

Sanctions Denied

By Katherine Gallo

When I started blogging, I asked fellow attorneys what issues they would like me to address. I received this response from a lawyer in San Francisco:

Key problem – judges that won't crack down on parties that lodge bogus objections and don't answer interros, and object to discovery demands that are straight forward. Amount of sanctions awarded is usually pitiful.

I can easily respond to this complaint by saying "Judges want to be liked," or "Maybe the judge was intimidated by the big law firm" or "The judge is trying to establish a working relationship with the parties and awarding sanctions makes the losing party more hostile" or "The judge may have seen fault on both sides of the table." However, the bottom line is I don't know why your judge didn't give you sanctions and neither do you, unless you argued the issue at the hearing.

In order to overcome the reluctance of the judge to order meaningful sanctions, you need to be proactive in your moving papers and your arguments at the hearing regarding your request for sanctions. Don't be timid in asserting your position on this. It is just as important as your other arguments. Filing motions and the imposition of sanctions curbs discovery abuse and the 1986 Discovery Act recognizes

this. Thus you need to bring the motion and start establishing a pattern of opposing counsel's discovery abuse and create a record of an imposition of sanctions. Moreover, remember that judges are reluctant to impose a terminating sanction unless a history of lesser sanctions have first been imposed or prior discovery orders have been violated. (See Weil and Brown, California Practice Guide: Civil Procedure Before Trial (TRG 2009) ¶ 8:1215 et seq.)

When seeking an order to recover sanctions, C.C.P. §2023.040 requires your discovery motion to contain the following:

Notice

The notice of motion must expressly state that you are seeking [monetary, issue, evidence or terminating] sanctions as well as the identity of the person, party or attorney against whom sanctions are being sought.

Points and Authorities

Your moving papers must state the facts of the noncompliance, the authority as to why it is discoverable and the authority for the award of sanctions. Don't make the argument requesting sanctions in your P's and A's an afterthought. Spend time on it. List all the *garbage objections* to very basic questions and the law's supporting your interrogatory or request. For example: "The identity and location of witnesses are not protected by attorney work product or the right of privacy. C.C.P. § 2017.010 clearly states that the identity and location of witnesses are discoverable." Detail all the stonewalling, hostility and lack of good faith efforts during the meet and confer process. Make it clear that your train has left the station and you are losing precious trial prep time. Make sure you cite the authority for the sanctions you are requesting.

Declaration

Declarations need to state: (1) facts of the noncompliance and discovery abuse in which the declaring party has personal knowledge (if necessary use multiple declarations); (2) the meet and confer process; (3) time you have spent and are going to spend on each aspect of the motion; (4) your hourly rate; and (5) the calculations for the sanctions. Again, do it in detail!!

Hint:

Do not cut your hours. You need to let the judge know how much money this discovery dispute is costing your client.

Discovery sanctions are not a windfall. They are to compensate for costs and fees incurred by the party in enforcing discovery or defending a meritless motion.

In your moving papers point out to the court:

C.C.P. § 2023.030(a) states that "If a monetary sanction is authorized by any provision of this title [and almost all of them are], the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Emphasis added.)

The purpose of discovery sanctions is not to provide a weapon for punishment, forfeiture, and the avoidance of the trial on the merits, but to prevent abuse of the discovery process and correct the problem



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presented. (California Discovery Citations (TRG 2010) ¶1:6 citing *Parker v. Wolters Kauwer U.S., Inc.* (2007) 149 Cal.App.4th 285 at 301.)

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Discovery sanctions are not reported to the State Bar. (See Bus. & Prof. Code. § 6068(o)(3).)

The “trial court is not required to make findings at all” in granting any discovery sanctions, including terminating sanctions. (See Weil and Brown, California Practice Guide: Civil Procedure Before Trial (TRG 2009) ¶8:1241.5 citing *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal. App.4th 256 at 261.)

At the hearing:

Be prepared to argue for sanctions. Do not be afraid to make a record. If you think that the judge is still reluctant to give you sanctions, then suggest that the sanctions be stayed to be lifted by the court at a later date (i.e., when the party complies with the order or, the one I like to use, by the trial judge). This is important, because you need to establish a history of abuse. Past conduct that has already been considered by the court cannot be the basis for additional sanctions. (See Weil and Brown, California Practice Guide: Civil Procedure Before Trial (TRG 2009) ¶8:1209a citing *An-drus v. Estrada* (1995) 39 Cal.App.4th 1030, at 1043.)

Be prepared to argue for sanctions. Do not be afraid to make a record.

The court needs to take discovery motions seriously. They impact a case just as much as and in many cases more than demurrers and motions for summary judgment. However, it is your job to educate the judge as to why you are entitled to sanctions. Good luck!!

Let us know if you are successful in your next quest for discovery sanctions. ■



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