

“What Are They Hiding” Resolving Discovery Disputes

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Research shows...

6 out of 7 Dwarves
aren't Happy



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Common Discovery Disputes

Sub rosa for fun & trouble

- Refusal to provide med records/release
- Disputes over depo appearance, timing, location, or scope
- Objections to subpoenas (e.g., privacy, relevancy)
- Refusal to answer rogs or produce docs
- Use of surveillance



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LC § 5708-5709 - *Informality of WCAB Proceedings*

LC 5708 “The appeals board is not bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, best calculated to ascertain the substantial rights of the parties.”

Judge...not jury!



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WCAB not req'd to follow strict civil
proc/evidence rules

(consistent ruling for IW? Def?)



WCJ may admit **hearsay**/informal evidence,
so long as "due process" observed ("I'll take it
in under advisement")



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Focus is on

"**substantial justice**", not technicalities

Under Article XIV, § 4 of the CA Constit, must:

“accomplish substantial justice in all cases
expeditiously,

inexpensively, and

without incumbrance of any character.”



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In discovery disputes, Constit means:

Discovery must = fair resolution, not just delay or burden

Tools like depos, SDT must = efficient resolution

WCJ may limit or deny discovery if creates unjust delay, cost, or complexity w/out advancing the resolution of substantive issues



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Surveillance

- ❖ Malingering?
- ❖ Working elsewhere?
- ❖ Exaggerating?
- ❖ Proving F-R-A-U-D!
- ❖ Lying?



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Expensive, but commonly utilized



Usually admissible

Often ruled "competent evidence" to show extent of disability



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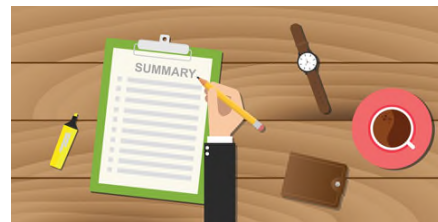


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Shown At Trial?

WCJ must summarize in:

- minutes of hearing
- summary of evidence



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CA Constitution -

Generally protects the right to privacy

(right is not absolute)



No "reasonable expectation" of privacy for med condition placed at issue

Right to privacy generally does not prevent:

- a) surveillance films, nor
- b) sharing them w/docs



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Must Be Filmed in Public Viewpoint

(No Expectation of Privacy)

Such as:

- Sidewalk, street, parking lot (public/exposed private), yard visible from public space
- Through open doors/windows, but only shot from public area



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Such as:

- ❖ Stores (store policy?), gym parking lots, or a front yard that is clearly visible from the public road



- ❖ Public area of gym



- ❖ NOT private areas (dressing) = crime



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NO:



- ❖ Trespass on private property
- ❖ Looking over/through a solid privacy fence



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Originally "anti-paparazzi" law:

1. Physical Invasion of Privacy (Trespassing)
Civil Code Section 1708.8(a), liable for physical invasion of privacy if:

- a) Knowingly enter someone else's land
- b) W/out permission (trespass)
- c) To capture a visual image, sound recording, or physical impression of plaintiff,
- d) With the intent to invade their privacy.



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1. Rule:

You cannot:

- ❖ Jump a fence
- ❖ Walk into someone's backyard, or
- ❖ Break into private facility (e.g., gym locker room). to secretly film



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2. Constructive Invasion of Privacy

(Using Tech to Bypass Barriers)

- ❖ Section 1708.8(b) can't capture images or sound of someone engaging in "private, personal, or familial activity" w/out consent even if don't trespass



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Rule:

- ❖ No visual/auditory device (telephoto lens, boom microphone) to see/hear what can't be seen via naked eye from public space
- Ex: PI on public sidewalk using huge zoom lens to film through a gap in curtains = "constructive invasion of privacy"



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3. "Drone" Amendment

- ❖ Rule: Section 1708.8 extends "reasonable expectation of privacy" to sky
- Ex.: Flying drone over fence or by 2nd story window for film in PRIVATE setting



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4. Severe Financial Penalties

- ❖ Treble Damages: Up to 3x
General damages (loss of enjoyment,
consortium, etc)
+
special damages (economic)
- ❖ Punitive Damages: if malice = more punis ok



