THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

SEMIANNUAL GUIDE TO EXPERT WITNESSES

Los Angeles Lawyer

NOVEMBER 2015 / $4

EARN MCLE CREDIT

Juror Misconduct
page 21

Pension Recoupment
page 11

Ethics of Advising Clients
page 60

Transactional Mediation
page 68

PLUS

Interpreting Wills
page 26

Just Discovery

Judge Michael J. Raphael (right), Michael M. Farhang (center), and Christopher A. Nowlin (left) contend that properly focused discovery requests benefit clients and courts

page 14

by Judge Michael J. Raphael, Michael M. Farhang and Christopher A. Nowlin

JUST DISCOVERY

Properly focused discovery requests and responses and good-faith use of the meet-and-confer process can help save attorneys time and clients money

DISCOVERY DISPUTES and motion practice consume a significant portion of the dockets of California Superior Court judges. Given that the Code of Civil Procedure broadly authorizes discovery of nonprivileged, relevant material that is admissible or "reasonably calculated to lead to the discovery of admissible evidence,"[1] proper use of discovery is essential to successfully advance a party's position in litigation. But indiscriminate use of discovery as a litigation tactic is neither effective nor desirable. Overbroad discovery requests are likely to meet judicial disapproval.[2] On the other hand, California courts frown on overly nitpicky or nuisance objections that evade requests seeking clearly relevant information.[3] Either over-aggressive tactic is likely to result in a dispute that may eventually require court resolution. For many civil judges, a third or more of the motions they hear pertain to discovery disputes, and plaintiffs' and defense attorneys also spend a significant amount of their time and their clients' resources litigating discovery disputes in order to further their positions.

These disputes are best avoided when possible, and inordinate expenditures of time and money on thorny discovery disputes need not be a part of every case. A large percentage of discovery motions can be avoided with proper initial structuring of requests and responses to make them more effective, combined with good-faith efforts at informal dispute resolution. Properly focused requests and responses can help both sides succeed in identifying and obtaining the discovery they need to best represent their clients. Meaningful and thoughtful use of the meet-and-confer process can help

Michael J. Raphael is a judge on the Los Angeles Superior Court who presides over a civil calendar in the Stanley Mosk Courthouse. Michael M. Farhang is a partner in the Los Angeles Office of Gibson, Dunn & Crutcher LLP, where he handles civil and criminal litigation matters. Christopher A. Nowlin is an associate in Gibson Dunn's Los Angeles office, where he also handles litigation matters.

HADI FARAHANI

resolve disputes without result to motion practice, which in turn will save attorney time and client money and avoid the threat of discovery sanctions, which discovery rules provide should be presumptively imposed against a party that unsuccessfully makes or opposes a motion to compel absent a finding of substantial justification or that sanctions would otherwise be unjust. Applying these principles can help attorneys gain important credibility with the courts before which they appear.

One application of these principles is to narrow the likelihood of disputes at the outset by negotiating with opposing counsel to clarify the scope of discovery. Determining legitimate discovery goals early and communicating with opposing counsel will increase the efficiency of the discovery process. Once a party's discovery goals—i.e., what information will be needed to prove or defend the case—have been analyzed and identified, attorneys should open the lines of communication with opposing counsel. Communication by a requesting party about the purposes and scope of the requests can help the parties define their expectations and start working to resolve disputes before they arise.

One effective way to proceed is to negotiate a discovery protocol. Discovery is most likely to proceed smoothly, with the potential for disputes minimized, when the parties have reached agreement on scope through a framework or protocol. Before initiating discussions of a discovery framework with opposing counsel, attorneys can benefit from first addressing discovery goals with their clients and gaining familiarity with the universe of potentially relevant documents, the locations where those documents might be found, and the burden of searching them. Clients may be sensitive about producing particular documents for a host of reasons. Attorneys should understand these sensitivities before beginning discussions with opposing counsel so that they can negotiate a discovery framework that best addresses their clients' concerns within the applicable rules.

