

## RESOLUTION 3-4-2002

### DIGEST

#### Discovery: Monetary Sanctions for Failure to Oppose a Discovery Motion

Amends Code of Civil Procedure sections 2017, 2019, 2024, 2025, 2028, 2030, 2031, 2032, 2033, and 2034 to clarify that the court shall award monetary sanctions for failure to oppose motions to compel answers or production brought under these sections.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### Reasons:

This resolution amends Code of Civil Procedure sections 2017, 2019, 2024, 2025, 2028, 2030, 2031, 2032, 2033, and 2034 to clarify that the court shall award monetary sanctions for failure to oppose motions to compel answers or production brought under these sections. This resolution should be disapproved because it is overbroad.

This resolution would require the court to award sanctions even in situations in which a moving party files a motion to compel discovery without going through proper meet and confer procedures, or without giving the producing party a reasonable time within which to respond to a meet and confer request. In these situations the producing party should be given the chance to produce the discovery without penalty if that party sees the motion and realizes for the first time that his or her objections lacked merit.

### TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure sections 2017, 2019, 2024, 2025, 2028, 2030, 2031, 2032, 2033, and 2034 to read as follows:

1 § 2017.

2 [Subdivisions (a) through (b) remain unchanged.]

3 (c) The court shall limit the scope of discovery if it determines that the burden, expense, or  
4 intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to  
5 the discovery of admissible evidence. The court may make this determination pursuant to a motion  
6 for protective order by a party or other affected person. This motion shall be accompanied by a  
7 declaration stating facts showing a good faith attempt at an informal resolution of each issue  
8 presented by the motion.

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

13 (d) In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or

14 sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals  
15 other than the alleged perpetrator is required to establish specific facts showing good cause for that  
16 discovery, and that the matter sought to be discovered is relevant to the subject matter of the action  
17 and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be  
18 made by noticed motion and shall not be made or considered by the court at an ex parte hearing.  
19 This motion shall be accompanied by a declaration stating facts showing a good faith attempt at an  
20 informal resolution of each issue presented by the motion.

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

25 [Subdivision (e) remains unchanged.]

26  
27 § 2019.

28 [Subdivision (a) remains unchanged.]

29 (b) The court shall restrict the frequency or extent of use of these discovery methods if it  
30 determines either of the following:

31 (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from  
32 some other source that is more convenient, less burdensome, or less expensive.

33 (2) The selected method of discovery is unduly burdensome or expensive, taking into  
34 account the needs of the case, the amount in controversy, and the importance of the issues at stake in  
35 the litigation.

36 The court may make these determinations pursuant to a motion for a protective order by a  
37 party or other affected person. This motion shall be accompanied by a declaration stating facts  
38 showing a good faith attempt at an informal resolution of each issue presented by the motion.

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

43 [Subdivisions (c) through (e) remain unchanged.]

44  
45 § 2024.

46 [Subdivisions (a) through (d) remain unchanged.]

47 (e) On motion of any party, the court may grant leave to complete discovery proceedings,  
48 or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery  
49 after a new trial date has been set. This motion shall be accompanied by a declaration stating facts  
50 showing a reasonable and good faith attempt at an informal resolution of each issue presented by the  
51 motion.

52 In exercising its discretion to grant or deny this motion, the court shall take into consideration any  
53 matter relevant to the leave requested, including, but not limited to, the following:

54 (1) The necessity and the reasons for the discovery.

55 (2) The diligence or lack of diligence of the party seeking the discovery or the hearing of a  
56 discovery motion, and the reasons that the discovery was not completed or that the discovery motion

57 was not heard earlier.

58 (3) Any likelihood that permitting the discovery or hearing the discovery motion will prevent  
59 the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in  
60 prejudice to any other party.

61 (4) The length of time that has elapsed between any date previously set, and the date  
62 presently set, for the trial of the action.

63 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
64 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to extend or to  
65 reopen discovery, unless it finds that the one subject to the sanction acted with substantial  
66 justification or that other circumstances make the imposition of the sanction unjust.

67 [Subdivisions (f) through (g) remain unchanged.]

68

69 §2025.

70 [Subdivisions (a) through (d) remain unchanged.]

71 (e) (1) The deposition of a natural person, whether or not a party to the action, shall be  
72 taken at a place that is, at the option of the party giving notice of the deposition, either within 75  
73 miles of the deponent's residence, or within the county where the action is pending and within 150  
74 miles of the deponent's residence, unless the court orders otherwise under paragraph (3).

75 (2) The deposition of an organization that is a party to the action shall be taken at a place  
76 that is, at the option of the party giving notice of the deposition, either within 75 miles of the  
77 organization's principal executive or business office in California, or within the county where the  
78 action is pending and within 150 miles of that office. The deposition of any other organization shall  
79 be taken within 75 miles of the organization's principal executive or business office in California,  
80 unless the organization consents to a more distant place. If the organization has not designated a  
81 principal executive or business office in California, the deposition shall be taken at a place that is, at  
82 the option of the party giving notice of the deposition, either within the county where the action is  
83 pending, or within 75 miles of any executive or business office in California of the organization.

84 (3) A party desiring to take the deposition of a natural person who is a party to the action or  
85 an officer, director, managing agent, or employee of a party may make a motion for an order that the  
86 deponent attend for deposition at a place that is more distant than that permitted under paragraph  
87 (1).

88 This motion shall be accompanied by a declaration stating facts showing a reasonable and  
89 good faith attempt at an informal resolution of any issue presented by the motion.

