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# OOPS!!! NOW WHAT DO I DO?

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You are a good lawyer. You run an efficient law office with the most current calendaring software. You have a secretary that always brings to your attention all-important deadlines. Yet, there are those times when something slips through the cracks and you have to pull the rabbit out of the hat. Unfortunately, the Discovery Act is full of pesky little deadlines and traps for the unwary. However, there are many ways to pull that rabbit out of the hat when it comes to the Discovery Act.

***Scenario #1:** You are a solo practitioner and you have been in trial in a neighboring county for the last three weeks. You thought you had advised everyone that you were going to be unavailable during the time you were in trial. However, what shows up in your stack of mail, but a motion to compel responses to discovery. The motion states (1) that the time to respond has passed and no responses have been provided, (2) you never asked for an extension and (3) the court should grant the motion ordering you to respond and that all your objections including claims of privilege are waived. What do you do?*

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Lets go back to what you should have done prior to your three-week trial. You should have contacted opposing counsel and requested an extension of time to respond to the discovery. Once the extension is obtained then the extension must “be confirmed in a writing that specifies the extended date for service of a response.” See C.C.P. Sections 2030(i), 2031(j), and 2033(I).

However, assuming that you did not obtain such an extension and/or that you did not confirm it in writing your only option is to immediately file a noticed motion seeking relief from waiver pursuant to C.C.P. Section 2030(k), 2031(l) and 2033(k). Just filling an opposition to the motion will not reinstate your ability to object and claim your privileges. Also, the motion **must not** rely on C.C.P. Section 473<sup>1</sup>. The motion must show that the discovery responses (with objections and claims of privilege) have been served and are in substantial compliance and must contain a declaration from counsel that the party’s failure to serve timely responses resulted from “mistake, inadvertence or excusable neglect.” C.C.P. Section 2030(k), 2031(l) and 2033(k). Because the judge has broad discretion, it would behoove you to stick in the declaration each time you advised opposing counsel that you were going to be in trial during the relevant time period as well as the fact that if opposing counsel had contacted your office prior to filing the motion, he would have learned of your trial. See *Mannino*

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<sup>1</sup>Because the Discovery Act contains specific relief for delayed responses, relief cannot be obtained under C.C.P. Section 473(b). See Weil and Brown *Civil Procedure Before Trial* Section 8:1038. et seq. Citing *Zellerino v. Brown* (1991) 235 Cal. App. 3d 1097, 1107. However, when there is no analogous Discovery Act Provision, relief may be obtained under C.C.P. Section 473(b). The broad language of Section 473(b) “judgement order or other proceeding” includes discovery proceedings. *Zellerino v. Brown* supra, 235 Cal. App. 3d at 1105.



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v. *Superior Court* (1983) 142 CA3d 776.

**Scenario #2:** *You served your special interrogatories and requests for production of documents. Surprisingly, the responses you receive back is full of objections and no information. You write opposing counsel a nice, cordial meet and confer letter, listing each interrogatory and your reasons why they should be responded free of objections. Thirty days goes by and you haven't heard from opposing counsel. You then instruct your young associate to file a motion compel further responses. The motion is filed and served. Twenty days later you get the tentative ruling-- "Motion Denied. No CRC 335 statement." What do you do?*

You are in a real dilemma now. CRC 335(a) states that "(a)ny motion involving the content of a discovery request or the responses to such a request shall be accompanied by a separate statement." You could argue that the meet and confer letter complies with CRC 335(c) but don't hold your breath. After 15 years of the Discovery Act the judges, research staff and the discovery referee's have come to appreciate the usefulness of the CRC 335 statement. In fact it is even more appreciated when the opposition adds to the moving party's CRC 335 statement with a following paragraph titled "Why Further Responses Should Not Be Compelled."

Time has also run out to re-file the motion. A motion to compel further response must be brought within 45 days of the service of the response. See C.C.P. Section 2030(l), 2031(m) and 2033(l). This 45-day rule is jurisdictional. *SEE: Vidal Sassoon v. Superior Court* (1983) 147 Cal. app. 3d 681; *Sexton v. Superior Court* (1997) 58 Cal. App. 4th 1403. According to these cases the court cannot give you any relief on this drop dead date. However, Weil and Brown Civil Procedure Before Trial Section

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8:1150 suggests that you may be able to obtain under relief C.C.P. Section 473(b) which authorizes relief generally from “any judgment, order or other proceeding” on a showing of “mistake, inadvertence, surprise or excusable neglect.” Though there is no case law on whether or not a C.C.P. Section 473(b) is applicable in this situation, it has been the authors experience that judges are more likely to follow the *Vidal Sassoon* case and find that the 45-day rule is jurisdictional.