There is no one-size-fits-all framework, but there are certain general characteristics common to effective discovery agreements. The first of these is a clear definition of the sources of documents to be searched. In the age of electronic discovery, clients (especially corporate clients) may maintain documents in multiple forms of electronic media, ranging from e-mails to local files to centralized databases. And many clients continue to maintain hard-copy records. An effective discovery protocol should address which of these sources will need to be searched in order to accomplish the reasonable goals underlying the discovery requests. With respect to electronically stored information (ESI), disputes frequently arise over the manner in which such data is produced. These disputes are avoidable and are far less likely to arise if the parties sit down with any available technical support at the outset of discovery and reach agreement on discovery specifications for ESI. Additionally, agreeing on a framework for which custodians' documents will be searched and the date ranges for document productions can lessen the likelihood of future disputes arising.

Counsel should also work to reach agreement on the substantive scope of discovery. These disputes can present difficult dilemmas for attorneys, but one of the best ways to prevent them is by addressing them before discovery even begins. Take as an example a landlord-tenant dispute involving allegations that the landlord breached housing standards. The tenant may seek discovery related to all of the buildings owned by the landlord to attempt to establish a pattern of misconduct. The landlord may object and argue that the only relevant discovery is that concerning the apartment building at issue or, even more narrowly, the tenant's particular unit. Because both parties understand the risk that their position may not ultimately be accepted by the court, a compromise agreement to meet somewhere in the middle, e.g., discovery relating only to a limited number of other properties that are similarly situated, might emerge as a more attractive solution after substantial communication and a good-faith effort to achieve a middle ground.

Experienced counsel may realize that this result is in fact a fair resolution and what a court may end up requiring in any event. By seriously debating and assessing the merits of their positions at the outset of a case, and by working to find a middle ground if possible, parties have the potential to forestall disagreements from arising and bogging down the discovery process.

Stated simply, opening the lines of communication with opposing counsel early is a basic but critical first step toward improving effectiveness in the discovery process. Parties are less likely to enter into disputes when they are governed by a discovery framework in which they are mutually invested. Opposing counsel will be hard-pressed to argue that a position is unreasonable if the parties previously discussed and agreed to that very position.

Exercise Restraint

A second principle is to be reasonable and exercise restraint in drafting discovery requests and responses. Most attorneys have had the experience of being served with voluminous, extremely broad, catchall discovery requests or vague boilerplate objections unaccompanied by meaningful responses. Another way to minimize the potential for unnecessary motion practice is to use discerning judgment in crafting discovery requests and responses so that they target only what is necessary.

In serving discovery requests, counsel should tailor the requests to the information that they genuinely need to prove or defend their client's case. Overly broad requests, or requests that seek irrelevant information, serve only the purpose of drawing legitimate objections. Tailoring requests to more narrowly cover the critical subject matter will actually put more pressure on the responding party, which will have fewer grounds for objection and may risk looking unreasonable if the party resists a limited request. Moreover, clear and narrow requests better frame the issues for the court in the event of motion practice. As noted above, courts look unfavorably on excessively overbroad discovery requests.[4]

Similarly, attorneys should be judicious in crafting responses and objections to discovery requests. Quibbling with semantics and advancing boilerplate objections without meaningful responses are not conducive to reaching compromise on discovery issues. Nuisance objections will undermine the appearance of a party's good faith and will likely draw court disapproval when used to frustrate legitimate discovery requests.[5] Making an unmeritorious objection or an evasive response to discovery are considered misuses of the discovery process that can subject parties and attorneys to monetary sanctions.[6] The responding party can enhance its credibility significantly if the court sees that it has carefully considered its responses and objections, tailored them to the particular requests, and made an effort to be forthcoming rather than evasive.

When facing requests that are overly broad but seek some relevant information, attorneys are advised to provide at least some meaningful responses in addition to articulating their legitimate objections. For example, if a defendant in a personal injury action seeks 10 years of medical records from a plaintiff, an overbreadth objection may be warranted, depending on the circumstances, but a constructive response could include the production of clearly relevant records from a narrower period of time.