90 In exercising its discretion to grant or deny this motion, the court shall take into consideration  
91 any factor tending to show whether the interests of justice will be served by requiring the deponent's  
92 attendance at that more distant place, including, but not limited to, the following:

93 (A) Whether the moving party selected the forum.

94 (B) Whether the deponent will be present to testify at the trial of the action.

95 (C) The convenience of the deponent.

96 (D) The feasibility of conducting the deposition by written questions under Section 2028, or  
97 of using a discovery method other than a deposition.

98 (E) The number of depositions sought to be taken at a place more distant than that  
99 permitted under paragraph (1).

100 (F) The expense to the parties of requiring the deposition to be taken within the distance  
101 permitted under paragraph (1).

102 (G) The whereabouts of the deponent at the time for which the deposition is scheduled.  
103 The order may be conditioned on the advancement by the moving party of the reasonable  
104 expenses and costs to the deponent for travel to the place of deposition.

105 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
106 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to increase travel  
107 limits for party deponent, unless it finds that the one subject to the sanction acted with substantial  
108 justification or that other circumstances make the imposition of the sanction unjust.

109 [Subdivision (f) remains unchanged.]

110 (g) Any party served with a deposition notice that does not comply with subdivisions (b) to  
111 (f), inclusive, waives any error or irregularity unless that party promptly serves a written objection  
112 specifying that error or irregularity at least three calendar days prior to the date for which the  
113 deposition is scheduled, on the party seeking to take the deposition and any other attorney or party  
114 on whom the deposition notice was served. If an objection is made three calendar days before the  
115 deposition date, the objecting party shall make personal service of that objection pursuant to Section  
116 1011 on the party who gave notice of the deposition. Any deposition taken after the service of a  
117 written objection shall not be used against the objecting party under subdivision (u) if the party did  
118 not attend the deposition and if the court determines that the objection was a valid one.

119 In addition to serving this written objection, a party may also move for an order staying the  
120 taking of the deposition and quashing the deposition notice. This motion shall be accompanied by a  
121 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any  
122 issue presented by the motion. The taking of the deposition is stayed pending the determination of  
123 this motion.

124 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
125 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to quash a  
126 deposition notice, unless it finds that the one subject to the sanction acted with substantial justification  
127 or that other circumstances make the imposition of the sanction unjust.

128 [Subdivision (h) remains unchanged.]

129 (i) Before, during, or after a deposition, any party, any deponent, or any other affected  
130 natural person or organization may promptly move for a protective order. The motion shall be  
131 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an  
132 informal resolution of each issue presented by the motion.

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

137 (1) That the deposition not be taken at all.

138 (2) That the deposition be taken at a different time.

139 (3) That a videotape deposition of a treating or consulting physician or of any expert  
140 witness, intended for possible use at trial under paragraph (4) of subdivision (u), be postponed until  
141 the moving party has had an adequate opportunity to prepare, by discovery deposition of the  
142 deponent, or other means, for cross-examination.

143 (4) That the deposition be taken at a place other than that specified in the deposition notice,  
144 if it is within a distance permitted by subdivision (e).

145 (5) That the deposition be taken only on certain specified terms and conditions.

146 (6) That the deponent's testimony be taken by written, instead of oral, examination.

147 (7) That the method of discovery be interrogatories to a party instead of an oral deposition.

148 (8) That the testimony be recorded in a manner different from that specified in the deposition  
149 notice.

150 (9) That certain matters not be inquired into.

151 (10) That the scope of the examination be limited to certain matters.

152 (11) That all or certain of the writings or tangible things designated in the deposition notice  
153 not be produced, inspected, or copied.

154 (12) That designated persons, other than the parties to the action and their officers and  
155 counsel, be excluded from attending the deposition.

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

158 (14) That the parties simultaneously file specified documents enclosed in sealed envelopes to  
159 be opened as directed by the court.

160 (15) That the deposition be sealed and thereafter opened only on order of the court.  
161 If the motion for a protective order is denied in whole or in part, the court may order that the  
162 deponent provide or permit the discovery against which protection was sought on those terms and  
163 conditions that are just.

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

168 [Subdivisions (j) through (m) remain unchanged.]

169 (n) The deposition officer shall not suspend the taking of testimony without stipulation of the  
170 party conducting the deposition and the deponent unless any party attending the deposition or the  
171 deponent demands the taking of testimony be suspended to enable that party or deponent to move  
172 for a protective order on the ground that the examination is being conducted in bad faith or in a  
173 manner that unreasonably annoys, embarrasses, or oppresses that deponent or party. This motion  
174 shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at  
175 an informal resolution of each issue presented by the motion. The court, for good cause shown, may  
176 terminate the examination or may limit the scope and manner of taking the deposition as provided in  
177 subdivision (i). If the order terminates the examination, the deposition shall not thereafter be  
178 resumed, except on order of the court.

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

183 (o) If a deponent fails to answer any question or to produce any document or tangible thing  
184 under the deponent's control that is specified in the deposition notice or a deposition subpoena, the  
185 party seeking discovery may move the court for an order compelling that answer or production. This

186 motion shall be made no later than 60 days after the completion of the record of the deposition, and  
187 shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at  
188 an informal resolution of each issue presented by the motion. Notice of this motion shall be given to  
189 all parties, and to the deponent either orally at the examination, or by subsequent service in writing.  
190 If the notice of the motion is given orally, the deposition officer shall direct the deponent to attend a  
191 session of the court at the time specified in the notice.

