

# EXPERT GUIDE

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## Current Approaches to Managing Discovery in California Complex Courts

By Thad Davis & Christine Fujita

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In California, seven trial courts have civil litigation departments dedicated exclusively to complex cases—the Superior Courts of Alameda, Contra Costa, Los Angeles, Orange County, San Francisco, Santa Clara, and San Mateo. A “complex” case is defined as “an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.”<sup>1</sup>

Complex courts can be particularly helpful in assisting parties in managing time and costs relating to discovery.

As Judge Curtis Karnow of the San Francisco complex court acknowledged: “discovery management is extremely important because, as we all know, we are spending most of our money as lawyers on discovery.”<sup>2</sup> Judge Karnow describes the general

challenge as limiting discovery and getting counsel to focus on what they need to do to get to the next stage of litigation.<sup>3</sup>

As described below, complex judges often tailor discovery procedures on a case-by-case basis and take a hands-on approach. These procedures vary by complex department and sometimes even by judge within a complex department. This article focuses primarily on current practices in two courts handling some of the largest matters in the state, the complex courts in San Francisco and Santa Clara counties.

### Early Judicial Involvement

Many complex judges agree that early involvement in a case is critical and can save substantial amounts of time and expense.<sup>4</sup> In particular, the initial case management conference is a valuable opportunity for parties to tee up for the court the key issues in

the case and aid the court in shaping priorities for discovery. Indeed, many judges in the Los Angeles complex court immediately stay discovery until after the initial case management conference. Some courts, such as in San Francisco County, set early limits on discovery in class actions, limiting parties to only the discovery they need in connection with a class certification motion.<sup>5</sup> In addition, some courts are receptive to early discussions regarding phasing discovery. For example, the San Francisco complex court encourages parties to consider the efficiency of phasing discovery, with each phase designed to either lead directly to a motion or provide efficacies for the next phase.<sup>6</sup>

### Assistance in Discovery Disputes

Complex courts offer a variety of procedures to streamline and speed resolution of discovery disputes. For example, many courts encourage informal face-to-face discovery conferences with the judge and other opportunities to seek informal guidance before filing discovery

motions. The San Francisco complex court strongly suggests that parties attend an informal non-recorded and non-binding conference with the judge before filing a discovery motion. The parties send the court a 1-2 page non-argumentative letter presenting the issues two court days in advance.<sup>7</sup> The San Francisco court also offers parties the ability to call the judge’s chambers before filing a discovery motion and get a read on a likely resolution.<sup>8</sup> In other courts, such as in Santa Clara, parties are not just encouraged, but are required to attend an informal conference with the court before filing any discovery motions.<sup>9</sup> Similarly, one Alameda complex judge requires parties to participate in what it calls a “CMC on a discovery dispute” either in person or by phone before filing a discovery motion, and also offers the parties the opportunity to seek informal guidance through a joint email submission.<sup>10</sup>

These informal conferences and requests for guidance are frequently successful in helping the parties reach resolution without the need





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for formal motion practice. In Los Angeles complex court, for example, parties have been able to reach resolution in informal conferences in well over 90 percent of discovery disputes.<sup>11</sup>

Some judges only allow filing of discovery motions with the court's permission. For example, one Alameda complex judge requires the aggrieved party to e-mail the court a 3-page letter outlining the dispute.<sup>12</sup> The other party has an opportunity to respond. The judge will then provide informal guidance and grant permission to file a discovery motion, if deemed appropriate.

As another example of a cost-saving procedure, the San Francisco complex court permits parties to bypass traditional briefing of discovery motions and instead file a "one-shot" joint submission. The court rules on the submission without a hearing, usually within a few business days.<sup>13</sup> If the parties request a hearing, the joint submission must be filed three court

days in advance of the hearing.

### Adjudication of Key Issues

Complex courts also encourage the use of California Code of Civil Procedure § 437c to tee up for the court key legal issues for early determination. This can translate into time and cost savings in terms of limited discovery. For example, the San Francisco complex court encourages parties to bifurcate key legal issues, which the judge can decide at an early stage. The court then instructs the parties to conduct the discovery needed to allow resolution of the legal issues before full discovery of the factual issues on the merits.<sup>14</sup> This procedure is permitted under Section 437c, which was amended recently in 2012 to permit motions for partial summary adjudication that do "not completely dispose of a cause of action."<sup>15</sup> A significant feature of such motions is that they must be brought upon stipulation of the parties and the court must determine that "the

motion will further the interests of judicial economy, by reducing the time to be consumed in trial, or significantly increase the ability of the parties to resolve the case by settlement."<sup>16</sup>

Relatedly, the Santa Clara complex court allows parties to conduct "mini-trials" to determine any pivotal issues, such as a special defense or evidentiary ruling, upon which the rest of the case depends.<sup>17</sup> This also presents an opportunity for limited discovery. We expect the variety and creativity of these procedures to only increase in these tight budgetary times and as parties and courts try to get to the heart of the matters before them.

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- 1 - Cal. Rule of Court 3.400(a).
- 2 - Institute for the Advancement of the American Legal System, *Working Smarter, Not Harder: How Excellent Judges Manage Cases* (2014) (“Working Smarter”).
- 3 - *Working Smarter*, at 12-13.
- 4 - *Working Smarter*, at 7.
- 5 - Superior Court of California, County of San Francisco, Department 304 – Judge Curtis E.A. Karnow, *Complex Litigation – User’s Manual* (“San Francisco User’s Manual”).
- 6 - *San Francisco User’s Manual*.
- 7 - *San Francisco User’s Manual*.
- 8 - *Working Smarter*, at 24.
- 9 - Superior Court of California, County of Santa Clara, *Guidelines and Protocols, Complex Civil Litigation Department* (revised Jan. 21, 2014) (“Santa Clara Guidelines”).
- 10 - Department 21 – *Complex Litigation, The Honorable Wynne S. Carvill Presiding: Discovery Disputes*.
- 11 - *Daily Journal*, Richard L Kellner, *Complex Civil Litigation Program is ‘incubator’ for efficient practices* (Nov. 12, 2012).
- 12 - The Honorable George C. Hernandez Jr., *Complex Litigation*.
- 13 - *San Francisco User’s Manual*.
- 14 - *Working Smarter*, at 14.
- 15 - Cal. Civ. Proc. Code § 437c.
- 16 - Cal. Civ. Proc. Code § 437c.
- 17 - *Santa Clara Guidelines*.