A third principle is to always engage in a meaningful meet-and-confer process before bringing discovery disputes to the court. The Code of Civil Procedure requires that parties engage in a meet-and-confer process before the filing of most discovery motions in California civil courts. Motions to compel further responses to document requests, interrogatories, and requests for admissions all must be accompanied by a declaration stating facts showing a "reasonable and good faith attempt" to resolve informally the issues presented by the motion.[7] The process can

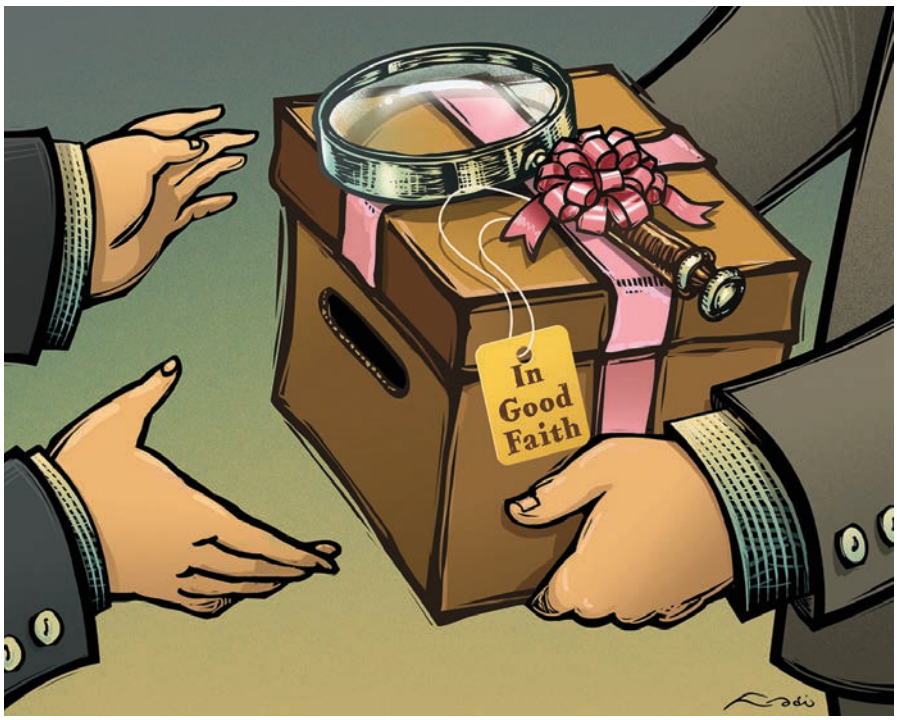
be conducted in writing, over the phone, or in person.[8]

The purpose of the meet-and-confer requirement is to "encourage the parties to work out their differences informally so as to avoid the necessity for a formal order."[9] The process is designed to narrow discovery disputes as much as possible before seeking judicial intervention. A failure to make reasonable, good-faith efforts at an informal resolution may be considered a misuse of the discovery process,[10] and the court may impose monetary sanctions, including attorney's fees, on the offending party or attorney regardless of the outcome of the motion.[11] While few published California authorities elaborate on the "reasonable and good faith" meet-and-confer requirement, those that do provide sound guidance for how to approach informal resolution. Attorneys should heed the lessons of these cases, which can help avoid costly motion practice and the imposition of sanctions by the court.

Simply going through the motions of the meet-and-confer process without a sincere effort to seek a real resolution of the disputed issues may not satisfy the statutory requirement. *Townsend v. Superior Court*,[12] for example, illustrates this point. In that case, a plaintiff refused to answer questions during her deposition.[13] This spurred a heated back-and-forth exchange between the attorneys during the deposition about the propriety of her refusal to answer.[14] The plaintiff remained steadfast in her refusal, and the defendants moved to compel.[15] In opposing the motion, the plaintiff argued that the defendants had failed to sufficiently meet and confer.[16] The trial court rejected this argument, holding that the back-and-forth discussion at the deposition sufficed.[17] The trial court granted the defendants' motion to compel.[18]

The court of appeal reversed the trial court, holding that the limited back-and-forth at the deposition did not suffice for the meet-and-confer requirement.[19] In an often-cited opinion, Justice Steven J. Stone explained that the purpose of the meet-and-confer requirement is to "lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extra-judicial resolution of discovery disputes."[20] The process requires that the parties "present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions."[21] The parties must make a serious effort at informal resolution, which "requires that counsel attempt to talk over the matter, compare their views, consult, and deliberate."[22] The defendants' failure to adequately meet and confer led the court of appeal to reverse the trial court's order and direct the trial court to deny the motion to compel.[23]

Further, a lack of diligence in initiating the meet-and-confer process may undermine an attorney's claim that the process was undertaken in good faith. In *Obregon v. Superior Court*,[24] the court applied *Townsend* in the context of a failure to adequately meet and confer before moving to compel further responses to interrogatories. Notably, *Obregon* ties the reasonableness of a party's meet-and-confer efforts to both the reasonableness of the underlying discovery requests and the speed with which the propounding party pursues informal resolution after receiving objections to its requests.