192

193 Not less than five days prior to the hearing on this motion, the moving party shall lodge with the court  
194 a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the  
195 motion. If a deposition is recorded by audiotape or videotape, the moving party is required to lodge  
196 a certified copy of a transcript of any parts of the deposition that are relevant to the motion. If the  
197 court determines that the answer or production sought is subject to discovery, it shall order that the  
198 answer be given or the production be made on the resumption of the deposition.

199 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
200 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to compel answer  
201 or production, unless it finds that the one subject to the sanction acted with substantial justification or  
202 that other circumstances make the imposition of the sanction unjust.

203 If a deponent fails to obey an order entered under this subdivision, the failure may be  
204 considered a contempt of court. In addition, if the disobedient deponent is a party to the action or  
205 an officer, director, managing agent, or employee of a party, the court may make those orders that  
206 are just against the disobedient party, or against the party with whom the disobedient deponent is  
207 affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction  
208 under Section 2023. In lieu of, or in addition to, this sanction, the court may impose a monetary  
209 sanction under Section 2023 against that party deponent or against any party with whom the  
210 deponent is affiliated.

211 [Subdivision (p) remains unchanged.]

212 (q) (1) If the deposition testimony is stenographically recorded, the deposition officer shall  
213 send written notice to the deponent and to all parties attending the deposition when the original  
214 transcript of the testimony for each session of the deposition is available for reading, correcting, and  
215 signing, unless the deponent and the attending parties agree on the record that the reading,  
216 correcting, and signing of the transcript of the testimony will be waived or that the reading,  
217 correcting, and signing of a transcript of the testimony will take place after the entire deposition has  
218 been concluded or at some other specific time. For 30 days following each such notice, unless the  
219 attending parties and the deponent agree on the record or otherwise in writing to a longer or shorter  
220 time period, the deponent may change the form or the substance of the answer to a question, and  
221 may either approve the transcript of the deposition by signing it, or refuse to approve the transcript  
222 by not signing it.

223 Alternatively, within this same period, the deponent may change the form or the substance of  
224 the answer to any question and may approve or refuse to approve the transcript by means of a letter  
225 to the deposition officer signed by the deponent which is mailed by certified or registered mail with  
226 return receipt requested. A copy of that letter shall be sent by first-class mail to all parties attending  
227 the deposition. For good cause shown, the court may shorten the 30-day period for making  
228 changes, approving, or refusing to approve the transcript.

229 The deposition officer shall indicate on the original of the transcript, if the deponent has not  
230 already done so at the office of the deposition officer, any action taken by the deponent and indicate  
231 on the original of the transcript, the deponent's approval of, or failure or refusal to approve, the  
232 transcript. The deposition officer shall also notify in writing the parties attending the deposition of any  
233 changes which the deponent timely made in person. If the deponent fails or refuses to approve the  
234 transcript within the allotted period, the deposition shall be given the same effect as though it had  
235 been approved, subject to any changes timely made by the deponent. However, on a seasonable  
236 motion to suppress the deposition, accompanied by a declaration stating facts showing a reasonable  
237 and good faith attempt at an informal resolution of each issue presented by the motion, the court may  
238 determine that the reasons given for the failure or refusal to approve the transcript require rejection of  
239 the deposition in whole or in part.

240 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
241 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to suppress a  
242 deposition, unless it finds that the one subject to the sanction acted with substantial justification or  
243 that other circumstances make the imposition of the sanction unjust.

244 (2) If there is no stenographic transcription of the deposition, the deposition officer shall  
245 send written notice to the deponent and to all parties attending the deposition that the recording is  
246 available for review, unless the deponent and all these parties agree on the record to waive the  
247 hearing or viewing of an audiotape or videotape recording of the testimony. For 30 days following  
248 this notice the deponent, either in person or by signed letter to the deposition officer, may change the  
249 substance of the answer to any question.

250 The deposition officer shall set forth in a writing to accompany the recording any changes  
251 made by the deponent, as well as either the deponent's signature identifying the deposition as his or  
252 her own, or a statement of the deponent's failure to supply the signature, or to contact the officer  
253 within the allotted period. When a deponent fails to contact the officer within the allotted period, or  
254 expressly refuses by a signature to identify the deposition as his or her own, the deposition shall be  
255 given the same effect as though signed. However, on a reasonable motion to suppress the  
256 deposition, accompanied by a declaration stating facts showing a reasonable and good faith attempt  
257 at an informal resolution of each issue presented by the motion, the court may determine that the  
258 reasons given for the refusal to sign require rejection of the deposition in whole or in part.

259 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
260 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to suppress a  
261 deposition, unless it finds that the one subject to the sanction acted with substantial justification or  
262 that other circumstances make the imposition of the sanction unjust.

263 [Subdivisions (r) through (v) remain unchanged.]

264  
265 §2028.

266 [Subdivisions (a) through (c) remain unchanged.]

267 (d) (1) A party who objects to the form of any question shall serve a specific objection to  
268 that question on all parties entitled to notice of the deposition within 15 days after service of the  
269 question. A party who fails to timely serve an objection to the form of a question waives it. The  
270 objecting party shall promptly move the court to sustain the objection. This motion shall be  
271 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an

272 informal resolution of each issue presented by the objection and motion. Unless the court has  
273 sustained that objection, the deposition officer shall propound to the deponent that question subject  
274 to that objection as to its form.

275 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
276 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to sustain an  
277 objection, unless it finds that the one subject to the sanction acted with substantial justification or that  
278 other circumstances make the imposition of the sanction unjust.

