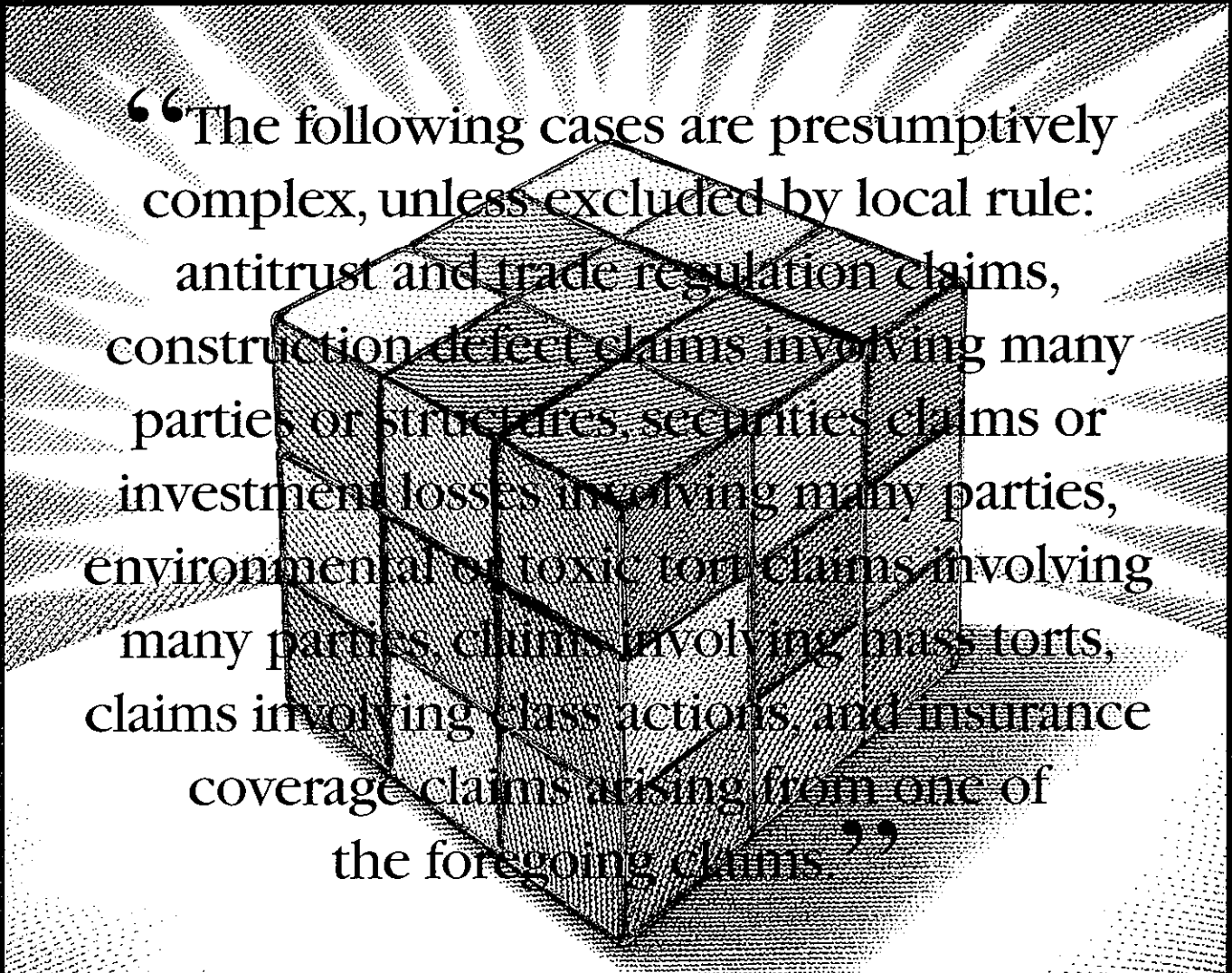


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“The following cases are presumptively complex, unless excluded by local rule: antitrust and trade regulation claims, construction defect claims involving many parties or structures, securities claims or investment losses involving many parties, environmental or toxic tort claims involving many parties, claims involving mass torts, claims involving class actions, and insurance coverage claims arising from one of the foregoing claims.”

