and freeing up both attorney and court time for other matters. In two recent Daily Journal articles (quoted with permission of the Daily Journal and the quoted individuals), my colleagues, Judge Howard Halm and Judge Teresa Beaudet, praised the process. In a profile authored by staff writer Arin Mikailian (April 12, 2018), Judge Halm recalled that "[o]f the hundreds [of IDCs] he's held since [he moved to an independent civil calendar courtroom in the Stanley Mosk Courthouse two years ago]....he can confidently recall only three that ended with a motion being made. 'That's hundreds of hours saved that I can devote to other things, getting ready for trial and other matters.... I think it's a very effective tool in reducing the amount of work that the judge has to do and the courts have to deal with.'"

As reported in Mikailian's April 23, 2018 profile in the Daily Journal, Judge Beaudet expressed her belief that IDCs "play a role in curbing potential objections." The article also discussed ways in which Judge Beaudet believed IDCs can result in creative ways of handling discovery issues. For example, "[Judge] Beaudet said suggesting phases [for discovery] is a popular solution when tasked with ironing out potential objections in an informal discovery conference.

Sole practitioner Marlene Thomason is a fan of the judge's conferences because they've helped level the playing field in a matter with multiple lawyers on the other side. 'One way a sole practitioner can get overwhelmed is by answering all discovery motions that large law firms might like to pursue on a case,' Thompson said."

At an IDC, judges can suggest numerous ways in which discovery can be simplified so as to provide all necessary information to the requesting party in a timely manner while minimizing time-consuming and duplicative efforts by the responding party. Judges also try to ensure that discovery is completed in the most efficient manner so as to accommodate existing motion and trial dates.

In the two-plus years that I have been conducting IDCs, I have found them an extremely useful tool in making the litigation process as cost-effective as possible. With the goal of allowing attorneys to prepare for either settlement, resolution or trial by helping them to obtain the information they need, the IDC can assist all parties in conducting discovery while reducing the workload of the courts.

Holly J. Fujie is a judge on the Superior Court of Los Angeles County in California. She was appointed by Governor Jerry Brown in December 2011. She was elected in 2014 for a term that expires in Jan. 2021. ☐