279 (2) A party who objects to any question on the ground that it calls for information that is  
280 privileged or is protected work product under Section 2018 shall serve a specific objection to that  
281 question on all parties entitled to notice of the deposition within 15 days after service of the question.  
282 A party who fails to timely serve that objection waives it. The party propounding any question to  
283 which an objection is made on those grounds may then move the court for an order overruling that  
284 objection. This motion shall be accompanied by a declaration stating facts constituting a reasonable  
285 and good faith attempt at an informal resolution of each issue presented by the objection and motion.  
286 The deposition officer shall not propound to the deponent any question to which a written objection  
287 on those grounds has been served unless the court has overruled that objection.

288 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
289 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to overrule an  
290 objection, unless it finds that the one subject to the sanction acted with substantial justification or that  
291 other circumstances make the imposition of the sanction unjust.

292 [Subdivisions (e) through (g) remain unchanged.]

293

294 §2030.

295 [Subdivisions (a) through (d) remain unchanged.]

296 (e) When interrogatories have been propounded, the responding party, and any other party  
297 or affected natural person or organization may promptly move for a protective order. This motion  
298 shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at  
299 an informal resolution of each issue presented by the motion.

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

304 (1) That the set of interrogatories, or particular interrogatories in the set, need not be  
305 answered.

306 (2) That, contrary to the representations made in a declaration submitted under paragraph  
307 (3) of subdivision (c), the number of specially prepared interrogatories is unwarranted.

308 (3) That the time specified in subdivision (h) to respond to the set of interrogatories, or to  
309 particular interrogatories in the set, be extended.

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

311 (5) That the method of discovery be an oral deposition instead of interrogatories to a party.

312 (6) That a trade secret or other confidential research, development, or commercial  
313 information not be disclosed or be disclosed only in a certain way.

314 (7) That some or all of the answers to interrogatories be sealed and thereafter opened only

315 on order of the court.

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

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

323 [Subdivisions (f) through (j) remain unchanged.]

324 (k) If a party to whom interrogatories have been directed fails to serve a timely response,  
325 that party waives any right to exercise the option to produce writings under subdivision (f), as well as  
326 any objection to the interrogatories, including one based on privilege or on the protection for work  
327 product under Section 2018. However, the court, on motion, may relieve that party from this waiver  
328 on its determination that (1) the party has subsequently served a response that is in substantial  
329 compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of  
330 mistake, inadvertence, or excusable neglect.

331 The party propounding the interrogatories may move for an order compelling response to the  
332 interrogatories. The court shall impose a monetary sanction under Section 2023 against any party,  
333 person, or attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to  
334 compel a response to interrogatories, unless it finds that the one subject to the sanction acted with  
335 substantial justification or that other circumstances make the imposition of the sanction unjust. If a  
336 party then fails to obey an order compelling answers, the court may make those orders that are just,  
337 including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under  
338 Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction  
339 under Section 2023.

340 (l) If the propounding party, on receipt of a response to interrogatories, deems that (1) an  
341 answer to a particular interrogatory is evasive or incomplete, (2) an exercise of the option to produce  
342 documents under paragraph (2) of subdivision (f) is unwarranted or the required specification of  
343 those documents is inadequate, or (3) an objection to an interrogatory is without merit or too  
344 general, that party may move for an order compelling a further response. This motion shall be  
345 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an  
346 informal resolution of each issue presented by the motion.

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

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

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

358 court may impose a monetary sanction under Section 2023.

359 (m) Without leave of court, a party may serve an amended answer to any interrogatory that  
360 contains information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial  
361 interrogatory. At the trial of the action, the propounding party or any other party may use the initial  
362 answer under subdivision (n), and the responding party may then use the amended answer.

363 The party who propounded an interrogatory to which an amended answer has been served  
364 may move for an order that the initial answer to that interrogatory be deemed binding on the  
365 responding party for the purpose of the pending action. This motion shall be accompanied by a  
366 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of  
367 each issue presented by the motion. The court shall grant this motion if it determines that (1) the  
368 initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced  
369 the party who propounded the interrogatory, (2) the responding party has failed to show substantial  
370 justification for the initial answer to that interrogatory, and (3) the prejudice to the propounding party  
371 cannot be cured either by a continuance to permit further discovery or by the use of the initial answer  
372 under subdivision (n).

373 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
374 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to deem binding  
375 an initial answer to an interrogatory, unless it finds that the one subject to the sanction acted with  
376 substantial justification or that other circumstances make the imposition of the sanction unjust.

377 [Subdivision (n) remains unchanged.]

378

379 §2031.

380 [Subdivisions (a) through (e) remain unchanged.]

381 (f) When an inspection of documents, tangible things or places has been demanded, the  
382 party to whom the demand has been directed, and any other party or affected person or  
383 organization, may promptly move for a protective order. This motion shall be accompanied by a  
384 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of  
385 each issue presented by the motion.

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

390

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

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

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

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

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

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

400 If the motion for a protective order is denied in whole or in part, the court may order that the

401 party to whom the demand was directed provide or permit the discovery against which protection  
402 was sought on terms and conditions that are just.

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

407 [Subdivisions (g) through (k) remain unchanged.]

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

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

423 (m) If the party demanding an inspection, on receipt of a response to an inspection demand,  
424 deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of  
425 inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is  
426 without merit or too general, that party may move for an order compelling further response to the  
427 demand. This motion (A) shall set forth specific facts showing good cause justifying the discovery  
428 sought by the inspection demand, and (B) shall be accompanied by a declaration stating facts  
429 showing a reasonable and good faith attempt at an informal resolution of any issue presented by it.

