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Pre-trial Sanctions: An Empirical Study

Florrie Young Roberts*

This Article presents the results of an empirical study of pre-trial sanctions in the Central District of the Los Angeles County Superior Court. The study specifically examined motions for monetary sanctions brought under the Discovery Act of 1986¹ [Discovery Act] and section 128.5 of the California Code of Civil Procedure. The purpose of this study is to isolate and analyze a representative sample of pre-trial motions for sanctions and the judicial response to these requests. The findings illustrate, among other things, the following: (1) the frequency of motions for sanctions; (2) the amounts of sanctions requested and awarded on a total, average, and hourly rate basis; (3) a breakdown of sanctions requests and awards under the various discovery statutes; (4) a breakdown of sanction requests and awards under Code of Civil Procedure section 128.5; (5) a breakdown of sanction awards by individual judges; (6) the differences between sanctions issued in the Fast Track courts and the Slow Track courts; and (7) on a less serious side, the sanctioning pattern according to different days of the week. This Article concludes with some thoughts on the proper use and amount of sanctions.

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1. CAL. CIV. PROC. CODE §§ 2016-2036 (West 1983 & Supp. 1991).

Commentators frequently call for greater use of monetary sanctions as a deterrent to discovery and other pre-trial abuse.² However, no study has been previously conducted in California, and only one has taken place in the federal courts which surveyed pre-trial motions to determine the use of sanctions and present findings.³ This is the first study of its kind analyzing the sanctioning patterns of California Superior Court judges.

I. METHODOLOGY

By necessity, any meaningful study of this type must be conducted at the trial court level with an examination of actual trial court files. Because motions granting or denying sanctions generally are not reviewed by the appellate courts, very few cases involving sanctions become the subject of appellate court decisions.⁴ Therefore, the data for this study was gathered directly from trial court files by reading and analyzing the moving and opposing papers and the resulting court minute orders. The motions were examined, briefed, and computerized. All information was derived from files and court records available to the public.

2. See, e.g., Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 271 (1979); Sherwood, *Curbing Discovery Abuse: Sanctioning Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567, 611 (1981); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983); Comment, *The Sanctioning Provision of the New California Civil Discovery Act, Section 2023: Will It Make a Difference or Is It Just Another "Paper Tiger,"* 15 PEPPERDINE L. REV. 401 (1988); Comment, *The California Discovery Act of 1986: Discovery the New Fashioned Way*, 18 SW. U. L. REV. 233, 247, 249 (1989).

3. Connolly, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center (1978). This study was conducted in 1978 and involved Federal Rule of Civil Procedure 37. Unfortunately, the study isolated only 67 motions for sanctions out of its case window of discovery motions. In 75% of these 67 cases, the sanction was granted and in 25% it was denied. As shown in Part IIIA, *infra*, California Superior Court Judges face significantly more sanction requests.

4. Until recently, motions granting or denying sanctions were not considered final judgments reviewable by appeal. Rather, the decisions were reviewable only by a discretionary writ of mandate, which was rarely granted. However, a recent statute provides that sanction awards in excess of \$750 may be reviewed on an appeal. CAL. CIV. PROC. CODE § 904.1(k) (West Supp. 1991).

A. Sample

1. Motions Studied

This study involved a complete survey of all motions ruled on in the Los Angeles Superior Court, Central District, from May 15, 1989, through July 15, 1989. This time frame will be hereinafter referred to as the "study window."

The study window of two months, or forty-three working days, was large enough to provide a representative sample of judges' ruling patterns without expanding the data beyond control. Because the Central District is the busiest court in California, the study window contained thousands of ruled-upon motions which had to be reviewed. Of those reviewed, 813 were identified as involving pre-trial sanctions under the Discovery Act or Code of Civil Procedure section 128.5. Of these, 516 were isolated as "studiable" because they contained enough information to contribute to the study's results.

Motions qualified as "studiable" if they were within the study window and contained the following: (1) The complete memorandum of points and authorities; (2) a declaration setting forth supporting facts, and the amount of the monetary sanction requested by the moving party;⁵ and (3) the trial court's ruling in the form of a minute order.

The remaining 297 cases were excluded after review for the following reasons:

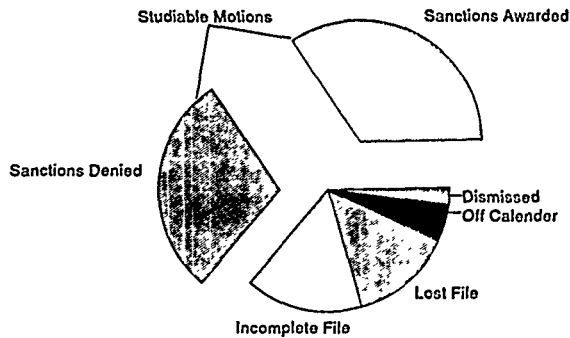
- 20 cases were dismissed with no ruling on monetary sanctions;
- 40 cases were taken off calendar and subsequently decided outside the study window;
- 125 cases had incomplete files, missing either the minute order indicating the court's ruling or the moving party's required points and authorities and declaration;

5. If submitted, the memorandum of points and authorities and the declaration of the opposing party were also examined.

-112 cases involved lost files which, after repeated extensive searches, could not be located anywhere in the Los Angeles Superior Court Records, Archives Departments, or individual courtrooms.⁶

These figures are demonstrated in the following graph:

APPORTIONMENT OF TOTAL MOTIONS INVOLVING SANCTIONS



Disposition	Number	Percent
Studiable Motions	516	63.5%
Monetary Sanctions Awarded	277	34.1%
Monetary Sanctions Denied	239	29.4%
Incomplete File	125	15.4%
Lost File	112	13.8%
Off Calendar	40	4.9%
Dismissed	20	2.4%

6. The problem of lost files was the topic of an article in a local legal periodical, which quoted the Superior Court Records Management Services Department as saying that "fewer than 1 percent of 430,000 to 450,000 files stored at the County Courthouse are missing each year." Most of the missing files are "buried under stacks on a clerk's desk or in a judge's chambers." Blum, *Occasional Loss of a Court File Can Be Frustrating For Lawyers*, Los Angeles Daily Journal, July 10, 1990, § 2, at 1, col. 1. However, the experiences gleaned from conducting this study suggest that the problem is much more widespread.

2. *Judges*

Every judge in the Central District of Los Angeles County Superior Court who heard one or more motions involving pre-trial sanctions during the study window period became a part of the study. For purposes of analyzing the actions of individual judges,⁷ only judges who heard five or more motions were considered. In this category, twenty-three Fast Track Judges and five Slow Track Judges, including two who regularly hear only Law and Motion matters, were surveyed.

B. Data Gathering

Superior court records are not computerized. Nor are any compilations kept according to the subject matter of motions ruled upon. Therefore, the initial problem faced in conducting the study was identifying the relevant motions. The sheer magnitude of files and the associated difficulty in tracking files through the unautomated court system in Los Angeles required a widespread effort. The process of gathering data was accomplished through the following steps.⁸

1. Superior Court Clerk Identification

Initially, cases involving motions for sanctions during the study window were identified by court personnel by case number from minute orders. This task was performed by the supervisors of the individual courtroom clerks who, as part of their daily duties, review all minute orders written by the judges. If the minute order indicated that a pre-trial sanction involving discovery or section 128.5 had been requested, the supervisor would note the case number. Once identified by case number, the files could be

7. See *infra* notes 85-96 and accompanying text (discussing the patterns of awards on motions for pretrial sanctions granted by judges who were analyzed in this study).

8. The cooperation of the personnel of the Los Angeles County Superior Court was willingly given and greatly appreciated.

pulled from the filing area and examined. Unfortunately, many of the motions identified in this way were found not to involve sanctions or to involve sanctions initiated by the court and unrelated to the study.⁹ Also, there was inconsistency in the reporting by the supervising clerks and the volume of cases eventually began to burden them. This necessitated the development of an alternative method for identification of files.

2. Review of Logs in Calendar and Minutes Department

In order to preserve the accuracy of the study and ensure that all relevant motions were identified, it became necessary to personally review the logs in the Calendar and Minutes Department during the study window. The department's records contain a description of all calendared motions and copies of all minute orders from the civil trial courts. From this examination, the 813 cases related to pre-trial sanctions heard during the study window were identified.

3. Examination of Court Files

All data used in the study was gathered directly from the court files by reading the moving and opposing papers and the court minute order. Examination of the actual court records used in the study began during development of the master list of 813 cases related to pre-trial sanctions. The files were examined in random order, as retrieved by the file clerks.

Many requests to the Records Department for files were routinely returned as "checked out" to the courtrooms. A random sample of 328 case files was obtained. These motions were fully briefed for purposes of the study by noting the judge presiding, department, date of motion, type of motion, reason for request, code sections relied upon, amount requested, time specified,

9. The most common example was sanctions imposed for violation of the time standards and deadline requirements of the Fast Track rules under the Rules of the Superior Court for the County of Los Angeles § 1109 (Dec. 1989).

response, resulting ruling, and reasons given by the judge for the ruling if stated in the minute order.

The full briefing of 328 requests for sanctions involved significant time. With 485 remaining motions to be examined and with a large sample of 328 fully briefed motions completed, it was decided to examine the remaining motions in a more streamlined fashion. Thus, the remaining 485 files were examined by noting the judge presiding, department, date of motion, type of motion, code sections ruled upon, amount requested, time specified, and the resulting ruling. This eliminated a full briefing of the conduct cited as the reason for the motion, the response to the motion, and the reasons stated by the judge.

4. Computerization of Briefs

With an eye toward facilitating later searches through the data, the briefs were entered into a database developed for this study. The database fields were designed to match those specified in the briefs, thereby allowing searches by code section, judge, amount requested, time expended, and outcome of motion. This made manipulation of the data for the 813 briefs easy to manage and present in a custom-designed report format and eliminated the use of a cumbersome tallying process normally associated with this type of research. It also insured greater accuracy in the data analysis results.