A long shot is that you could ask for additional time to serve the CRC 335 statement and make the argument that the motion, though not complete, was filed and served within the 45-day time period. Sometimes this works.

If everything fails, then the answer is another day, another discovery device. In the above scenario, in order to obtain the information and documents that the interrogatories and request for production of documents were attempting to ferret out you could serve any of the following discovery devices and pretty much get the same result:

- A. Deposition Notice with Document Request
- B. Corporate Deposition Notice with Document Request
- C. Third-party subpoena deposition and/or documents; and/or
- D. Requests for Admissions coupled with Form Interrogatory 17.1 and a Request for Production of documents seeking all documents listed in their answer to 17.1(d).

***Scenario #3:***     *You are involved in a hotly litigated case where there are numerous discovery battles. Your opposing counsel has now served you with a motion to have his request for admissions be deemed*

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*admitted. The motion claims that you failed to timely serve “verified” responses. The motion further claims that you have waived all your objections and claims of privilege. Upon review of your file you find that you had in fact served your responses, but for some reason the verification was not attached. What should you do?*

First of all relax. Though it is true that where a verification is required, an unverified response is the equivalent of no response at all. SEE Weil and Brown, Civil Procedure Before Trial Section 8:1364.1. However, no verification is required to preserve objections, even if the response contains both answers and objections. Weil and Brown, Civil Procedure Before Trial Section 8:1364.2 citing C.C.P. Section 2033(g).

Second, the motion can be defeated if you serve a proposed response . . . that is in “substantial compliance” prior to the hearing. C.C.P. Section 2033(k). No showing of “mistake, inadvertence or excusable neglect” is required. Weil and Brown, Civil Procedure Before Trial Section 8:1374.2 citing *Tobin v. Oris* (1992) 3 Cal. App. 4th 814, 828.

Finally, assuming that you have provided the verification and your initial responses were in “substantial compliance” the motion will be denied. However, you **will** be sanctioned. “Regardless of the reason or excuse for the delay or failure to respond, ‘(i)t is mandatory that the court impose a monetary sanction under Section 2023 on the party whose failure to serve a timely response to requests for admission necessitated this motion.’” SEE Weil and Brown Civil Procedure Before Trial Section 8:1376 citing C.C.P. Section 2033(k) citing *Appleton v. Superior Court (Cook)* (1988) 206 Cal. Appl. 3d 632 at 634.



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**Scenario #4:** *It is 60 days before trial and you are doing your pre-trial report to your client advising him of what you will be doing in preparation for trial when you realize that no one served a demand for exchange of experts pursuant to C.C.P. Section 2034(a).<sup>2</sup> What are your options?*

You actually have a lot of options here. The first option is that you can ignore the situation and just proceed to trial with the understanding that not only are you going to sandbag your opponent with your experts, he is going to be able to sandbag you. The one advantage to proceeding this way is that it will not give the opposition enough time to gather information to impeach your witness.

The second option is to serve the untimely demand and see how the parties in the case react to it. If any party wants to challenge the untimely demand they will need to file a protective order. A written objection will not be enough. See *Zellerino v. Brown* (1991) 235 Cal. App. 3d 1097, 1107. However, keep in mind that pursuant to *Zavala v. Board of Trustees* (1993) 16 Cal. App. 4th, 1755, at 1761, the court of appeal found that an untimely demand for expert witness disclosure is ineffective. The parties were free to call undisclosed experts as they would be if no disclosure demand was served at all.

The third option is to seek relief under C.C.P. Section 473(b). Because the Discovery Act does not address this scenario, relief from C.C.P.

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<sup>2</sup>C.C.P. Section 2034(b) contains a deadline for service of a demand for disclosure of expert witnesses: “A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.”



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473(b) is available. See *Zellerino v. Brown* (1991) 235 Cal. App. 3d 1097, 1107. Since the standard under C.C.P. Section 473(b) is “mistake, inadvertence, surprise or excusable neglect” the motion should be granted.

The final option is only available when the case is ultimately tried and there is a mistrial, an order granting a new trial or a reversal on appeal (as opposed to a postponement or continuance of trial). The new trial date will be deemed to be a setting of an “initial trial date” thus enabling you to serve a new demand for expert disclosure. See James Hogan, California Civil Discovery, Bancroft Whitney Section 10.2 citing *Guzman v. Superior Court*(1993) 19 Cal. App. 4th 705 and *Beverley Hospital v. Superior Court* (193) 19 Cal. App. 4th. 1289.