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

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

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

442 (n) If a party filing a response to a demand for inspection under subdivision (g) thereafter  
443 fails to permit the inspection in accordance with that party's statement of compliance, the party

444 demanding the inspection may move for an order compelling compliance.

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

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

453

454 §2032.

455 [Subdivisions (a) through (b) remain unchanged.]

456 (c) (1) As used in this subdivision, plaintiff includes a cross-complainant, and defendant  
457 includes a cross-defendant.

458 (2) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant  
459 may demand one physical examination of the plaintiff, provided the examination does not include any  
460 diagnostic test or procedure that is painful, protracted, or intrusive, and is conducted at a location  
461 within 75 miles of the residence of the examinee. A defendant may make this demand without leave  
462 of court after that defendant has been served or has appeared in the action, whichever occurs first.  
463 This demand shall specify the time, place, manner, conditions, scope, and nature of the examination,  
464 as well as the identity and the specialty, if any, of the physician who will perform the examination.

465 (3) A physical examination demanded under this subdivision shall be scheduled for a date  
466 that is at least 30 days after service of the demand for it unless on motion of the party demanding the  
467 examination the court has shortened this time.

468 (4) The defendant shall serve a copy of the demand for this physical examination on the  
469 plaintiff and on all other parties who have appeared in the action.

470 (5) The plaintiff to whom this demand for a physical examination has been directed shall  
471 respond to the demand by a written statement that the examinee will comply with the demand as  
472 stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons  
473 specified in the response, to submit to the demanded physical examination. Within 20 days after  
474 service of the demand the plaintiff to whom the demand is directed shall serve the original of the  
475 response to it on the defendant making the demand, and a copy of the response on all other parties  
476 who have appeared in the action, unless on motion of the defendant making the demand the court  
477 has shortened the time for response, or unless on motion of the plaintiff to whom the demand has  
478 been directed, the court has extended the time for response.

479 (6) If a plaintiff to whom this demand for a physical examination has been directed fails to  
480 serve a timely response to it, that plaintiff waives any objection to the demand. However, the court,  
481 on motion, may relieve that plaintiff from this waiver on its determination that (A) the plaintiff has  
482 subsequently served a response that is in substantial compliance with paragraph (5), and (B) the  
483 plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable  
484 neglect.

485 The defendant may move for an order compelling response and compliance with a demand  
486 for a physical examination. The court shall impose a monetary sanction under Section 2023 against

487 any party, person, or attorney who unsuccessfully makes or opposes, or fails to timely oppose, a  
488 motion to compel response and compliance with a demand for a physical examination, unless it finds  
489 that the one subject to the sanction acted with substantial justification or that other circumstances  
490 make the imposition of the sanction unjust.

491 If a plaintiff then fails to obey the order compelling response and compliance, the court may  
492 make those orders that are just, including the imposition of an issue sanction, an evidence sanction,  
493 or a terminating sanction under Section 2023. In lieu of or in addition to that sanction the court may  
494 impose a monetary sanction under Section 2023.

495 (7) If a defendant who has demanded a physical examination under this subdivision, on  
496 receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any  
497 refusal to submit to the physical examination is unwarranted, that defendant may move for an order  
498 compelling compliance with the demand. This motion shall be accompanied by a declaration stating  
499 facts showing a reasonable and good faith attempt at an informal resolution of each issue presented  
500 by the motion.

501 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
502 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to compel  
503 compliance with a demand for a physical examination, unless it finds that the one subject to the  
504 sanction acted with substantial justification or that other circumstances make the imposition of the  
505 sanction unjust.

506 (8) The demand for a physical examination and the response to it shall not be filed with the  
507 court. The defendant shall retain both the original of the demand, with the original proof of service  
508 affixed to it, and the original response until six months after final disposition of the action. At that  
509 time, the original may be destroyed, unless the court, on motion of any party and for good cause  
510 shown, orders that the originals be preserved for a longer period.

511 [Subdivisions (d) through (f) remain unchanged.]

512 (g) (1) The attorney for the examinee or for a party producing the examinee, or that  
513 attorney's representative, shall be permitted to attend and observe any physical examination  
514 conducted for discovery purposes, and to record stenographically or by audiotape any words  
515 spoken to or by the examinee during any phase of the examination. This observer may monitor the  
516 examination, but shall not participate in or disrupt it. If an attorney's representative is to serve as the  
517 observer, the representative shall be authorized to so act by a writing subscribed by the attorney  
518 which identifies the representative.

519 If in the judgment of the observer the examiner becomes abusive to the examinee or  
520 undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it  
521 to enable the party being examined or producing the examinee to make a motion for a protective  
522 order. If the observer begins to participate in or disrupt the examination, the person conducting the  
523 physical examination may suspend the examination to enable the party at whose instance it is being  
524 conducted to move for a protective order.

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

529 If the examinee submits or authorizes access to X-rays of any area of his or her body for

530 inspection by the examining physician, no additional X-rays of that area may be taken by the  
531 examining physician except with consent of the examinee or on order of the court for good cause  
532 shown.

533 (2) The examiner and examinee shall have the right to record a mental examination on audio  
534 tape. However, nothing in this article shall be construed to alter, amend, or affect existing case law  
535 with respect to the presence of the attorney for the examinee or other persons during the examination  
536 by agreement or court order.