II. SUMMARY OF RESULTS OF STUDY

Once the briefing was completed and the data was computerized, the analysis of the data through computer searches was accomplished. While all 813 cases were entered into the database, calculations were performed using only the 516 studiable motions. The data analysis was divided into the following categories and is summarized in this section. A more detailed analysis is set forth in Part III.

A. Yearly Forecasts

This section uses the total number of motions for sanctions filed during the study window and a hypothetical amount of judicial time expended per motion to project yearly totals. It is estimated that the Central District faces at least 4,878 motions for pre-trial sanctions per year and expends at least 2,439 hours of judicial time on pre-trial motions for sanctions.

B. General Analysis of Studiable Motions

All of the studiable motions were analyzed together and were not segregated by code section or judge. The results of this section of the study can be summarized as follows:

Total Studiable Motions¹⁰

Motions (studiable) in which sanctions were requested	516
Number in which sanctions were awarded	277 or 53.7%
Number in which sanctions were denied	239 or 46.3%
Total amount of sanctions requested ¹¹	\$830,149
Total amount of sanctions awarded	\$228,387
Percent awarded of amount requested	27.5%
Average amount of sanctions requested	\$1,608
Total hours billed	3,107
Average billing rate requested ¹²	\$138

10. These figures include all motions, including those in which sanctions were denied.

11. This amount includes attorneys' fees and related costs.

12. This amount represents total hours billed for all categories (3,107) divided into the total dollar amount of attorneys' fees (excluding costs) requested where the moving attorney segregated fees from costs and specified the number of attorney hours expended (\$427,944). *See infra* page 21 (discussing the above calculation).

1991 / Pre-Trial Sanctions: An Empirical Study

Motions In Which Sanctions Were Awarded¹³

Number in which sanctions were awarded	277
Total amount of sanctions requested	\$333,134
Total amount of sanctions awarded	\$228,387
Average amount of sanctions requested ¹⁴	\$1,203
Average amount of sanctions awarded ¹⁵	\$825
Percent awarded of amount requested	68.6%
Average billing rate requested ¹⁶	\$135
Average billing rate awarded ¹⁷	\$100

Motions in which amount of sanctions awarded equalled amount requested	140
Percentage of total motions	27.1%
Percentage of successful motions	50.5%
Average amount of sanctions when awarded without reduction	\$911
Average billing rate when awarded without reduction	\$122

Motions in which sanctions awarded but amount awarded was less than amount requested	130
Percentage of total motions	25.2%
Percentage of successful motions	46.9%
Average amount of sanctions requested	\$1,549
Average amount of sanctions awarded	\$720
Percent awarded of amount requested	46.5%
Average billing rate requested	\$146
Average billing rate awarded ¹⁸	\$80

13. These figures do not include the motions in which sanctions were denied.

14. This figure represents the average of the successful motions only. The total amount (requested or awarded) was divided by the 277 successful motions.

15. This figure represents the average of the successful motions only. The total amount (requested or awarded) was divided by the 277 successful motions.

16. This figure is computed from those successful motions in which the attorneys in their moving papers segregated the amount requested in attorneys' fees and specified the number of hours billed. (\$231,612 in billable time divided by 1,716 hours).

17. The lowest calculable amount was \$99 an hour and the highest was \$105. The allocation method produces a billable rate of \$100. See *infra* pages 22-23 for a description of these methods.

18. The lowest calculable billing rate awarded in this category was \$77 and the highest was \$84. The allocation method produced a billing rate awarded of \$80. See *infra* pages 22-23 for a description of these methods.

Motions in which sanctions awarded and amount awarded was greater than amount requested	7
Percentage of total motions	1.4%
Percentage of successful motions	2.5%
Average amount of sanctions requested	\$608
Average amount of sanctions awarded	\$1,035
Percent awarded of amount requested	170.3%
Average billing rate requested	\$112
Average billing rate awarded ¹⁹	\$191-\$211

Motions in Which Sanctions Were Denied

Motions in which no sanctions awarded and substantive motion was denied	122
Percentage of total motions	23.6%
Percentage of unsuccessful motions	51%
Average total amount of sanctions requested	\$2,868
Average billing rate requested	\$146

Motions in which no sanctions awarded but substantive motion was granted	117
Percentage of total motions	22.7%
Percentage of unsuccessful motions	49%
Average total amount of sanctions requested	\$1,257
Average billing rate requested	\$136

19. See *infra* note 61 and accompanying text (discussing the total billable hours reported in motions in which sanctions were awarded and the average hourly billable rate request).

C. Fast Track v. Slow Track Breakdown

This section analyzes the judges' sanctioning patterns by their respective assignments to the Fast Track or the Slow Track.²⁰ The results can be summarized as follows:

Fast Track Totals:

Number of motions heard	192
Percentage of total motions	38.8%
Number in which sanctions were awarded	119 or 62%
Total amount of sanctions requested	\$224,528
Total amount of sanctions awarded	\$91,070
Percent awarded of amount requested	40.6%
Average amount of sanctions requested ²¹	\$1,169
Average amount of sanctions awarded ²²	\$765
Average billing rate awarded ²³	\$106
In motions where sanctions were granted,	

20. At the time of the study, the "Fast Track" was a name commonly used by the Los Angeles County Superior Court for a pilot project pursuant to the Trial Court Delay Reduction Act of 1986, CAL. GOV'T CODE, §§ 68600-68619 (West 1989). Trial Delay Reduction Rules were incorporated under Chapter 11 of the Rules of the Superior Court for the County of Los Angeles. The Fast Track cases had an expedited pre-trial schedule with shortened mandatory deadlines. The Los Angeles County Superior Court adopted the case disposition standards recommended by the American Bar Association and adopted by the Judicial Council. The goal as of July 1, 1991, was to dispose of 90% of all civil cases within one year of filing, 98% within 18 months, and 100% within 2 years. Rule 1100.4 of the Los Angeles County Superior Court Rules (1990).

Half of the cases filed in the Central District and half of the pending cases were assigned to the Fast Track based on whether the case number was odd or even. Cases assigned to the Fast Track were controlled by individual calendaring judges who would preside at the trial and who also heard all motions related to the case.

Cases not assigned to the Fast Track were heard and disposed of under the regular time parameters, although guidelines were established under Chapter 12 of the Rules of the Superior Court for the County of Los Angeles. Cases not on the Fast Track are called "Slow Track" for lack of a better term. The Slow Track courts received cases on the master calendar system. These courts utilized the Law and Motion departments to hear pre-trial motions and different judges to conduct the trial.

The Central District has adopted new rules for cases filed on or after January 1, 1991. Cases will still be divided between "Individual Calendar" and "Master Calendar Judges," but all cases now have the same mandatory expedited deadlines. Rules 1300 *et seq.* of the Los Angeles County Superior Court Rules (1991).

21. This average includes the motions in which sanctions were denied.

22. This average includes successful motions only.

23. The lowest calculable billing rate awarded was \$104 per hour and the highest was \$114 per hour. The \$106 rate was calculated under the allocation method. *See infra* pages 22-23 for a description of these calculations.

the percent awarded of amount requested²⁴ 74.2%

Slow Track Totals:

Number of motions heard	303
Percentage of total motions	61.2%
Number in which sanctions were awarded	149 or 49.2%
Total amount of sanctions requested	\$582,062
Total amount of sanctions awarded	\$136,284
Percent awarded of amount requested	23.4%
Average amount of sanctions requested ²⁵	\$1,921
Average amount of sanctions awarded ²⁶	\$915
Average billing rate awarded ²⁷	\$93
In motions where sanctions were granted, the percent awarded of amount requested	73.6% ²⁸

D. Judges Breakdown

This section focuses separately on each judge. The following were examined: the number of motions for monetary sanctions heard by the judge, the percentage of time the judge awarded sanctions (called the average), the total amount of sanctions requested, the total amount of sanctions awarded, and a "slugging percentage," which indicates the percent of sanctions awarded out of the amount of sanctions requested when the judge granted a motion for sanctions.²⁹ The following is an example:

24. This is the "slugging percentage" described in Part IIID, *infra*.

25. This average includes the motions in which sanctions were denied.

26. This average includes successful motions only.

27. The lowest calculable billing rate awarded was \$90 per hour and the highest was \$99 per hour. The \$93 rate was calculated under the allocation method. *See infra* pages 22-23 and accompanying text for a description of these calculations.

28. This is the "slugging percentage" described *infra* note 86 and accompanying text.

29. The "slugging percentage" is described *infra* note 86 and accompanying text.

1991 / Pre-Trial Sanctions: An Empirical Study

Judge Who Most Frequently Awarded Sanctions:

Judge 2 of the Fast Track:

- 6 motions heard
- 5 motions granted
- \$2,740 in sanctions requested
- \$2,326 in sanctions awarded
- Average = 0.833
- Slug. = 1.000

Judges Who Least Frequently Awarded Sanctions:

Judge 23 of the Fast Track

- 5 motions heard
- 0 motions granted
- \$12,572 in sanctions requested
- \$ 0,000 in sanctions awarded
- Average = 0.000
- Slug. = 0.000

Judge E of the Slow Track

- 113 motions heard
- 41 motions granted
- \$257,109 in sanctions requested
- \$31,882 in sanctions awarded
- Average = 0.363
- Slug. = 0.409

E. Discovery Act Breakdown

This section focuses on sanctions requested and awarded for violations of various provisions of the Discovery Act. It analyzes the code sections cited as authority by the moving parties³⁰ and shows the success rates when cited.