Ex Parte Discovery Hearings in Coordinated Proceedings:

The Wave of the Future

By Robert C. Wright and Laurie E. Barber



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Is there a better way to resolve discovery disputes than the present 21-day noticed motion?

A five-day, *ex parte*-type procedure recently used in coordinated proceedings resolved the vast majority of discovery disputes quickly without compromising the quality of adjudication. On the basis of this success, the legislature should implement a pilot program in several counties to determine whether a similar motion scheme can be effectively applied to all civil cases.

— JCCP 4041 and 4042 —

In July 1998, five actions brought on

behalf of the People of the State of California against major tobacco companies were coordinated in Judicial Council Coordinated Proceeding ("JCCP") No. 4041. See <http://www.sandiego.courts.ca.gov/jccp/tobacco/index.html>. In August 1998, eleven actions by labor unions and a class action against the tobacco companies were coordinated in

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JCCP No. 4042. *Id.* In December 1998, an additional class action against the same defendants was "added on" to JCCP 4042. San Diego Superior Court Judge Ronald S. Prager was appointed Coordination Trial Judge in both proceedings.

The coordinated cases include representative actions brought by plaintiffs in the role of private Attorneys General under Business and Professions Code § 17200 for alleged unfair and fraudulent business practices in the advertising and promotion of cigarettes. Each satisfies the "complex case" tests set forth in Rule of Court 1800(b)(1)-(5), including the need to manage a large number of witnesses and a substantial amount of documentary evidence.

In March 1999, the court ordered that the filing and service of papers in JCCP 4042 be done electronically via CourtLink (formerly JusticeLink). In addition, the court implemented a special procedure to handle discovery disputes. Unless otherwise ordered, all such disputes were to be first addressed to the court through a procedure similar to an *ex parte* application. On or before 9:00 a.m., on Thursdays, written papers seeking resolution of a dispute were to be filed and served. Responses were to be filed and served by noon on Fridays. At 1:30 p.m. the following Mondays, the matters were to be heard.

The purpose of the hearings was to determine whether the discovery dispute could be resolved without further briefing. In fact, *all* disputes were resolved at the hearing without requests for permission to file further papers. After oral argument, the court routinely ruled from the bench, and proposed orders were prepared by the prevailing party reflecting the outcome.

To accommodate this process, the court reserved Monday afternoons at 1:30 for discovery matters in the case. The court also ordered that the time limitations would not be enforced for bringing a motion to compel following an inadequate discovery response.

See, e.g., Cal. Code Civ. Proc. §§ 2025(o), 2034(k). In effect, consistent with its discretionary authority in Code of Civil Procedure § 1005(b), the court permanently shortened the 21 and 10 calendar-day deadlines for moving and opposing papers. Without objec-

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tion from the parties, the reply brief was *de facto* eliminated.

— **Discovery Motions Resolved** —

In JCCP 4042, this *ex parte*-type process was used to resolve numerous motions on the most common types of discovery disputes involving responses to interrogatories, requests for production of documents and deposition questions. Cf. Peggy E. Bruggman, *Reducing the Costs of Civil Litigation; Discovery Reform*, Public Law Research Institute, <http://www.uchastings.edu/plri/folsstax/discov.html>, at 26 (2003). The process was also used to resolve discovery issues that arose less often: to obtain the

return of inadvertently produced documents, amend expert witness designations, compel the production of persons most knowledgeable to attend depositions, compel production of documents subpoenaed from expert witnesses, compel further responses to requests for admission, obtain verifications to discovery responses, enter and modify protective orders, enjoin *ex parte* contacts with former employees, and establish procedures governing disclosure of causation and monetary recovery models by experts.

As in present practice, the motions were based on a written notice with a memorandum of points and authorities of four to ten pages, declarations, and exhibits. Seldom was a Rule 335 memorandum submitted on motions to compel; however, when such motions were made, the disputed requests or questions were attached or set forth in the supporting memorandum.