The plaintiff in *Obregon* served very broad interrogatories on the defendant.[25] After the defendant responded, the plaintiff waited five weeks, or until just 13 days were left within the 45-day period to move to compel, before sending a letter to the defendant requesting further responses.[26] The defendant responded with a letter that the plaintiff received only one day before the motion deadline and that reiterated the same objections.[27] The plaintiff filed a motion to compel.[28] The defendant opposed the motion on the basis that the plaintiff had failed to adequately meet and confer.[29] The trial court agreed with the defendant, denying the plaintiff's motion and imposing sanctions on the plaintiff for failing to adequately meet and confer.[30]

The court of appeal affirmed the trial court's ruling that the plaintiff failed to adequately meet and confer. The court reasoned that the "overbreadth of the requests" was relevant to the question of whether the parties met and conferred in good faith, observing that "[h]ere plaintiff propounded grossly overbroad interrogatories" and, after receiving defendant's objections, "simply sent a single brief letter, late in the relevant time period…mak[ing] no effort to explain why interrogatories of such breadth are proper in this case, an omission that reasonably suggests lack of a proper discovery objective."[31]

While every case presents its own facts, the lesson from *Townsend* and *Obregon* is that counsel should make every effort to make the meet-and-confer process a meaningful opportunity for both parties to resolve their dispute in the way it should be resolved, rather than a hollow and perfunctory exercise necessary before filing a motion.

A constructive meet-and-confer process is especially important given the statutory requirement that a court shall impose monetary sanctions on a party that unsuccessfully makes or opposes a motion to compel unless the losing party shows that it acted with substantial justification or that the imposition of sanctions would be unjust.[32] In other words, a party that loses on a motion to compel may find itself facing an argument from the other side that monetary sanctions are appropriate absent an exception.[33] This stringent statutory scheme further highlights the importance of making serious efforts at informal resolution and avoiding unnecessary motion practice on discovery issues.

A recent premises liability case in Judge Raphael's court serves as an example of why it is important to ensure that objections to discovery requests are well-taken. In that case, the defendant, a movie theater, had made reasonable relevancy objections to a series of broad requests for factual informa-

tion about prior similar slip-and-fall incidents on the property. At an informal discovery conference, the parties agreed to narrow the request to a limited time period (two years) for a particular area of the theater (an area near the concession stand, where the plaintiff's incident occurred). Yet, following the conference, the defendant disclosed only the dates of three prior similar incidents and refused to disclose facts about the incidents, though such facts had been requested. Upon granting the plaintiff's motion to compel the information about the incidents, the court also imposed sanctions at the plaintiff's request to compensate her for litigating the motion to compel. While the defendant's initial objection was justified, the objection and failure to respond adequately to the narrowed request was without substantial justification.

How can attorneys avoid the prospect of a meet-and-confer process in which counsel are simply going through the motions rather than actively seeking to narrow or resolve disputes? First, a party that identifies a discovery issue should not delay in conferring with opposing counsel. As a formal matter, the meet-and-confer process does not automatically extend the 45-day period for bringing a motion to compel, so promptly starting the process can ensure that a meaningful process can occur before a motion is due. As a practical matter, a delay in initiating discovery discussions may show a lack of good faith.[34] Importantly, a delay in a meaningful meet-and-confer attempt can have the effect of locking the parties into their positions, should they begin preparing for motion practice before efforts at informal resolution begin.