30. Because more than one code was often argued per motion, there were 809 citations in 473 motions which relied in part or in full on Discovery Act provisions. Forty-three (43) motions relied solely on Code of Civil Procedure § 128.5 as authority and did not cite a discovery code section.

In summary, the individual code sections were cited in the study cases as follows:³¹

	Number of Times Cited	Number of Times Successful
-2017 (general discovery)	9	5
-2019 (methods of discovery)	6	4
-2025 (deposition)	82	55
-2030 (interrogatories)	182	127
-2031 (document inspection)	144	97
-2032 (physical and mental exams)	23	13
-2033 (requests for admissions)	35	22
-2034 (expert witnesses)	13	5

F. Utilization of Code of Civil Procedure Section 128.5

This section analyzes the composition and disposition of motions where Code of Civil Procedure section 128.5 was relied upon for the imposition of sanctions for non-discovery matters, and also where it was cited in support of discovery sanctions. The study produced eighty-five motions that cited section 128.5, forty-three of which did not involve discovery.

31. The general sanctions provision, Code of Civil Procedure § 2023, which applies to all types of discovery, was utilized 315 times. *See* CAL. CIV. PROC. CODE § 2023 (West Supp. 1991).

G. Days Of The Week Breakdown

This section attempts to shed light on the question of which day of the week is most advantageous to bring a motion for sanctions. Although no correlation is claimed, the statistics were computed out of interest. The greatest number of motions for sanctions during the study window were set for hearing on Wednesdays, but the highest success rate in terms of the percentage of motions granted occurred on Tuesdays. The day on which the greatest percentage of motion requests were taken off calendar was Friday.

III. DETAILED RESULTS OF STUDY

A. Yearly Projections

In a two-month period, judges in the Los Angeles Superior Court, Central District, faced 813³² motions for pre-trial sanctions. If this figure is multiplied by six to reach a yearly total,³³ the number of motions involving pre-trial sanctions heard in the Central District each year can be estimated at 4,878.

This figure leads to several conclusions. First, attorneys apparently perceive that their adversaries have engaged in conduct which not only violates pre-trial rules but does so in a fashion that is sanctionable because it is “without substantial justification”³⁴ or is in “bad faith,” “frivolous,” or “for the purpose of delay.”³⁵ In other words, these are not good faith differences of opinion but rather are disputes where the moving party feels the adversary has acted in an unsupportable fashion. Additionally, since all of the discovery provisions require the parties to attempt to

32. As explained *supra* notes 5-6 and accompanying text, 297 motions were excluded from the sample to obtain the 516 studiable motions. However, this does not diminish the total number of sanctions motion filed. Some cases were not actually heard by the judge because they were taken off calendar.

33. Of course, this type of extrapolation can only provide an estimate.

34. See, e.g., CAL. CIV. PROC. CODE § 2023 (West Supp. 1991).

35. *Id.* at § 128.5 (West Supp. 1991).

resolve their differences informally,³⁶ this figure indicates that attorneys practicing in the Central District of Los Angeles are unable to do so almost 5,000 times per year.

Second, the number of requests for sanctions is significant from the standpoint of expenditure of judicial resources. As a very rough estimate, the average judge spends at the minimum thirty minutes per motion in the form of a combination of off-the-bench preparation time, actual hearing time, and decision-making time. If 4,878 motions per year are hypothesized, then 2,439 hours of judicial time are expended on issues where the attorneys are unable to resolve their pre-trial disputes themselves and one or both of them feel the other's conduct is so egregious as to warrant sanctions.

B. General Analysis of Studiable Motions

Of the 813 cases identified during the study window, 516 were determined to be studiable.³⁷ Most of the computations utilized the 516 studiable motions as the sample. For all hourly rate computations performed in the study, a smaller sample of motions was used. In each category, only motions in which the attorney specifically segregated fees from costs and specified his billable hours were considered. Motions in which the attorney made general lump sum requests for sanctions that covered both fees and costs, or where the attorney did not detail the hours of attorney time expended, were excluded from these computations.³⁸ An analysis of the motions reveals the following statistics.

36. *Id.* at §§ 2017(d), 2019(b)(2), 2023(a)(9), 2025(i), 2030(e), (l), 2031(e), 2032(c)(7), 2033(e), (l), 2034(e), (l) (West Supp. 1991).

37. For an explanation of which motions were "studiable," see *supra* notes 5-6 and accompanying text.

38. Because different categories contained different numbers of motions where attorneys segregated fees, costs, and billable hours, the sample sizes differ.

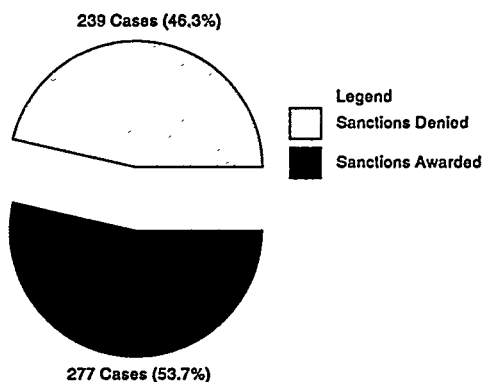
1. Totals

Sanctions were awarded in 277 or 53.7% of the 516 studiable motions. Sanctions were denied in 239 or 46.3% of the motions.

The total amount of monetary sanctions requested over the two-month period was \$830,149.³⁹ The average request was \$1,608.⁴⁰ The total amount of sanctions awarded was \$228,387, or 27.5% of the amount requested, for a 72.5% reduction.

These figures are demonstrated in the following graphs.

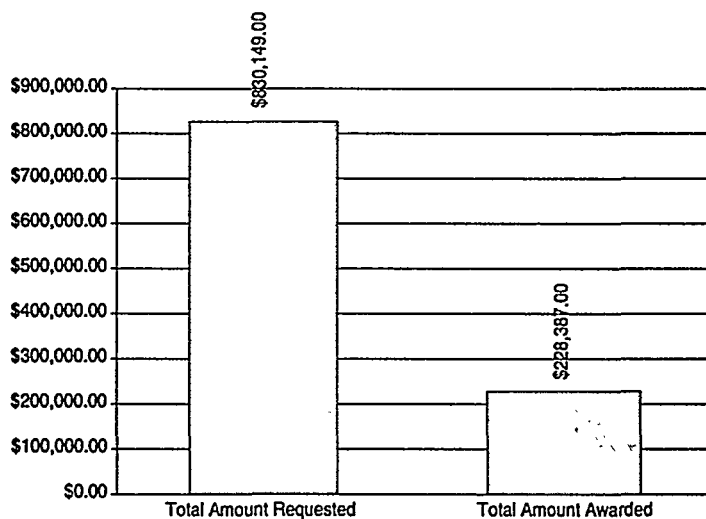
A COMPARISON OF SANCTIONS AWARDED AND DENIED



39. Six very large requests totalling \$182,929 are included in this figure. These requests were in the amount of \$54,900, \$59,708, \$24,715, \$14,362 (in the category of substantive motion denied and motion for sanctions denied); \$21,842 (in the category of motion for sanctions granted and amount awarded equalled the amount requested); and \$27,402 (in the category of motion for sanctions granted and amount awarded reduced (in this case to \$800)). Only two of these large requests resulted in a sanction award. All of these requests were general requests in that the moving attorneys did not differentiate between fees and costs.

40. This average is the result of dividing the total amounts requested of \$830,149 by the total number of motions of 516. This average should be distinguished from the average requested for *successful* motions of \$1,203. See *infra* notes 45-68 and accompanying text (discussing the amounts requested and the monetary awards in successful motions for sanctions).

**A COMPARISON OF THE TOTAL AMOUNT REQUESTED AND
THE TOTAL AMOUNT AWARDED**



Total Amount Requested	\$830,149
Total Amount Awarded	\$228,387
Percent Awarded	27.5%

a. Time Expended

In the category of total studiable motions, the moving parties reported 3,107 hours of work necessitated by their motions. This number is from 420 cases (81% of the cases studied) where the moving party reported the number of hours expended in seeking the sanction and differentiated between fees and costs. The average hours expended per motion based on these numbers was 6.5 hours.

In ninety-six cases the attorneys did not specify the hours expended or differentiate fees from costs. Instead, the moving

parties either requested “reasonable attorney’s fees” and left the amount of sanctions to the court or asked for a certain amount under the label of “reasonable attorney’s fees.” If these cases are included in the sample and multiplied by the average number of hours expended of 6.5 hours, the total hours expended by the moving parties would amount to 3,731. Additionally, if the 125 incomplete cases and the 112 lost cases were included and computed in the sample, the total hours necessitated by motions for sanctions would rise to 5,272 hours.⁴¹

The common categories of attorney time and the percentage of time devoted to each category was as follows:⁴²

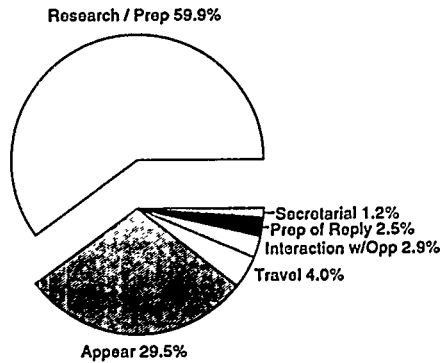
Preparation of motion	59.9%
Appearance time	29.5%
Travel time	4.0%
Conferring with opposing counsel	2.9%
Preparation of reply	2.5%
Secretarial	1.2%

41. The opposing party, while not tracked for this study when unsuccessful, nonetheless has reported hours that could double the total hours expended.

42. These were the categories described by the moving parties. Some overlap may occur. For example, travel time may incorporate some portion of the appearance time category depending on how the moving party presented its breakdown.