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- ❖ Fines: \$5,000 to \$50,000
- ❖ Disgorgement: If commercial, give up any profit



Applicable to carriers, TPAs, Employers, DAs who hire PI



IF



had hand in directing illegal activity



1. "Directs, Solicits, or Causes" Provision



“Get footage of him inside his house,”
or
“Fly a drone over his backyard to see if
he's doing yard work”
=
liable as PI



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2. Closure of "Independent Contractor" Loophole



Party directing the surveillance

liable

"regardless of whether there is [ER-EE]
relationship"



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3. Willful Ignorance vs. Strict Liability

❖ Only liable if:



- knew or should have known, or
- explicitly directed illegal method



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HOWEVER, if

1. Carrier receives film obviously taken illegally, and
2. Accepts, pays for, and
3. Uses in court

=

Ratifying illegal act

4. Shared Penalties
 - ❖ Same as the PI



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1. Surveillance Not Automatically Discoverable:

- ❖ not need to be disclosed in advance, unless a specific discovery request
- ❖ IW served no discovery demand* for surveillance



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2. Admission of Late Evidence

Permitted if Fair:

- ❖ WCJs have broad discretion to admit/exclude evidence
- ❖ As long as IW has chance to review & respond to the evidence, due process satisfied
- ❖ Watch for boilerplate



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ADMISSIBILITY

WCAB not bound by:

- common law
- statutory rules of evidence



BUT...



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Film must be "authenticated" to be admitted



“Surveillance films are not ordinarily admitted, unless the operator of the movie camera testifies concerning the manner in which the applicant was observed and relates the technical data pertaining to the taking of the movies.”

In re Alleged Contempt of James Buzan and Clifford Sweet, III (1978) 43 CCC 789 (appeals board en banc)



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“Foundation for admission”

TYPICAL: require PI who filmed to state that accurately depicts

NO INVESTIGATOR: exclude evidence



*some cases have held otherwise



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H: WCJ improperly excluded surveillance

R: WCJ used an improper analysis to exclude

- ❖ not bound by the common law or statutory rules of evidence and procedure



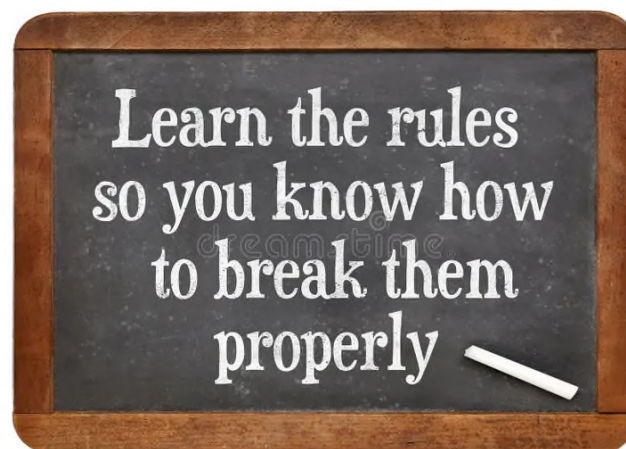
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R (con't):

- routine in w/c to allow most docs into evidence w/out formal authentication
- even in criminal/civil cases, "chain of custody" not necessary to est authenticity of a video.



LC § 5708

- ❖ Not bound by common law/statutory evidence rules
- ❖ Proceedings are to be conducted to achieve “substantial justice”

LC § 5703

- ❖ Allows any "relevant" evidence
- ❖ Includes documents, records, and other probative material



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WCJ may not exclude video evidence

(e.g., dashcam or surveillance) solely b/c proponent:

- ❖ Did not call investigator to testify:
 - How video was prepared
 - What it depicts
 - Whether edited/alterred

- ❖ Goes to weight, not admissibility



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Downing v. City of Hayward (panel)

Key Holdings

- ❖ WCAB emphasized:
 - ❖ Authentication requirements are relaxed
 - ❖ Video evidence admissible if:
 - ❖ Relevant, and
 - ❖ Appears reliable on its face
- ❖ Lack of a foundational W goes to:
 - ❖ Credibility / weight, not admissibility



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How to Use This (Def Framing)