Second, the meet-and-confer process may stand a better chance of succeeding in some cases if the meeting takes place in person. While the rules permit the conference to be accomplished through letters, in practice these letters tend to contain more than a little posturing and advocacy, particularly given the probability that they will end up as exhibits to a motion to compel. Courts may appreciate seeing a meet-and-confer process that includes more than a simple exchange of letters. And, as in *Townsend*, a judge may conclude that such advocacy and argument do not suffice.[35] When an in-person meeting takes place, it is best if an attorney with authority to resolve the discovery disputes can be in attendance.[36]

Third, both sides should approach the meet-and-confer process prepared to compromise to whatever extent they can without truly compromising their legitimate discovery interests. A requesting party should consider reasonable restrictions on its requests, while a responding party should contemplate how it can expand on what it offers in response to requests. While resolution may not always be possible, willingness to compromise will show the court that the parties have made meaningful attempts to narrow the points of dispute. And, as in *Obregon*, unreasonable discovery requests (and responses for that matter) may discredit a party and suggest to the court that it did not take the meet-and-confer process seriously.

A fourth principle is to participate in an informal discovery conference or other informal avenues for resolving discovery disputes. Negotiations are not always successful, and even meet-and-confer efforts undertaken in good faith will not resolve every discovery dispute. In such cases, the parties may still have other options before resorting to motion practice. The Personal Injury Courts in the Los Angeles County Superior Court, for example, require that the parties engage in an Informal Discovery Conference (IDC) prior to filing motions to compel further responses to discovery requests. The purpose of the IDC "is to assist the parties to resolve and/or narrow the scope of discovery disputes."[37] Critically, judges in the Personal Injury Courts "have found that, in nearly every case, the parties amicably resolve disputes with the assistance of the Court."[38] This high rate of success is certainly attributable in part to the presence of the judge, which encourages the parties to earnestly come to the negotiating table, lessen their posturing, and be more reasonable in their positions. The IDCs also provide the parties with insight into which way a judge is leaning on a particular issue, which might indicate that motion practice is not a wise choice.

Importantly, the scheduling of an IDC does not extend the deadline for filing a motion to compel. Because of this, parties should try to schedule an IDC as soon as a dispute is identified, as the IDC "may avoid the necessity of a motion or reduce its scope."[39] In most cases, both parties would be best served by entering into a stipulated extension of the 45-day motion to compel deadline. This will allow them to enter the required IDC without having invested too much time in preparing their motions, which could further entrench them in their positions.

Opportunities to receive informal judicial assistance in resolving discovery disputes are not limited to the Personal Injury Courts. Many Los Angeles County Superior Court judges make themselves available, either through telephonic or in-person conferences, to address and attempt to resolve discovery disputes so to avoid unnecessary motion practice. These informal conferences provide the same benefits as the IDCs in the Personal Injury Courts. They are an effective way of bringing attorneys to the negotiating table and persuading them to moderate their positions. Attorneys can take a number of steps to determine if a particular civil judge allows for these informal discovery conferences. These include 1) checking the court's website and looking under "courtroom information" for the specific judge, 2) raising the matter with the judge at the case management conference, to hear directly from the judge what he or she believes should be done with a discovery dispute, and 3) contacting the judicial assistant (i.e., courtroom clerk) to inquire whether the judge would be amenable to an informal conference. Notably, some judges allow the parties to enter into a discovery resolution stipulation that governs discovery disputes. These stipulations are "intended to provide a fast and informal resolution of discovery issues through limited paperwork and an informal conference with the Court to aid in the resolution of the issues."[40]

California civil judges also have the statutory authority to "appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."[41] Often, the active involvement of a court-appointed referee, who may have more time than a judge to focus on resolving discovery disputes, can help facilitate the meet-and-confer process and increase the likelihood of informal resolution. Because of this, civil litigants may want to explore the prospect of requesting a discovery referee at the outset of a case.

Motion practice on discovery issues should be a last resort for civil litigants in California state court. While some intractable issues cannot be resolved absent court intervention, a large portion of discovery disputes can be avoided or resolved informally if approached constructively. Both practitioners and their clients benefit from making meaningful efforts to informally resolve discovery disputes. Attorneys can be more effective at getting the discovery they need without resorting to costly and unnecessary motion practice. And making good-faith efforts to resolve disputes will protect counsel from the risk of sanctions for abuse of the discovery process. Moreover, an effective meet-and-confer process and judicious structuring of discovery requests and responses can help attorneys improve their credibility with the court. The court will appreciate not having its busy docket consumed with discovery motions that could have been avoided if the attorneys had engaged in a constructive dialogue. Given the serious demands and burdens placed on today's state court system, a reduction in the number of discovery motions can free up time for courts to address other critical merits-related issues. This benefits all litigants. ■

---

[1] Code Civ. Proc. §2017.010.