537 (h) If a party submits to, or produces another for, a physical or mental examination in  
538 compliance with a demand under subdivision (c), an order of court under subdivision (d), or an  
539 agreement under subdivision (e), that party has the option of making a written demand that the party  
540 at whose instance the examination was made deliver to the demanding party (1) a copy of a detailed  
541 written report setting out the history, examinations, findings, including the results of all tests made,  
542 diagnoses, prognoses, and conclusions of the examiner, and (2) a copy of reports of all earlier  
543 examinations of the same condition of the examinee made by that or any other examiner. If this  
544 option is exercised, a copy of these reports shall be delivered within 30 days after service of the  
545 demand, or within 15 days of trial, whichever is earlier. The protection for work product under  
546 Section 2018 is waived, both for the examiner's writings and reports and to the taking of the  
547 examiner's testimony.

548 If the party at whose instance the examination was made fails to make a timely delivery of the  
549 reports demanded, the demanding party may move for an order compelling their delivery. This  
550 motion shall be accompanied by a declaration stating facts showing a reasonable and good faith  
551 attempt at an informal resolution of any issue presented by the motion.

552 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
553 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to compel  
554 delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial  
555 justification or that other circumstances make the imposition of the sanction unjust.

556 If a party then fails to obey an order compelling delivery of demanded medical reports, the  
557 court may make those orders that are just, including the imposition of an issue sanction, an evidence  
558 sanction, or a terminating sanction under Section 2023. In lieu of or in addition to those sanctions,  
559 the court may impose a monetary sanction under Section 2023. The court shall exclude at trial the  
560 testimony of any examiner whose report has not been provided by a party.

561 [Subdivision (i) remains unchanged.]

562 (j) A party receiving a demand for a report under subdivision (h) is entitled at the time of  
563 compliance to receive in exchange a copy of any existing written report of any examination of the  
564 same condition by any other physician, psychologist, or licensed health care practitioner. In addition,  
565 that party is entitled to receive promptly any later report of any previous or subsequent examination  
566 of the same condition, by any physician, psychologist, or licensed health care practitioner.

567 If a party who has demanded and received delivery of medical reports under subdivision (h)  
568 fails to deliver existing or later reports of previous or subsequent examinations, a party who has  
569 complied with subdivision (h) may move for an order compelling delivery of medical reports. This  
570 motion shall be accompanied by a declaration stating facts showing a reasonable and good faith  
571 attempt at an informal resolution of each issue presented by the motion.

572 The court shall impose a monetary sanction under Section 2023 against any party, person, or

573 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to compel  
574 delivery of medical reports, unless it finds that the one subject to the sanction acted with substantial  
575 justification or that other circumstances make the imposition of the sanction unjust.

576 If a party then fails to obey an order compelling delivery of medical reports, the court may  
577 make those orders that are just, including the imposition of an issue sanction, an evidence sanction,  
578 or a terminating sanction under Section 2023. In lieu of or in addition to the sanction, the court may  
579 impose a monetary sanction under Section 2023. The court shall exclude at trial the testimony of any  
580 health care practitioner whose report has not been provided by a party ordered to do so by the  
581 court.

582 [Subdivision (k) remains unchanged.]

583

584 §2033.

585 [Subdivisions (a) through (d) remain unchanged.]

586 (e) When requests for admission have been made, the responding party may promptly move  
587 for a protective order. This motion shall be accompanied by a declaration stating facts showing a  
588 reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

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

592 (1) That the set of admission requests, or particular requests in the set, need not be  
593 answered at all.

594 (2) That, contrary to the representations made in a declaration submitted under paragraph  
595 (3) of subdivision (c), the number of admission requests is unwarranted.

596 (3) That the time specified in subdivision (h) to respond to the set of admission requests, or  
597 to particular requests in the set, be extended.

598 (4) That a trade secret or other confidential research, development, or commercial  
599 information not be admitted or be admitted only in a certain way.

600 (5) That some or all of the answers to requests for admission be sealed and thereafter  
601 opened only on order of the court.

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

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

609 [Subdivisions (f) through (k) remain unchanged.]

610 (1) If the party requesting admissions, on receipt of a response to the requests, deems that  
611 (1) an answer to a particular request is evasive or incomplete, or (2) an objection to a particular  
612 request is without merit or too general, that party may move for an order compelling a further  
613 response. The motion shall be accompanied by a declaration stating facts showing a reasonable and  
614 good faith attempt at an informal resolution of each issue presented by the motion.

615 Unless notice of this motion is given within 45 days of the service of the response, or any

616 supplemental response, or any specific later date to which the requesting party and the responding  
617 party have agreed in writing, the requesting party waives any right to compel further response to the  
618 requests for admission.

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

623 If a party then fails to obey an order compelling further response to requests for admission,  
624 the court may order that the matters involved in the requests be deemed admitted. In lieu of or in  
625 addition to this order, the court may impose a monetary sanction under Section 2023.

626 [Subdivisions (m) through (o) remain unchanged.]

627

628 §2034.

629 [Subdivisions (a) through (d) remain unchanged.]

630 (e) A party who has been served with a demand to exchange information concerning expert  
631 trial witnesses may promptly move for a protective order. This motion shall be accompanied by a  
632 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of  
633 each issue presented by the motion.

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

637 (1) That the demand be quashed because it was not timely served.

638 (2) That the date of exchange be earlier or later than that specified in the demand.

639 (3) That the exchange be made only on specified terms and conditions.

640 (4) That the production and exchange of any reports and writings of experts be made at a  
641 different place or at a different time than specified in the demand.

642 (5) That some or all of the parties be divided into sides on the basis of their identity of  
643 interest in the issues in the action, and that the designation of any experts as described in paragraph  
644 (2) of subdivision (a) be made by any side so created.

645 (6) That a party or a side reduce the list of employed or retained experts designated by that  
646 party or side under paragraph (2) of subdivision (a).