- ❖ Argue:
 - ❖ Authentication threshold = minimal at WCAB
 - ❖ Video = real evidence, not hearsay in the traditional sense
- ❖ Emphasize:
 - ❖ Opposing party can:
 - ❖ Cross-examine
 - ❖ Offer rebuttal evidence
- ❖ Therefore:
 - ❖ Exclusion = abuse of discretion



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Downing v. City of Hayward (1988) 16 CWCR 76

Not req'd to

- ❖ Disclose whether films exist before depo
- ❖ Produce any such films before depo



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Pollard v. Lemstra Cattle Co. 2025 Cal. Wrk. Comp. P.D. LEXIS 219

- ❖ Depo complete?
- ❖ Film must be produced w/in "reasonable time"
- ❖ R: IW has an opportunity to obtain rebuttal evidence



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Subsequent Case Law

❖ WCAB:

1. Excluded surveillance where Def w/held video through multiple depositions, or
2. Until after key medical evaluations and reports

+

"willful discovery abuse"



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SIDE BAR

PI's report not discoverable

- ❖ attorney work product privilege
- ❖ contained communications/info generated at request of DA*
- ❖ no intent to forward to the QME

OR

as an exhibit for trial

- ❖ strategy

Therefore:

- ❖ not relevant or admissible at trial
- ❖ IW not be prejudiced by not having access



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SUMMARY

Some judges continue to refuse to admit surveillance films unless authenticated...

Some don't!



DON'T TAKE THE CHANCE



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Fraud Films *Redner v. WCAB* (CA Sup Ct)

H: surveillance not admissible if PI

=

deceitfully induce IW to perform



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- ❖ F: accepted back
PI befriended IW
- ❖ invited to ranch
- ❖ Drunk = PI suggests horseback riding = EE
joins
- ❖ PI hides in barn, films v
- ❖ more video riding next day



- ❖ carrier (a) term'd TD, and
(b) refused tx
- ❖ docs found no PD
- ❖ film not offered at trial
- ❖ referee would not admit medical reports



RECON:

Admitted:

- ✓ film
- ✓ med evidence



H: no PD (despite PI's "might have been" booze)

AND

another PI filmed



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The Supremes...



- ❖ WCAB abused discretion allowing DEF to w/hold films until after ref reached decision
- ❖ Even if films timely offered, WCAB must reject b/c "fraudulent inducement"



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Med evidence not “substantial” b/c docs didn't know:

- a) conditions under which EE rode
- b) conditions that followed or
- c) whether subsequent pain precluded repeat



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LC § 5710 - *Depos* - "Brave New World" of Discovery Fights

Allows parties to take deposes; requires deposing party to pay:

Deponent's reasonable expenses (travel, meals, lodging)

AA "reasonable" hourly rate (\$350–\$450+):

- a) Experience
- b) Atty v HR
- c) Complexity (or not)



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AA hourly rate: long story

("How Much Is A CAAA Member Really Worth?")



"Guidelines & Recommendations."

How persuasive are guidelines?



Not very.

Consider WCJ Dennis Stach, who—after reviewing “evidence” that included memos with recommended rates authored by the presiding judges from San Francisco and Stockton—declared:



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“...the exhibits... are not only inappropriate under the Labor Code but they are irrelevant immaterial and inadmissible hearsay. They are mere opinions of individuals. Said opinions have not been adopted by administrative directors’ office... It is within the discretion of the WCALJ as to the reasonable fee for services rendered.

Consider: hill worth dying on?



Taken from 3/4/08 Report & Recommendation On Petition for Reconsideration, *Haller v City of Riverside*; expressly adopting and incorporating the WCJ’s reasoning, the WCAB denied reconsideration.



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Discovery Disputes

How to resolve-

1. Meet and Confer

Informally attempt to resolve (WCJ may not require..but do it)

Entails:

CCP § 2016.040: "meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion"



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Good Faith Effort: "meet and confer" requires a "reasonable and good faith attempt" more than boilerplate letter.