This breakdown of time is illustrated in the following graph:

ALLOCATION OF ATTORNEYS' TIME



Disposition	Percentage	Hours
Research/Prep of Motion	59.9%	1861.2
Appear	29.5%	916.6
Travel	4.0%	124.5
Interaction with Opponent	2.9%	90.2
Preparation of Reply	2.5%	77
Secretarial	1.2%	37.5

b. Total Amount Requested in Fees

Of the 420 cases where attorneys in their moving papers specified the hours billed and differentiated between fees and costs, a total amount of fees of \$427,944 was requested. Of course, the actual amount of attorney's fees requested was significantly higher

because many attorneys did not differentiate between fees and costs in their moving papers. This is evident from the fact that \$830,149 in total sanctions was requested.⁴³ However, for purposes of computing the hourly rate requested, it was necessary to use the \$427,944 figure.

c. Hourly Rate Requested

Attorneys requested an average hourly rate of \$138. This figure was computed by dividing the total amount of attorneys' fees specifically requested (\$427,944) by the total amount of attorneys' time specifically reported (3,107 hours).

2. Successful Motions for Monetary Sanctions

Sanctions were awarded in 277 or 53.7% of the 516 cases where monetary sanctions were requested.⁴⁴ In these 277 motions, a total of \$333,134, or an average of \$1,203 per motion was requested.⁴⁵ The courts awarded \$228,387, or an average of \$825 per motion.⁴⁶ This was 68.6% of the amount requested or a 31.4% reduction.⁴⁷

a. Hourly Rate Requested

Of the \$333,134 in sanctions requested by the moving parties in the successful motions, the total amount for reported billable time was \$231,612. This figure was computed by adding the total

43. As mentioned above, attorneys did not differentiate between fees and costs in 96 cases. In those cases, they requested \$267,382 in general requests that were not allocated between fees and costs.

44. Of course, the substantive motion was also granted.

45. These figures include both fees and costs.

46. These figures include both fees and costs.

47. If two large requests of \$21,842 and \$27,402 are excluded from the successful category, the total requested drops to \$283,890 and the average successful request drops to \$1,032. Removing these requests from the \$228,387 awarded results in a total amount awarded of \$205,745 because \$21,842 was awarded in one motion and \$800 was awarded in the other. Therefore, the average amount awarded excluding these two large motions was \$748. This would result in the court awarding 72.5% of the amount requested or a 27.5% reduction.

dollar amounts of billable time in the successful motions where the moving attorney segregated fees from costs and specified the number of billable hours. The specific subcategories were as follows: (1) Cases where the amount awarded equalled the amount requested (\$91,012); (2) cases where the amount awarded was less than the amount requested (\$137,240); and (3) cases where the amount awarded was more than the amount requested (\$3,360). An additional \$11,607 (or 3.5% of total requested) was awarded for costs.⁴⁸ The remaining \$89,915 was reported as general requests in the 37 motions in which attorneys did not differentiate between fees and costs.

The total hours specified by attorneys as billable time in those motions, where the attorneys segregated fees from costs was 1,716. Dividing this figure into the \$231,612 of total billable time reported results in an average billable rate requested for successful motions of \$135 per hour.⁴⁹ This is \$3.00 less than the average billing rate requested for all motions of \$138 per hour.⁵⁰

b. Hourly Rate Awarded

1). Methodology

The average hourly rate awarded by the court for all motions where sanctions were awarded cannot be accurately represented by one number. It is fair to present a range when calculating the average billing rate awarded by the court. The need for a range arises due to the nature of motions and court minute orders. In their moving papers, most attorneys specify the hours spent in preparation of the motion, their billing rate, the total amount of

48. Costs include court reporter fees, travel, expenses, and expert witness fees. Sometimes they can be extensive. For example in *Levy v. Diamant*, Case # C663732, May 15, 1989, travel expenses in the amount of \$2,573 for a foreign attorney working on the case were not allowed. However, the motion was granted.

49. Because the total dollar amount reported for billable time and the total billable hours reported were clearly stated in the motions, no range is necessary.

50. See *supra* page 21 (setting forth the average hourly rate requested by attorneys in the studiable motions). See also *supra* note 12 and accompanying text (discussing the average billing rate requested).

costs incurred, and the total request for sanctions. Court minute orders, however, only specify the total amount of sanctions granted and do not specify which portion of the award is for costs and which is for the attorney's billable time. Also, judges often pick a "round number" as the amount of the award.

Therefore, in order to determine an hourly rate, three calculations were performed. The lowest calculation assumes all costs were granted and subtracts this from the total awarded. The remaining amount is presumed to represent attorney fees and is used to calculate the billable rate awarded from the reported hours. This method produces what will be called the "lowest calculable amount."

The highest calculation assumes that no costs were awarded. The total amount awarded is presumed to represent attorney's fees and is divided by the hours reported to arrive at the billing rate awarded. This method produces what will be called the "highest calculable amount."

Since both of these numbers operate at the extremes, perhaps a more representative method allocates the amount awarded according to the percentage reported for costs and billable time. It assumes that the court reduced both the costs and the attorney's fees requested by the same percentage. For example, if the amount awarded by the court was 75% of that requested by the attorney, it was assumed that both the costs and the billable time requested by the attorney were reduced by 25%. In other words, if 75% of the sanction request was for fees and 25% was for costs, then 75% of the amount awarded was allocated to fees. This "allocation method" then divides the amount allocated for attorney's fees by the hours reported to arrive at the billing rate.

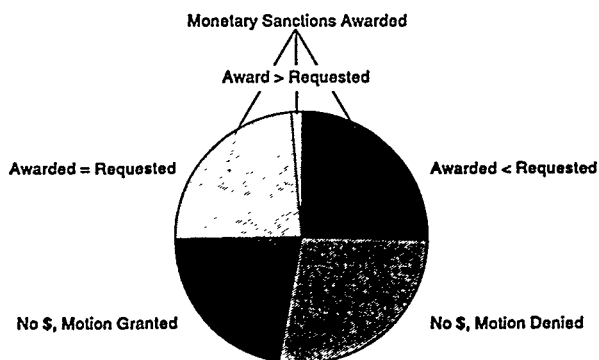
2). Result

In the category of all successful motions for sanctions, the three methods for computation of the hourly rate of attorney's fees awarded produce the following numbers. The lowest calculable amount is \$99 per hour. The highest calculable amount is \$105 per hour. The allocation method produces an hourly rate awarded of \$100.

c. Subcategories of Successful Motions

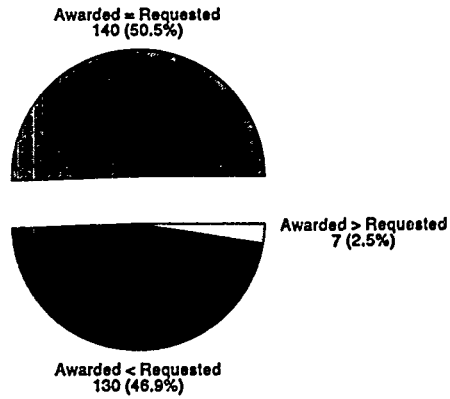
For analysis, the category of successful motions has been divided into three subcategories wherein: (1) the amount awarded was equal to the amount requested; (2) the amount awarded was less than the amount requested; and (3) the amount awarded was greater than the amount requested. These categories, along with the categories of unsuccessful motions, are displayed in the following graphs:

DISPOSITION OF STUDIALE MOTIONS



Description	Number	Percent
Monetary Sanctions Awarded	277	53.7%
Amount Awarded = Amount Requested	140	27.1%
Amount Awarded < Amount Requested	130	25.2%
Amount Awarded > Amount Requested	7	1.4%
No Monetary Sanctions Awarded and Motion Denied	122	23.6%
No Monetary Sanctions Awarded and Motion Granted	117	22.7%

DISPOSITION OF ALL SUCCESSFUL MOTIONS



Description	Number	Percent
Amount Awarded = Amount Requested	140	50.5%
Amount Awarded < Amount Requested	130	46.9%
Amount Awarded > Amount Requested	7	2.5%

1). Motions For Monetary Sanctions In Which Amount Awarded Equalled The Amount Requested

In 140 or 50.5% of the successful motions, the attorneys were completely successful by receiving the entire amount requested. This is 27.1% of the total motions. The total amount of sanctions awarded and requested was \$127,506. The average amount awarded and requested per motion was \$911.⁵¹

Of the total requested of \$127,506, \$95,116 in sanctions⁵² was requested in the 122 motions where the attorneys specified billable hours and segregated fees from costs. Eighteen motions requesting \$32,390 were of the general request variety in that the attorneys did not differentiate between fees and costs.

Where specified, attorney's fees were \$91,012 and costs totalled \$4,104. Therefore, approximately 96% of the amount requested in each motion was for attorney's fees and 4% was for costs associated with the motion.

The total attorney time expended where specified was 746 hours. This results in an average time expended per motion of 6.1 hours⁵³ at an hourly billing rate of \$122.⁵⁴

2). Motions For Monetary Sanctions In Which The Amount Awarded Was Less Than The Amount Requested

Motions in this category comprise 130 or 46.9% of the successful motions. This is 25.2% of the total motions. The total dollar amount of sanctions requested was \$201,372. The total dollar amount awarded was \$93,635, which is 46.5% of the amount

51. This figure is the result of dividing \$127,506 by 140. If one large request of \$21,842 is excluded from this total, the total requested is reduced to \$105,664 and the average requested per motion drops to \$760.

52. This figure includes both fees and costs.

53. This figure is computed by dividing 746 by 122.

54. The total billable hours of \$91,012 divided by the total hours billed of 746.

requested. The average amount requested per motion was \$1,549.⁵⁵ The average monetary sanction awarded by the court was \$720 per motion, again representing 46.5% of the original request.