[2] *See, e.g.,* Obregon v. Superior Court, 67 Cal. App.

ATTORNEYS:
CAN WE HELP YOU?

LOOKING TO REFER CASES?

We pay the highest referral fees per State Bar Rules

LOOKING TO RETIRE?

We buy Trust and Will practices State-wide

PRACTICE AREAS

- Trust Contests & Will Contests
- Trust, Estate & Probate Litigation
- Abused Trust & Abused Will Beneficiary Litigation
- Holding Trustees & Executors Accountable

HANDLING CASES THROUGHOUT CALIFORNIA

San Francisco Office
(415) 685-0909

Silicon Valley Office
(650) 596-9999

Los Angeles Office
(213) 670-7940

Orange County Office
(949) 608-0040

San Diego County Office
(760) 804-2711

Inland Empire Office
(909) 466-1711

www.aldavlaw.com

ALBERTSON & DAVIDSON LLP
Trust, Estate & Probate TRIAL LAWYERS

4th 424, 431 (1998) ("When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden.").

[3] *See* Clement v. Alegre, 177 Cal. App. 4th 1277, 1285-93 (2009); *see also* Standon Co., Inc. v. Superior Court, 225 Cal. App. 3d 898, 901 (1990).

[4] *See* Obregon, 67 Cal. App. 4th at 431.

[5] *See* Clement, 177 Cal. App. 4th at 1285-93; *see also* Standon Co., 225 Cal. App. 3d at 901.

[6] Code Civ. Proc. §§2023.010(e), (f), 2023.030; *see also* Clement, 177 Cal. App. 4th at 1292-93 (affirming trial court's award of sanctions against party that provided "evasive" discovery responses).

[7] *See* Code Civ. Proc. §§2016.040, 2031.310(b)(2) (motion to compel further responses to requests for document production), 2030.300(b) (motion to compel further responses to interrogatories), 2033.290(b) (motion to compel further responses to requests for admissions).

[8] Code Civ. Proc. §2023.010(i).

[9] Stewart v. Colonial W. Agency, Inc., 87 Cal. App. 4th 1006, 1016 (2001) (quotations omitted).

[10] Code Civ. Proc. §2023.010(i).

[11] *Id.* Code Civ. Proc. §2023.020.

[12] Townsend v. Superior Court, 61 Cal. App. 4th 1431 (1998).

[13] *Id.* at 1434.

[14] *Id.* at 1434, 1436-37.

[15] *Id.* at 1434.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1439.

[20] *Id.* at 1435.

[21] *Id.* (quoting Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 120 (D. Nev. 1993)).

[22] *Id.* at 1438-39.

[23] *Id.* at 1439.

[24] Obregon v. Superior Court, 67 Cal. App. 4th 424 (1998).

[25] *Id.* at 428.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 431-32.

[32] Code Civ. Proc. §§2023.030(a), 2031.320(b) (motion to compel further responses to requests for production), 2030.300(d) (motion to compel further responses to interrogatories), 2033.290(d) (motion to compel further responses to requests for admissions).

[33] Mattco Forge, Inc. v. Arthur Young & Co., 223 Cal. App. 3d 1429, 1441 (1990).

[34] Volkswagenwerk Aktiengesellschaft v. Superior Court, 122 Cal. App. 3d 326, 333-34 (1981); *see also* Obregon, 67 Cal. App. 4th at 432.

[35] *See also* Clement v. Alegre, 177 Cal. App. 4th 1277, 1294 (2009).

[36] Volkswagenwerk, 122 Cal. App. 3d at 333-34 (reasoning that an attorney's delegation of the meet-and-confer process to a paralegal without authority to resolve the dispute was unreasonable).

[37] Los Angeles County Superior Court Fourth Amended General Order Re Personal Injury Court Procedures ¶11, *available at* http://www.lacourt.org/division/civil/pdf/4thAmendedPIProcedures_012615.pdf.

[38] *Id.*

[39] *Id.* at ¶12.

[40] Los Angeles County Superior Court Form CIV-036 (Discovery Resolution Stipulation).

[41] Code Civ. Proc. §639(a)(5).