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You've Blown the Dreaded Draconian 45-Day Rule-Now What Do You Do?

By Katherine Gallo

Motions to compel further responses to interrogatories, requests for productions of documents and requests for admissions require that the motion be filed within 45 days. CCP §§ 2030.300(c), 2031.310(c) and 2032.290(c) Delaying the filing of the motion waives a party's right to compel further responses. The case of [Vidal Sassoon, Inc. v. Superior Court \(1983\) 147 Cal. App. 3d 681 \(pdf\)](#) at 685 (Pre-1986 Discovery Act) takes the position that the court lacks jurisdiction to order further responses after time has expired. The Second District Court of Appeal upheld this rationale in [Sexton v. Superior Court \(1987\) 58 Cal. App. 4th 1403 \(pdf\)](#), 1410.

Weil and Brown Civil Procedure Before Trial (TRG 2009) §8:1150 suggests that you may be able to obtain relief under C.C.P. Section 473(b) which allows for relief generally from "any judgement, order or other proceeding" on a showing of "mistake, inadvertence, surprise or excusable neglect" citing [Zellerino v. Brown \(1991\) 235 Cal. App. 3d 1097 \(pdf\)](#). In that case the Court of Appeal stated that relief can be obtained under CCP § 473(b) when the Discovery Act does not provide a remedy. However, *Zellerino* involved experts and none of the cases citing *Zellerino* involved the 45-Day Rule. To date, I have never heard anyone being successful and after 20 years of the Discovery Act, I seriously doubt that any court would give relief under CCP § 473.

So now what do you do? The answer is another discovery device. In [Carter v. Superior Court \(1990\) 218 CA3d 994 \(pdf\)](#) the court held even though a party had missed the deadline for compelling inspection of documents under C.C.P. Section 2031 it did not bar him from requesting the same documents be brought to a deposition. Therefore, you can serve any of the following discovery devices and pretty much get the same result:

- **Interrogatories**—Use requests for admissions coupled with Form Interrogatory 17.1 and request for documents.
- **Request for Production of Documents** —Use deposition notices with a document requests, corporate deposition notices with a document request and/or third party subpoena for deposition with documents.
- **Request for Admissions** —use special interrogatories or deposition notices

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One thing you can't do is reserve the same interrogatories, requests for documents and/or requests for admissions and "reset the clock." *Sexton* at 1408 citing *Professional Colleges, Magna Institute, Inc. v. Sup. Ct.* (1989) 207 CA 3d 490.

Your other alternative is let the objections stand. Then at trial serve a motion in limine excluding all evidence that was not produced in discovery. If a party does not cough up the info during discovery they can't use it at trial.

These are a few suggestions on the dreaded draconian 45-Day Rule. **Does anyone have any more?**

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