Of the total requested of \$201,372, \$143,847 in sanctions⁵⁶ was requested in the 111 motions where the attorneys specified billable hours and segregated fees from costs. In nineteen motions the attorneys made general requests of \$57,525.⁵⁷

Where specified, attorney's fees were \$137,240 and costs totalled \$6,607. The motions in this category had roughly the same apportionment of time billed versus costs as those motions where the amount awarded equalled the amount requested.⁵⁸ On average these motions involved 95% billable time (\$137,240) and 5% for costs (\$6,607) out of the total amount requested of \$143,847.⁵⁹

The total billable hours reported in this category was 940. This results in an average time expended per motion of 8.5 hours⁶⁰ and an average hourly billable rate request of \$146.⁶¹

The court awarded the successful moving parties an hourly billing rate of \$80 under the allocation method. This represents a reduction of the hourly billing rate requested of 45%.⁶² The lowest calculable amount is \$77. The highest calculable amount is \$84.⁶³

55. If one large request of \$27,402 is excluded from these calculations, the total requested is reduced to \$173,970 and the average amount requested per motion drops to \$1,348. While the average amount awarded per motion would not be affected significantly (because the court awarded only \$800) the total amount awarded is reduced to \$92,835. Accordingly, the percentage awarded of the original request would increase from 46.5% to 53.3%.

56. This figure includes both fees and costs.

57. A total of \$14,689 was awarded in these motions.

58. The previous category represented a 96% to 4% request breakdown between billable hours and costs.

59. The remaining \$57,525 in requests was of the general request variety, resulting in a total amount requested of \$201,372.

60. This figure is the result of dividing 940 by 111 (the number of motions where hours were specified).

61. The total billable hours of \$137,240 divided by the total hours billed of 940.

62. The total billable rate requested of \$146 as compared to the billable rate awarded of \$80.

63. See *supra* pages 22-23 for the basis of these calculations.

3). *Comparison of Categories 1) and 2): Excessive Requests Are Unwise*

In comparing the statistics for the motions in which the amount awarded equalled the amount requested⁶⁴ with the motions in which the amount awarded was less than the amount requested,⁶⁵ it is interesting to note a common negotiating strategy that does not appear to work in the sanctions context -- the strategy of asking for more than the amount which one is likely to be awarded on the theory that the request will be reduced in any event. Under this theory, even with a reduction, the moving party would still come out ahead of the amount that would have been granted if it had asked for the correct amount in the first place. However, this does not hold true.

This study shows that in the cases where trial judges award sanctions, they do not overwhelmingly tend to compromise by reducing the amount of sanctions requested. In fact, the motions are about evenly split between those in which the amount awarded equalled the amount requested (50%) and in which where the amount requested was reduced (47%).

Furthermore, the attorneys who did not request more than they were awarded did better monetarily. The average sanction amount awarded per motion where the amount requested equalled the amount awarded was \$911. The average hourly rate requested and awarded in this category was \$122. The average sanction awarded where the amount requested was reduced was \$720, which is a reduction of 53.5% from the average amount requested of \$1,549. This was \$191 less than the average where the amount requested equalled the amount awarded. The average hourly rate using the allocation method where the amount requested was reduced was \$80, a 45% reduction from the average billable rate requested of \$146. This is \$42 per hour less under the allocation method than

64. See *supra* notes 52-55 and accompanying text (discussing motions for monetary sanctions in which the amount awarded equalled the amount requested).

65. See *supra* notes 56-64 and accompanying text (discussing motions for monetary sanctions in which the amount awarded was less than the amount requested).

the average hourly billing rate of \$122 awarded where the judge did not see the need to reduce the amount of sanctions requested.⁶⁶

4). Motions For Monetary Sanctions In Which The Amount Awarded Was Greater Than The Amount Requested

Only seven cases or 2.5% of the successful motions comprise this category. This is 1.4% of the studiable motions. These motions requested a total of \$4,256. A total amount of \$7,246 was awarded by the courts. This was 170.3% of the amount requested, or a 70.3% increase. The average amount requested per motion was \$608.

In all seven cases the attorneys specified the amount of attorneys time and billable hours expended. The average time expended per motion was 4.2 hours at an hourly billing rate of \$112. The courts awarded an average amount per motion of \$1,035 at an average hourly billing rate of between \$191 and \$211.⁶⁷

The increase in sanction awards is peculiar because, according to all of the code sections studied, the courts are authorized to award reasonable attorney's fees and expenses. It is difficult to imagine an attorney underestimating the time and expenses of bringing the motion or a judge being able to determine reasonable fees and expenses without support from the requesting attorney's moving papers.

Of these seven cases, some seemed to involve an extra amount of costs awarded, some involved an increased award because of

66. Under the lowest calculable amount the difference would be \$122 minus \$71, or \$51. Under the highest calculable amount, the difference would be \$122 minus \$84, or \$38. *See supra* pages 22-23 (discussing methods used to calculate the hourly rate awarded for all motions where sanctions were awarded).

67. Of the total amount requested of \$4,256, 69% of the amount was based on billable hours, and 21% was based on costs. Because the court's minute orders do not specify the basis of the award, one could assume that the billable hours and cost percentages would remain constant. Therefore, using 69% of the total amount awarded as the amount of attorneys fees awarded, the court awarded an average billing rate of \$191. However, if by increasing the award, the court increased the billable hours only and not the costs reported, the hourly billing rate would increase to \$211.

egregious conduct, and some simply seemed to be the result of the judge awarding a “round number.”

5). The Effects of Specifying Fees and Billable Hours

a). Motions In Which The Amount Awarded Was Less Than The Amount Requested

In those motions where the court reduced the amount requested, the attorneys were usually thorough in their moving papers by specifying the total billable time requested and the total billable hours worked. This was done in 111 motions where a total of \$143,847 in fees and costs was requested. The amount awarded in these motions was \$78,946. This was 55% of the amount requested or an average of \$711 per motion.

In nineteen of the motions stated, the attorneys did not itemize their fees, costs, and billable hours, but rather requested a lump sum in sanctions. In these nineteen cases a total of \$57,525 was requested. Only \$14,689 was awarded. This was 25% of the amount requested as compared to an award of 54% of the amount requested where the fees were specified. Interestingly though, the *average* sanction amount awarded in these motions was \$773, more than the \$711 awarded where fees were specified.

The only conclusion that can be drawn is that in this limited sample of nineteen motions with unspecified requests, the attorneys asked for much more to begin with -- an average request of \$3,027 where fees were unspecified as opposed to \$1,295 where fees were specified. Even though the unspecified requests were cut 75% as opposed to the specified requests which were cut only 46%, the average amount awarded for the nineteen unspecified requests turned out to be approximately 9% higher.

b). Motions In Which The Amount Awarded Was Greater Than The Amount Requested

In *all* of the cases where the judges awarded more money than the attorneys requested, the attorneys specified their fees and hours.

3. Unsuccessful Motions for Monetary Sanctions

In 239 motions, or 46.3% of the cases studied, monetary sanctions were requested and denied. In these cases, \$497,015 was requested by the moving parties. This category is divided into two subcategories as follows: (1) Motions in which no monetary sanctions were granted and the substantive motion was denied; and (2) motions in which no monetary sanctions were granted but the substantive motion was granted.

a. Motions In Which No Monetary Sanctions Were Awarded And The Substantive Motion Was Denied

One hundred twenty-two (122) cases fell within this category, representing \$349,884 in requests. The average amount requested per motion was \$2,868.⁶⁸ In this category, thirty-six motions contained general unspecified requests totalling \$160,809. In the remaining eighty-six cases in which fees, billable hours, and costs were specified, \$106,028 was reported as fees and \$83,047 was reported as costs. The average time reported per motion where fees and costs were specified was 8.45 hours at an hourly billing rate of \$146.

The motions that differentiated between fees and costs in this category are unusual because of the ratio of costs to attorney's fees. Only 56% of the total amount requested was for attorney's fees and 44% of the amount requested was for costs.

68. Four large general requests totalling \$133,685 are included in this average (\$59,708; \$34,900; \$24,715; and \$14,362). If these requests are excluded, the total amount requested is \$216,199 and the average amount requested per motion drops to \$1,832.

*b. Motions In Which No Monetary Sanctions Were
Awarded But The Substantive Motion Was Granted*

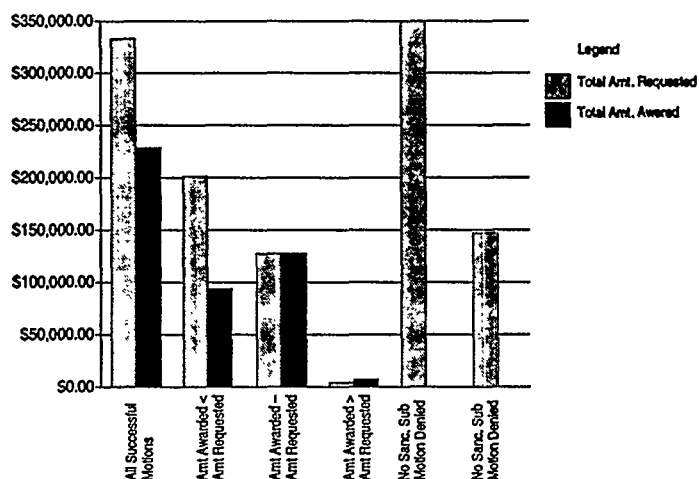
There were 117 cases within this category, representing \$147,131 in requests. The average amount requested per motion was \$1,257.⁶⁹ In this category, twenty-three motions had general unspecified requests totalling \$16,658. In the remaining ninety-four motions where fees, billable hours, and costs were specified, \$90,304 was reported as fees and \$40,169 was reported as costs. The average time reported per motion where fees and costs were specified was 7.0 hours at an hourly billing rate of \$136 an hour.