Can include:

Direct communication: phone call, email exchange, in-person meeting

Specific id of issues: Clearly explain what discovery is deficient and why

Propose solutions: Offer ways to resolve w/out WCAB intervention

Document efforts: Keep a record of all communications (emails, call logs, letters) to demonstrate your good faith effort



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Consequences of Failing to Meet and Confer:

Denial of motion

Sanctions: CCP § 2023.010(i) defines "failing to confer in person, by telephone, or by letter with an opposing party or attorney in an attempt to resolve any dispute concerning discovery, if the section governing a particular discovery motion"

=

"misuse of the discovery process"

CCP § 2023.020 *shall* impose a monetary sanction on party who fails to meet and confer ... EVEN if that party prevails on motion

Unlikely in WC...but sets a bad tone



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2. File a DOR

File DOR for MSC or Status Conference

Allows WCJ to

- (a) directly address non-compliance,
 - (b) issue orders,
 - (c) keep discovery process on track
- = w/out needing to settle entire case



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3. Appear at Conference

WCJ attempts to resolve informally

Unresolved?

(a) issue a discovery order or

(b) set discovery issue for trial



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4. File Pet to Compel or Quash

Depending on the issue, a party may file:

Pet to Compel Discovery (e.g., compel depo, documents)

Pet to Quash Subpoena (e.g., privacy concerns, improper scope)

Must include supporting declaration, relevant exhibits, and proof of service



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5. WCJ Ruling or Trial

WCJ may rule at conference or issue F&A after trial.

Discovery orders are **enforceable** under penalty of:



- a) money sanctions
- b) order certain facts be taken as est'd against non-complying party
- c) prohibiting non-complying party from introducing designated matters in evidence at trial.



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d) "Terminating Sanctions": can include

- (a) striking pleadings,
- (b) dismissing a claim, or
- (c) entering a default judgment -for egregious, willful, and persistent patterns of discovery abuse.



e) Contempt (Much less Common, More Serious):

- most severe remedy
- involves a direct affront to the authority of the court/WCAB
- can result in fines, imprisonment, or both



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When Contempt Might Be Used:



- Willful Disobedience: willful and egregious disobedience of a clear, and unambiguous discovery order (not minor or excusable oversight)
- Refusal to Testify/Produce: direct refusal by W to be sworn, answer questions, or produce docs after a direct order



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Rowen v. WCAB (1981) 119 Cal.App.3d 633:

F: AA held in contempt (anyone remember Ken Rowen?)

- disruptive/aggressive behavior towards a WCJ in chambers
- refusing to leave when directed
- fined

H: (DCA) annulled contempt...

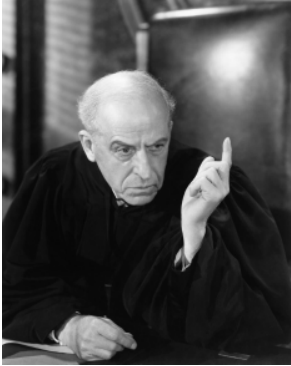


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Impact of *Rowen*:



- ❖ WCJ/referee could not *summarily* adjudge contempt but could only certify facts to Board



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Dismissal for Violating a Discovery Order?

rare and extreme cases

= willful, repeated, and bad-faith violations of discovery orders



Example: Salvation Army--"beneficiary", not EE

- need to teach AA/WCJ every case
- beneficiary disappears despite multiple order compelling depo



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Show:

- ❖ Other party received notice,
- ❖ WCJ issued a clear, enforceable order (yours), and
- ❖ Lesser sanctions have failed or would be ineffective.



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Where Prejudice Was Upheld



- Failed to appear at multiple depositions despite court orders
- Proven claim based on knowingly false narrative
- Claim adjudicated & refiled without new grounds.



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Dismissal w/out Prej.

IW fails to appear for MSC

AA: "have lost contact"

dismissed **w/out prejudice**

AA files Pet. to Reinstate with:

(a) good cause (most anything works: "dog ate my NOH") and
(b) supporting declaration.

❖ reinstated, esp if first (or second) violation



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Advantages to a Dismissal w/out Prej

1. Proc Reset / Delay

Halts lit, relieves def of immediate obligations (e.g., trial prep, discovery responses, QME scheduling).

Buys time

Get new panel, new WCJ, etc.?"