647 If the motion for a protective order is denied in whole or in part, the court may order that the  
648 parties against whom the motion is brought, provide or permit the discovery against which the  
649 protection was sought on those terms and conditions that are just.

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

654 [Subdivisions (f) through (h) remain unchanged.]

655 (i) On receipt of an expert witness list from a party, any other party may take the deposition  
656 of any person on the list. The procedures for taking oral and written depositions set forth in Sections  
657 2025, 2026, 2027, and 2028 apply to a deposition of a listed trial expert witness except as follows:

658 (1) The deposition of any expert described in paragraph (2) of subdivision (a) shall be taken

659 at a place that is within 75 miles of the courthouse where the action is pending. However, on motion  
660 for a protective order by the party designating an expert witness, and on a showing of exceptional  
661 hardship, the court may order that the deposition be taken at a more distant place from the  
662 courthouse.

663 (2) A party desiring to depose any expert witness, other than a party or employee of a  
664 party, who is either (A) an expert described in paragraph (2) of subdivision (a) except one who is a  
665 party or an employee of a party, (B) a treating physician and surgeon or other treating health care  
666 practitioner who is to be asked during the deposition to express opinion testimony, including opinion  
667 or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or  
668 the reasons for a particular treatment decision made by the practitioner, but not including testimony  
669 requiring only the reading of words and symbols contained in the relevant medical record or, if those  
670 words and symbols are not legible to the deponent, the approximation by the deponent of what those  
671 words or symbols are, or (C) an architect, professional engineer, or licensed land surveyor, who was  
672 involved with the original project design or survey for which he or she is asked to express an opinion  
673 within his or her expertise and relevant to the action or proceeding, shall pay the expert's reasonable  
674 and customary hourly or daily fee for any time spent at the deposition from the time noticed in the  
675 deposition subpoena or from the time of the arrival of the expert witness should that time be later  
676 than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from  
677 the deposition, whether or not the expert is actually deposed by any party attending the deposition.  
678 If any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's  
679 reasonable and customary hourly or daily fee for the time period determined from the time noticed in  
680 the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel. However,  
681 the hourly or daily fee shall not exceed the fee charged the party who retained the expert except  
682 where the expert donated his or her services to a charitable or other nonprofit organization. A daily  
683 fee shall only be charged for a full day of attendance at a deposition or where the expert was  
684 required by the deposing party to be available for a full day and the expert necessarily had to forego  
685 all business he or she would have otherwise conducted that day but for the request that he or she be  
686 available all day for the scheduled deposition. In a worker's compensation case arising under  
687 Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the  
688 Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay  
689 this fee.

690 The party taking the deposition shall either accompany the service of the deposition notice  
691 with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at  
692 the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party  
693 designating the expert. If the deposition of the expert takes longer than anticipated, the party giving  
694 notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an  
695 itemized statement from the expert. The party designating the expert is responsible for any fee  
696 charged by the expert for preparing for the deposition and for traveling to the place of the deposition,  
697 as well as for any travel expenses of the expert.

698 (3) The service of a proper deposition notice accompanied by the tender of the expert  
699 witness fee described in paragraph (2) is effective to require the party employing or retaining the  
700 expert to produce the expert for the deposition. If the party noticing the deposition fails to tender the  
701 expert's fee under paragraph (2), the expert shall not be deposed at that time unless the parties

702 stipulate otherwise.

703 (4) If a party desiring to take the deposition of an expert witness under this subdivision  
704 deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable,  
705 that party may move for an order setting the compensation of that expert. This motion shall be  
706 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an  
707 informal resolution of each issue presented by the motion. Notice of this motion shall also be given  
708 to the expert. In any such attempt at an informal resolution, either the party or the expert shall  
709 provide the other with (A) proof of the ordinary and customary fee actually charged and received by  
710 that expert for similar services provided outside the subject litigation, (B) the total number of times  
711 the presently demanded fee has ever been charged and received by that expert, and (C) the  
712 frequency and regularity with which the presently demanded fee has been charged and received by  
713 that expert within the two-year period preceding the hearing on the motion.

714 In addition to any other facts or evidence, the expert or the party designating the expert shall  
715 provide, and the court's determination as to the reasonableness of the fee shall be based upon (A)  
716 proof of the ordinary and customary fee actually charged and received by that expert for similar  
717 services provided outside the subject litigation, (B) the total number of times the presently demanded  
718 fee has ever been charged and received by that expert, and (C) the frequency and regularity with  
719 which the presently demanded fee has been charged and received by that expert within the two-year  
720 period preceding the hearing on the motion. Provisions (B) and (C) shall apply to actions filed after  
721 January 1, 1994. The court may also consider the ordinary and customary fees charged by similar  
722 experts for similar services within the relevant community and any other factors the court deems  
723 necessary or appropriate to make its determination.

724 Upon a determination that the fee demanded by that expert is unreasonable, and based upon  
725 the evidence and factors considered, the court shall set the fee of the expert providing testimony.

726 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
727 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to set the expert  
728 witness fee, unless it finds that the one subject to the sanction acted with substantial justification or  
729 that other circumstances make the imposition of the sanction unjust.

730 [Subdivision (j) remains unchanged.]