The motions in this category had the usual allocation between fees and costs by designating the majority of the request (69%) for fees, and the remainder (31%) for costs.

69. No unusually large requests (over \$10,000) were included in this category.

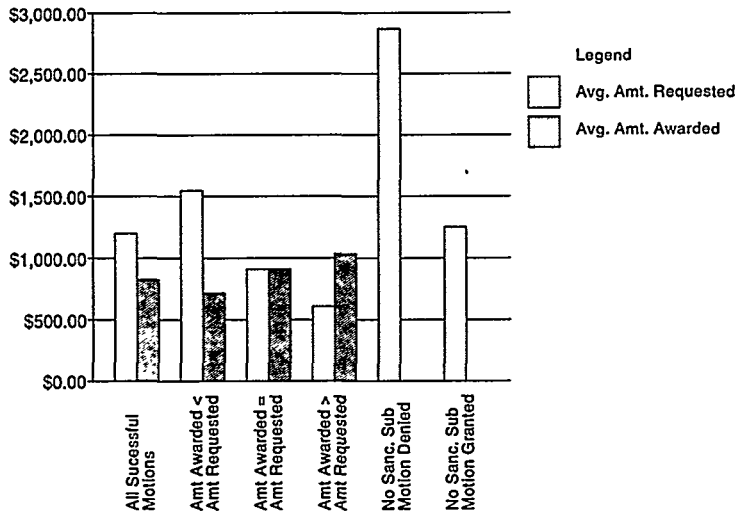
The following graphs show comparisons of the total amounts, average amounts, and hourly rates requested and awarded for the various categories of motions.

**A COMPARISON OF THE TOTAL AMOUNTS
REQUESTED AND AWARDED**



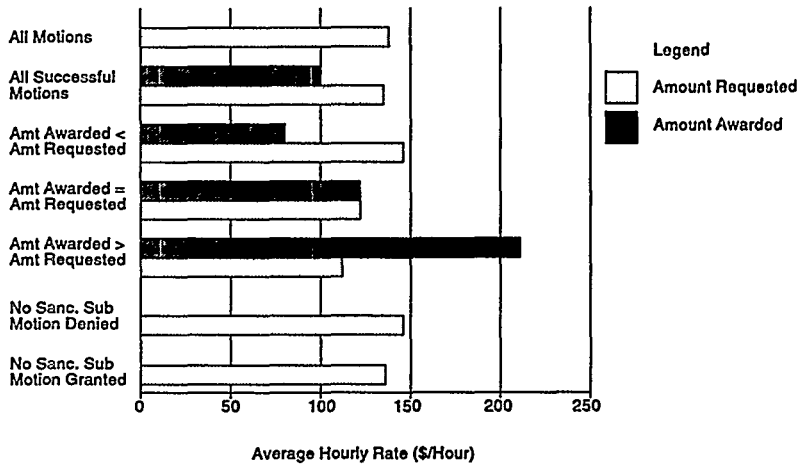
Disposition	Total Amount Requested	Total Amount Awarded	Percent Awarded
All Successful Motions	\$333,134	\$228,387	68.6%
Amount Awarded < Amount Requested	\$201,372	\$93,635	46.5%
Amount Awarded = Amount Requested	\$127,506	\$127,506	100.0%
Amount Awarded > Amount Requested	\$4,256	\$7,246	170.3%
No Monetary Sanctions Awarded and Motion Denied	\$349,884	\$0	0.0%
No Monetary Sanctions Awarded and Motion Granted	\$147,131	\$0	0.0%

A COMPARISON OF THE AVERAGE AMOUNTS
REQUESTED AND AWARDED



Disposition	Avg.Amt Requested	Avg.Amt Awarded	Percent Awarded
All Successful Motions	\$1,203	\$825	68.6%
Amount Awarded < Amount Requested	\$1,549	\$720	46.5%
Amount Awarded = Amount Requested	\$911	\$911	100.0%
Amount Awarded > Amount Requested	\$608	\$1,035	170.3%
No Monetary Sanctions Awarded and Motion Denied	\$2,868	\$0	0.0%
No Monetary Sanctions Awarded and Motion Granted	\$1,257	\$0	0.0%

**A COMPARISON OF THE AVERAGE HOURLY RATES
REQUESTED AND AWARDED**



Disposition	Avg.Amt Requested	Avg.Amt Awarded	Percent Awarded
All Motions	\$138	---	, ---
All Successful Motions	\$135	\$100	74.1%
Amount Awarded < Amount Requested	\$146	\$80	54.8%
Amount Awarded = Amount Requested	\$122	\$122	100.0%
Amount Awarded > Amount Requested	\$112	\$211	188.4%
No Monetary Sanctions Awarded and Motion Denied	\$146	\$0	0.0%
No Monetary Sanctions Awarded and Motion Granted	\$136	\$0	0.0%

C. Fast Track v. Slow Track Breakdown

The study analyzed 495⁷⁰ motions for sanctions on the basis of whether the judge who heard the motion was assigned to the Fast Track or Slow Track.⁷¹

1. Fast Track

Twenty-three judges assigned to the Fast Track were examined. They decided a total of 192 motions for sanctions. Each judge heard between five and fifteen motions, or about eight motions each. Of the 192 motions for sanctions heard, 119 or 62% were granted. Seventy-three or 38% were denied. A total of \$224,528 in monetary sanctions was requested and \$91,070 was awarded. This was 40.6% of the amount requested. The Fast Track judges awarded an average of \$765 per successful motion⁷² at a billing rate of \$106 per hour.⁷³ In cases where the Fast Track judges awarded sanctions, they allowed 74.2% of the sanctions requested.⁷⁴

70. There were 192 cases in the Fast Track and the 303 cases in the Slow Track. The number of motions studied is 21 fewer motions than the total "studiable" motions of 516. These 21 motions were attributed to 6 judges who had less than 5 decisions each. These motions and judges were not included in the computations because the sample for these judges would be too small to give a fair indication of the judge's particular awarding pattern. The cutoff was 5 cases or more, which a majority of the judges had.

71. See *supra* note 20 for a description of the Fast Track and Slow Track programs.

72. \$91,070 divided by 119 (total successful motions).

73. The lowest calculable billing rate awarded was \$104 per hour and the highest was \$114 per hour. The \$106 rate was calculated under the allocation method. See *supra* pages 22-23 for the basis of these calculations. These calculations do not include the general requests which did not specify fees, costs, and billable hours. The computations required using only those motions where attorneys specified fees, costs, and billable hours.

74. This figure represents the slugging percentage described in *infra* note 86 and accompanying text. Sanctions granted pursuant to both general requests where no allocation between fees and costs was made, and specific requests where attorneys did segregate fees and costs, were included in this calculation. Both request types were included because they demonstrate the actual level of sanctions awarded versus sanctions requested.

2. *Slow Track*

The study analyzed five Slow Track judges who heard between 25 and 113 sanctions motions each for a total of 303 motions.⁷⁵ The Slow Track judges awarded sanctions in 149 or 49.2% of the motions heard. One hundred fifty-four were denied, or 50.8%. A total of \$582,062 in monetary sanctions was requested and \$136,284 was awarded. This was 23.4% of the amount requested. The Slow Track judges awarded an average of \$915 per successful motion⁷⁶ at a billing rate of \$93 an hour.⁷⁷ In cases where the Slow Track judges granted sanctions, they allowed 73.6% of the sanctions requested.⁷⁸

3. *Comparison*

On the average, the Fast Track judges granted sanctions more often (62% as compared to 49%) and gave a higher average billing rate (\$106 as compared to \$93) than did the Slow Track judges. However, when the judges did award sanctions, the slugging rates⁷⁹ of the Fast Track and Slow Track were quite similar (74.2% on the Fast Track as compared to 73.6% on the Slow Track). The average sanction awarded by the Slow Track judges was higher than the average sanction awarded by the Fast Track judges (\$914 as compared to \$765). The graphs below compare the sanctions given by the Fast Track and Slow Track judges.

75. The two Slow Track judges assigned to the Law and Motion departments heard 78 and 113 motions respectively. Thus, the sanctioning patterns of one individual Slow Track judge would affect the outcome much more than would a pattern of an individual Fast Track judge.

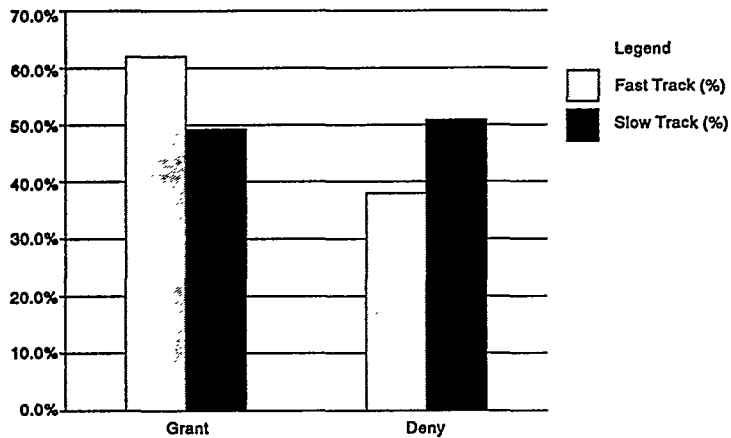
76. \$136,284 divided by 149 (total successful motions).

77. The lowest calculable billing rate awarded was \$90 per hour and the highest was \$99 per hour. The \$93 rate was calculated under the allocation method. *See supra* pages 22-23 for the basis of these calculations. These calculations do not include the general requests which did not specify fees, costs, and billable hours. The computations required analyzing only those motions where attorneys specified fees, costs, and billable hours.

78. *See supra* note 70 and accompanying text (setting forth the average amount of monetary sanctions requested in motions in which no monetary sanctions were awarded but the substantive motion was granted).