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4. Financial & Strategic Pressure on IW

Dismissal eliminates pending indemnity exposure

WCJ dismisses w/out prej =

Claim is closed for now

Def not obligated to pay

- ✓ TD
- ✓ PD advances
- ✓ Tx (except accepted body parts)



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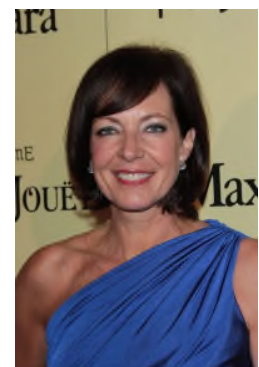
Allison v. WCAB (1999) 64 Cal.App.4th 1101

Allison Janney?

Nope

F: Evidence was challenged on tech grounds

- Hearsay
- Insufficient authentication
- Procedural defects



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- ❖ I: Whether WCAB improperly admitted per Evidence Code
- ❖ H (DCA): May admit/rely on evidence despite tech defect if “substantial justice” under Labor Code § 5708.



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Allison reasoning

- 1)
 - ❖ LC § 5708 - not bound by common law/statutory rules of evidence
 - ❖ (guided by achieving substantial justice)
 - ❖ Relaxed evidentiary standard



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2)

❖ WCAB is permitted to consider:

- Hearsay
- Informal medical reports
- Documents lacking formal authentication so long as they are reliable and probative



❖ IMPLICIT: No jury to be bamboozled



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❖ Focus on fairness, not tech exclusion:

Key inquiry - not admissibility per rules, but whether:

- Relevant and trustworthy, and
- Admission prejudices due process rights



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4) Def Takeaway



- ❖ Allison = go-to case when:
 - AA objects to surveillance, sub rosa, or med records on technicality
 - Authentication = imperfect
 - Evidence is hearsay but probative (what is "hearsay")



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Common grounds to quash SDT:

- ✓ Violation of privacy rights (e.g., psych, medical),
- ✓ Lack of relevance,
- ✓ Overbreadth or fishing expedition,
- ✓ No notice to consumer under CCP § 1985.3,
- ✓ SDT issued by unauthorized party



QUASH not SQUASH



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Practical Use

- ❖ Usually used for SDTs of medical records, mental health records, employment files w/out proper notice or overly broad



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If IW places med/psych condition in controversy

Placed med/psych controversy

=

Waive privacy to extent needed to eval

BUT...



Britt v. Superior Court
(1978) 20 Cal.3d 844, 859

CA Sup Ct explained...



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“As we have explained, although a plaintiff who places his or her mental or physical condition in issue may not withhold information relevant to that condition on privacy grounds, the scope of discovery must still be narrowly circumscribed. When discovery touches upon constitutionally protected interests, particularly rights arising under the First Amendment or the state constitutional right of privacy, a ‘compelling interest’ must be shown, and the discovery must be tailored to minimize intrusion.”



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Interrogatories

Questions w/out depo...interrogatories?

only per agreement
rare



Short Answer:

No, civil-style rog (like Form Rog - CCP § 2030.010)
not allowed



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LC § 5708

WCAB not bound by stat/common law rules of evidence or procedure, but proceedings must ensure "substantial justice"

HUH?

What about CA Constitution: "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character"

Wouldn't rog accomplish better than depo?



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When might rogs be allowed?

1. Agreement

- Stip to written questions in lieu of or in addition to depo
- Expediency (e.g. depo difficult to schedule)
- More pre-Zoom



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Special Circumstances

Can use if voluntarily provided

Such as:

- W incapacitated or unavailable
- Sufficiently narrow to address in writing
- WCJ determines it will facilitate justice w/out burdening process



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Only relevant records discoverable...BUT aren't they all?

- PD-based on ADLs
- Can't assess injury's, ADLs impacted in vacuum
- w/out knowing other disabilities, injuries, etc?
- Waiver extends to "reasonably calculated to lead to admissible evidence"
- Creatively argue relevance
- Official/unofficial LC 4050 input



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Common Discovery Disputes

Sub rosa for fun & trouble

- Withholding release
- Depo appearance, timing, location, or scope
- Objections to subpoenas (e.g., privacy, relevancy)
- Production refusal
- Surveillance/social media evidence



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CONGRATULATIONS

(you've survived!)



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