731 (k) On motion of any party who has engaged in a timely exchange of expert witness  
732 information, the court may grant leave to (1) augment that party's expert witness list and declaration  
733 by adding the name and address of any expert witness whom that party has subsequently retained, or  
734 (2) amend that party's expert witness declaration with respect to the general substance of the  
735 testimony that an expert previously designated is expected to give. This motion shall be made at a  
736 sufficient time in advance of the time limit for the completion of discovery under Section 2024 to  
737 permit the deposition of any expert to whom the motion relates to be taken within that time limit.  
738 However, under exceptional circumstances, the court may permit the motion to be made at a later  
739 time. This motion shall be accompanied by a declaration stating facts showing a reasonable and  
740 good faith attempt at an informal resolution of each issue presented by the motion. The demand, and  
741 all expert witness lists and declarations exchanged in response to it, shall be lodged with the court  
742 when their contents become relevant to an issue in any pending matter in the action. The court shall  
743 grant leave to augment or amend an expert witness list or declaration only after taking into account  
744 the extent to which the opposing party has relied on the list of expert witnesses, and after determining

745 that any party opposing the motion will not be prejudiced in maintaining that party's action or defense  
746 on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence  
747 have determined to call that expert witness or have decided to offer the different or additional  
748 testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the  
749 different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise,  
750 or excusable neglect, provided that the moving party (1) has sought leave to augment or amend  
751 promptly after deciding to call the expert witness or to offer the different or additional testimony, and  
752 (2) has promptly thereafter served a copy of the proposed expert witness information concerning the  
753 expert or the testimony described in subdivision (f) on all other parties who have appeared in the  
754 action. Leave shall be conditioned on the moving party making the expert available immediately for a  
755 deposition under subdivision (i), and on such other terms as may be just, including, but not limited to,  
756 leave to any party opposing the motion to designate additional expert witnesses or to elicit additional  
757 opinions from those previously designated, a continuance of the trial for a reasonable period of time,  
758 and the awarding of costs and litigation expenses to any party opposing the motion.

759 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
760 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to augment or  
761 amend expert witness information, unless it finds that the one subject to the sanction acted with  
762 substantial justification or that other circumstances made the imposition of the sanction unjust.

763 (l) On motion of any party who has failed to submit expert witness information on the date  
764 specified in a demand for that exchange, the court may grant leave to submit that information on a  
765 later date. This motion shall be made a sufficient time in advance of the time limit for the completion  
766 of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates  
767 to be taken within that time limit. However, under exceptional circumstances, the court may permit  
768 the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts  
769 showing a reasonable and good faith attempt at an informal resolution of each issue presented by the  
770 motion.

771 The court shall grant leave to submit tardy expert witness information only after taking into  
772 account the extent to which the opposing party has relied on the absence of a list of expert witnesses,  
773 and determining that any party opposing the motion will not be prejudiced in maintaining that party's  
774 action or defense on the merits, and that the moving party (1) failed to submit that information as the  
775 result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after  
776 learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter  
777 served a copy of the proposed expert witness information described in subdivision (f) on all other  
778 parties who have appeared in the action. This order shall be conditioned on the moving party  
779 making that expert available immediately for a deposition under subdivision (i), and on such other  
780 terms as may be just, including, but not limited to, leave to any party opposing the motion to  
781 designate additional expert witnesses or to elicit additional opinions from those previously  
782 designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and  
783 litigation expenses to any party opposing the motion.

784 The court shall impose a monetary sanction under Section 2023 against any party, person, or  
785 attorney who unsuccessfully makes or opposes, or fails to timely oppose, a motion to submit tardy  
786 expert witness information, unless it finds that the one subject to the sanction acted with substantial  
787 justification or that other circumstances make the imposition of the sanction unjust.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Beverly Hills Bar Association

#### STATEMENT OF REASONS

Existing Law: Code of Civil Procedure sections 2017, 2019, 2024, 2025, 2028, 2030, 2031, 2032, 2033, and 2034 specify that the court shall impose a monetary sanction under section 2023 against any party or attorney who unsuccessfully makes or opposes a motion. As such, parties have used such wording to avoid an imposition of sanctions based on the fact that the Code implies that an unsuccessful opposition would justify sanctions, and, thus, have purposefully not opposed a parties' justified motion for the purpose of evading the imposition of sanctions.

This Resolution: Will provide a proper checks and balances pertaining to litigants, and provides a level playing field. Also, this resolution will ensure that parties are being cooperative under discovery rules, and any violation of the Discovery Act is addressed by sanctions.

The Problem: Under the Code, as currently stated, parties may violate the discovery rules, and have no concern for imposition of sanctions after the propounding party is left with no alternative but to file a motion, and incur attorneys' fees and costs.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Alexander S. Gareeb, Tressler, Soderstrom, Maloney & Priess, 1901 Avenue of the Stars, Suite 450, Los Angeles, California, 90067, 310.203.4823, Fax 310.203.4823, email: [agareeb@mail.tsmp.com](mailto:agareeb@mail.tsmp.com)

**RESPONSIBLE FLOOR DELEGATE:**

#### COUNTERARGUMENT

##### SAN DIEGO COUNTY BAR ASSOCIATION

The Delegation of the San Diego County Bar Association recommends **DISAPPROVAL** of this resolution. The proposed change effectively forces the non-responding party to oppose all discovery motions. There may be a number of legitimate reasons why a party might not want to oppose a discovery motion. Similarly, should a party be subject to sanctions because their opposition was filed late? There are already remedies available to the court to address such a situation, e.g. disregarding any late filed oppositions. It also appears that the actual problem identified by the proponent is that some parties file stealth oppositions with different titles such as "response" or "reply" in an attempt to avoid

sanctions by then asserting that they have not “opposed” the discovery motion. While the Delegation of the San Diego County Bar Association does not condone such tactics, it does not believe that the proffered amendments correct the problem.