79. *See infra* note 86 and accompanying text (discussing the slugging percentage).

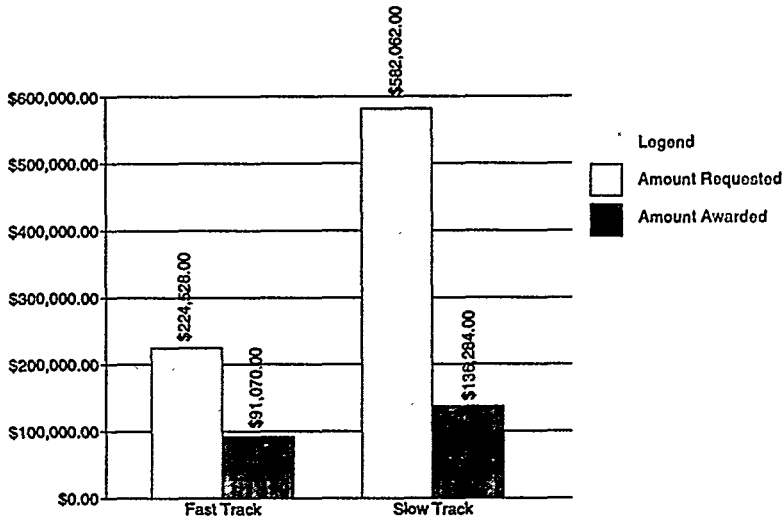
A COMPARISON OF DISPOSITION BY
FAST TRACK AND SLOW TRACK



Disposition	Fast Track Percentage	Slow Track Percentage
Grant	62.0%	49.2%
Deny	38.0%	50.8%

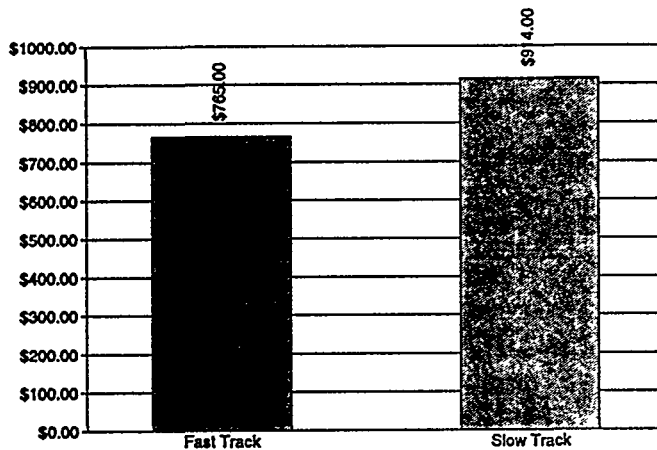
Disposition	Fast Track	Slow Track
Grant	119	149
Deny	73	154

**A COMPARISON OF TOTAL AMOUNTS REQUESTED
AND AWARDED ON THE FAST TRACK AND SLOW TRACK**



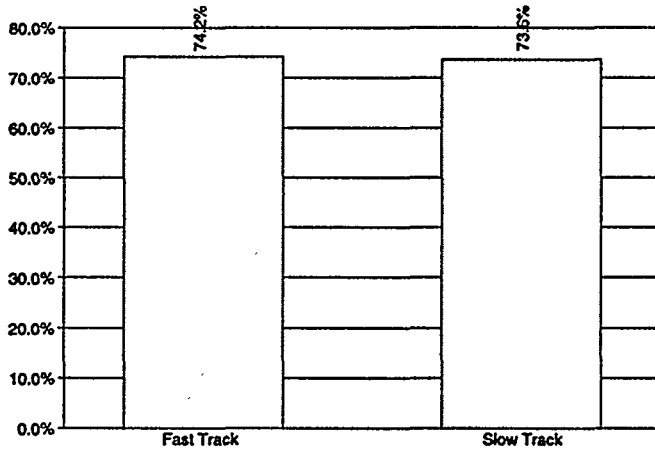
Disposition	Fast Track	Slow Track
Total Amount Requested	\$224,528	\$582,062
Total Amount Awarded	\$91,070	\$136,284
Percent Awarded of Amount Requested	40.6%	23.4%

**A COMPARISON OF THE AVERAGE AMOUNT AWARDED
ON THE FAST TRACK AND SLOW TRACK**



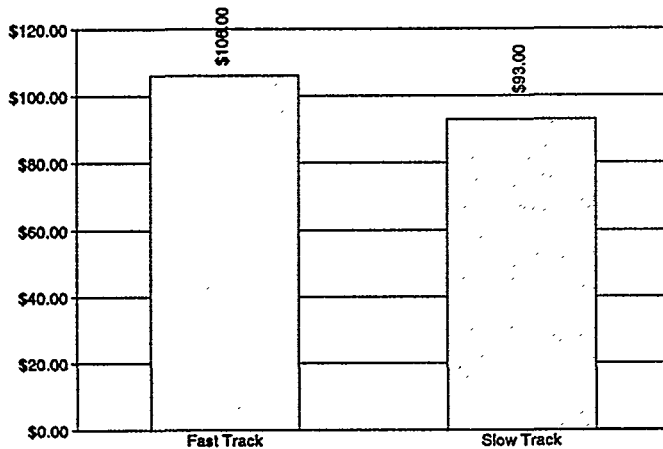
Court	Average Amount Awarded in Successful Motions
Fast Track	\$765
Slow Track	\$914

**A COMPARISON OF PERCENT AWARDED OF AMOUNT
REQUESTED IN SUCCESSFUL MOTIONS ON
THE FAST TRACK AND SLOW TRACK**



Court	Percent Awarded of Amount Requested
Fast Track	74.2%
Slow Track	73.6%

**A COMPARISON OF THE AVERAGE HOURLY RATE
AWARDED ON THE FAST TRACK AND SLOW TRACK**



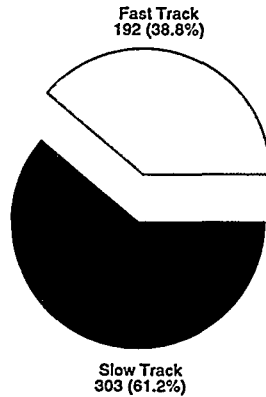
Court	Average Hourly Rate Awarded
Fast Track	\$106
Slow Track	\$93

Another noticeable distinction between the two tracks is the frequency of motions requesting sanctions. While cases are divided almost evenly between the two tracks,⁸⁰ approximately 22.4% more motions for sanctions were filed in cases on the Slow Track than in cases on the Fast Track.⁸¹ This apportionment is displayed below.

80. On the basis of assignment on an odd and even case number basis.

81. 192 motions or 38.8% on the Fast Track versus 303 motions or 61.2% on the Slow Track.

BREAKDOWN OF MOTIONS ON FAST TRACK AND SLOW TRACK



Court	Number of Motions	Percent
Fast Track	192	38.8%
Slow Track	303	61.2%

Although impossible to prove, these differences are in all likelihood due to the fact that less abuse of the pre-trial process occurs in cases on the Fast Track since attorneys know that the judge supervising the pre-trial proceedings will also be the trial judge. With this type of “all purpose judge” system, attorneys are less likely to engage in unauthorized pre-trial conduct because they must face the same judge throughout the litigation. Also, the judges are better able to control the conduct of the cases because they are responsible for those cases in their entirety. Consequently, in cases on the Fast Track, attorneys engage in less conduct warranting sanctions and fewer motions for sanctions are brought.

Another observation related to the Fast Track is that attorneys may be more conservative about bringing only meritorious motions for sanctions and not asking for excessive amounts. Accordingly,

although fewer motions for sanctions are brought in cases on the Fast Track, a greater percentage of motions for sanctions are granted than on the Slow Track.

In contrast, attorneys with cases on the Slow Track or master calendar system tend to feel less restrained in their pre-trial conduct because the law and motion judges rotate assignments periodically. These attorneys may never have to face the same judge again. Also, law and motion judges have no real control over other aspects of the case. Therefore, in cases on the Slow Track, attorneys are less cautious in their pre-trial conduct. They are more likely to engage in conduct warranting sanctions and are more likely to bring motions for sanctions which may not be meritorious.

D. The Judges Breakdown

The following breakdown considers the awarding pattern of each of the judges analyzed in the preceding section. Results were tabulated which indicate the total number of cases heard by each judge analyzed, the total dollar amount requested in those cases, and the total dollar amount subsequently awarded.

Also computed was the judge's "average" for awarding monetary sanctions. This figure indicates the percentage of times that the judge awarded sanctions out of the number of total cases that judge heard.⁸² For example, Judge 14 on the Fast Track heard thirteen cases and awarded sanctions in eleven cases. His "average" was 0.846.

A final computation was made to determine the equivalent of a "slugging percentage" for each judge indicating the percentage of the requested sanctions the judge awarded when he or she made a monetary sanction award. This computation is roughly the same as that used to calculate baseball slugging percentages. The figure indicates the percent of the requested sanction awarded from 0% to 100% when a sanction is given. It is an indication of whether a particular judge reduced sanctions when he or she decided to award

82. All cases, including those where the attorney did not specify fees, costs, and billable hours, were included in this computation.

them.⁸³ For the example, Judge 14 awarded \$6,014 out of \$13,797 in sanctions requested. His "slug" was 0.555, which indicates that in the eleven cases where sanctions were awarded, 55.5% of the sanctions requested was awarded.

The judges are listed by number (Fast Track) and letter (Slow Track) rather than by name to avoid the appearance of rating the individual judges. This study does not attempt to second guess the judges' decisions as to their correctness.