— Ordinary and — Exceptional Discovery Issues

This special procedure was very successful. As exemplified by the motions brought in the coordinated proceedings, many discovery issues are repetitive and do not require extensive briefing. When relevancy of the request to the subject matter of the action is clear and there is no privilege claim, the motion to compel a further response is usually meritorious and should be granted. From a statistical standpoint, the most common discovery motions involve failure to respond to interrogatories and requests for production of documents and failure to attend depositions — all of which lend themselves to rather straightforward briefing and resolution. Bruggman, *supra*, at 26. Furthermore, the better the court is educated about the case through directly handling discovery issues, the more efficient (and consistent) it becomes in its discovery rulings. The more predictable the results, the less likely counsel will need to bring a motion to know what the

outcome will be.

The special procedure is not appropriate for every discovery dispute. As also exemplified by the coordinated proceedings, motions addressed to claims of privilege, attorney work-product, or privacy — particularly when there is an extensive historical background to the claim — cannot be adequately briefed and considered in the shortened time frame of the special procedure. For example, an overarching issue affecting discovery in the coordinated proceedings was whether the attorney-client privilege and attorney work-product protection had been waived on certain documents produced by the tobacco companies to a congressional committee. The issue had a complicated factual and legal history. To resolve it, the court set a briefing schedule, issued a written opinion, and conducted an *in camera* document review.

Whether first raised in objections to discovery requests or a motion for protective order, privilege, work-product, and privacy claims often require *in camera* inspection of numerous documents and the assistance of a discovery referee. *See, e.g., Stadish v. Superior Court*, 71 Cal.App.4th 1130, 1144, 84 Cal.Rptr.2d 350 (1999) (court ordered to review thousands of documents containing alleged trade secrets). Motions addressing these subjects should continue to be brought under the current statutory regime and may require more than 21 days to resolve.

In JCCP 4041 and 4042, a discovery referee was appointed early in the proceeding at the request of the parties but was never used.

— Distinguishing Current Practices —

Superior court judges have long possessed the authority to shorten the time for hearing discovery motions and frequently exercise that authority on *ex parte* application. Cal. Code Civ. Proc. §1005(b). Many judges — about 25 percent in San Diego Superior Court — require a pre-filing appearance to

discuss discovery disputes before a motion is brought. Some require the movant to file papers 24 or more hours beforehand or provide a copy of the discovery requests and responses. A smaller but significant percent-



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age of judges will also address issues arising in deposition — particularly those conducted at distant locations — on the telephone or, as in JCCP 4041 and 4042, permit the parties to come into court during a deposition break to resolve disputes.

While these practices and policies have been beneficial in achieving prompt, efficient resolution of discovery issues, they are no substitute for the special procedure. For example, in the coordinated Firearm Cases, JCCP No. 4095, three actions by California cities and counties under Business and Professions Code § 17200 against major firearm manufacturers and distributors ([http://](http://www.sandiego.courts.ca.gov/jccp/firearms/index.html)

www.sandiego.courts.ca.gov/jccp/firearms/index.html), the parties were required to discuss discovery disputes with the court before bringing a motion. This salutary rule reduced the number of disputed issues by an estimated 25 to 30 percent. Although narrowing the scope of the discovery motions, it seldom eliminated the need for them.

— **Proposal** —

The leading-edge features of JCCP 4042, such as filing and serving papers electronically, do not prevent broad application of the special procedure. Facsimile filing and service of papers essential to the special procedure can be accomplished with facsimile machines found in virtually every lawyer’s office. In accordance with Code of Civil Procedure § 1010.5, most courts now permit the filing of papers by facsimile transmission, and service by facsimile is allowed when the parties agree to it. Cal. Code Civ. Proc. § 1013(e).

Since many superior court judges reserve Fridays for various non-trial matters, it is an ideal day to hear discovery motions. This leads to the following proposal for a pilot program in several California counties. Unless otherwise ordered by the court for good cause, all discovery motions, except those involving issues of privilege, attorney work-product, or privacy, would be filed and served by Friday at 9:00 a.m. Oppositions would be filed and served by Tuesday at 5:00 p.m. Replies would be filed and served by Thursday at 9:00 a.m. Code of Civil Procedure § 1005(c) would be amended to permit facsimile service of the papers. Motions would be heard on Fridays at 9:00 a.m.

In conclusion, the experiences of JCCP 4041, 4042, and 4095 suggest, and advances in electronic communication support, a better way to resolve discovery disputes. The special procedure successfully employed in coordinated proceedings is the wave of the future in discovery practice.