1. The Fast Track Judges:

The Fast Track judges heard 192 motions in the study. The individual breakdown for the twenty-three Fast Track judges is as follows:

Judge 1: ⁸⁴	-6 motions heard -4 motions granted -\$4,943 requested -\$2,954 awarded -Avg. 0.667 -Slug. 1.340 ⁸⁵	Judge 2:	-6 motions heard -5 motions granted -\$2,740 requested -\$2,326 awarded -Avg. 0.833 -Slug. 1.000
Judge 3: ⁸⁶	-5 motions heard -5 motions granted -\$7,633 requested -\$6,318 awarded -Avg. 1.000 -Slug. 0.828	Judge 4: ⁸⁷	-8 motions heard -7 motions granted -\$6,593 requested -\$4,596 awarded -Avg. 0.875 -Slug. 0.854

83. All cases, including those where the attorney did not specify fees, costs, and billable hours, were included in this computation.

84. This judge was one of six judges who *never* granted the substantive motion *and* denied sanctions. In other words, every time the judge granted the substantive motion, he also granted sanctions. All other judges in the Fast Track granted one or more such motions. There were 41 motions of this kind granted in the Fast Track.

85. This judge was one of those judges who awarded more than the amount requested so that the slugging percentage, or amount awarded as compared to the amount requested, was greater than one. The exact amount of the increase was \$750 over the \$2,204 requested for a total of \$2,954 awarded.

86. See *supra* note 84.

87. *Id.*

1991 / Pre-Trial Sanctions: An Empirical Study

Judge 5:	-15 motions heard -12 motions granted -\$19,636 requested -\$16,279 awarded -Avg. 0.800 -Slug. 0.928	Judge 6: ⁸⁸	-5 motions heard -4 motions granted -\$17,703 requested -\$ 2,616 awarded -Avg. 0.800 -Slug. 0.783
Judge 7:	-9 motions heard -7 motions granted -\$10,843 requested -\$ 3,980 awarded -Avg. 0.777 -Slug. 0.791	Judge 8:	-6 motions heard -4 motions granted -\$4,657 requested -\$2,847 awarded -Avg. 0.667 -Slug. 0.888
Judge 9:	-6 motions heard -3 motions granted -\$3,726 requested -\$1,528 awarded -Avg. 0.500 -Slug. 1.000	Judge 10:	-7 motions heard -4 motions granted -\$7,756 requested -\$4,464 awarded -Avg. 0.571 -Slug. 0.894
Judge 11:	-8 motions heard -4 motions granted -\$11,328 requested -\$ 4,108 awarded -Avg. 0.750 -Slug. 0.641	Judge 12:	-12 motions heard -7 motions granted -\$16,666 requested -\$ 5,508 awarded -Avg. 0.583 -Slug. 0.728
Judge 13: ⁸⁹	-13 motions heard -10 motions granted -\$12,592 requested -\$ 7,273 awarded -Avg. 0.692 -Slug. 0.728	Judge 14: ⁹⁰	-13 motions heard -11 motions granted -\$13,797 requested -\$ 6,014 awarded -Avg. 0.846 -Slug. 0.555

88. *Id.*

89. *Id.*

90. In 10 of 11 cases in which this judge granted sanctions (based on requests ranging from \$539 to \$1,014) the judge awarded similar sanctions as follows:

5 at \$475

4 at \$575

1 at \$675

Judge 14 appeared to favor dollar amounts ending in 75, which bore no relationship to the amount of sanctions requested.

Judge 15: ⁹¹	-9 motions heard -7 motions granted -\$10,020 requested -\$ 4,550 awarded -Avg. 0.777 -Slug. 0.592	Judge 16:	-6 motions heard -2 motions granted -\$ 3,804 requested -\$ 1,164 awarded -Avg. 0.333 -Slug. 1.000
Judge 17:	-7 motions heard -3 motions granted -\$ 6,248 requested -\$ 1,781 awarded -Avg. 0.429 -Slug. 0.947	Judge 18:	-6 motions heard -2 motions granted -\$ 4,439 requested -\$ 1,719 awarded -Avg. 0.333 -Slug. 0.762
Judge 19:	-13 motions heard -3 motions granted -\$16,100 requested -\$ 1,364 awarded -Avg. 0.231 -Slug. 0.773	Judge 20:	-10 motions heard -6 motions granted -\$14,555 requested -\$ 3,600 awarded -Avg. 0.600 -Slug. 0.357
Judge 21:	-12 motions heard -6 motions granted -\$12,710 requested -\$ 2,614 awarded -Avg. 0.500 -Slug. 0.401	Judge 22:	-5 motions heard -2 motions granted -\$ 3,467 requested -\$ 500 awarded -Avg. 0.400 -Slug. 0.465
Judge 23:	-5 motions heard -0 motions granted -\$12,572 requested -\$ 000 awarded -Avg. 0.000 -Slug. 0.000		

91. See *supra* note 84.

1991 / Pre-Trial Sanctions: An Empirical Study

2. The Slow Track Judges:⁹²

The Slow Track judges heard 303 motions in the study. The individual breakdown for the five Slow Track judges is as follows:

Judge A:	-25 motions heard -16 motions granted -\$114,771 requested -\$ 12,229 awarded -Avg. 0.640 -Slug. 0.916	Judge B:	-48 motions heard -31 motions granted -\$50,290 requested -\$25,983 awarded -Avg. 0.646 -Slug. 0.817
Judge C:	-39 motions heard -23 motions granted -\$ 58,359 requested -\$ 39,434 awarded -Avg. 0.590 -Slug. 0.856	Judge D:	-78 motions heard -38 motions granted -\$101,533 requested -\$ 26,756 awarded -Avg. 0.487 -Slug. 0.681
Judge E:	-113 motions heard -41 motions granted -\$257,109 requested -\$ 31,882 awarded -Avg. 0.363 -Slug. 0.409 ⁹³		

E. Discovery Act Breakdown

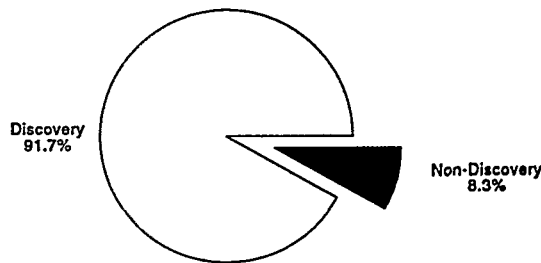
The overwhelming majority of motions for pre-trial sanctions that were brought during the study period involved requests for sanctions due to alleged discovery violations. Only forty-three motions relied solely on Code of Civil Procedure section 128.5 and did not involve discovery disputes. The remaining 473, or 91.7% motions, were brought on the basis of sanctions provisions in the

92. This group includes the judges sitting in the Law and Motion Departments.

93. This judge was one of two judges who heard and granted a large request for sanctions. However, unlike the other judge who gave the amount requested, this judge reduced the sanction requested of \$27,402 by 26,602, or 97%, and awarded an \$800 sanction. If this award is eliminated from the judge's "slug rate," the new "slug rate" would increase to 0.613.

Discovery Act.⁹⁴ The graph below illustrates these numbers. If this percentage is applied to the total amount of sanctions motions (813) in the two-month period and then a yearly figure is found, it amounts to approximately 745 discovery sanctions motion in two months or 4,470 per year.

DISCOVERY VERSUS NON-DISCOVERY MOTIONS



Motion Type	Number of Motions	Percent
Discovery	473	91.7%
Non-Discovery	43	8.3%

This breakdown analyzes the motions brought under the Discovery Act in terms of the number and percentage of times each code section was cited as the primary basis for sanctions and the success rate.⁹⁵ In this way it can be shown in which area of

94. CAL. CIV. PROC. CODE §§ 2017(c)-(d); 2019(b)(2); 2023(a)(9); 2025(e), (g), (i), (j)(1)-(3), (n), (o), (q)(1)-(2); 2028(d)(1)-(2); 2030(e), (k), (l), (m); 2031(e), (k), (l), (m); 2032(c)(6)-(7), (g)(1), (h), (j); 2033(e), (k), (l), (o); 2034(e), (i), (j), (k), (l) (West 1990).

95. This breakdown tracks the number of times a discovery code section was cited within a successful or unsuccessful motion. Because often a motion involved several different code sections, 809 different cites were found in the 516 studiable cases. References to irrelevant or non-existent code sections (for sanctions purposes) were excluded.

discovery litigants and judges feel that sanctions are necessary because abuse has occurred.

The chart which follows gives the following information. For each code section, excluding subsections, there is listed the total number of motions in which the code section was cited (“total cited”),⁹⁶ the percentage of the 516 studiable motions that total comprised (“percentage of motions”),⁹⁷ the number of motions that were granted, the number denied, and the percentage success rate.

These total figures were tallied to exclude double counting. Therefore, if a motion cited Code of Civil Procedure sections 2025(e), (g), and (i), section 2025 was only credited with one cite. From these figures it can be determined which different areas of discovery involved the most disputes for which sanctions were sought.

An attempt also was made to indicate some of the common problem areas within each code section. Under some of the discovery code sections, subsections are listed on the chart showing the total number of times cited, the number granted, and the number denied. If an attorney specifically cited a subsection that involved sanctionable conduct, it was noted on the chart under these headings. If a motion cited Code of Civil Procedure sections 2025(e), (g) and (i), subsections (e), (g), and (i) were each credited with one cite. The total subsection citations listed under each code section will *not* equal the total citations for each code section because most of the citations are listed under the main headings only. This is because often the attorneys did not cite subsections but only the main code section; often attorneys incorrectly cited subsections which did not involve sanctionable conduct (these were noted on the chart under the main headings only) and sometimes more than one subsection was listed.⁹⁸

96. *Id.*

97. This percentage reflects the number of times a specific code section appeared in the 516 studiable motions. These percentages will total more than 100% because motions often cited more than one code section. In total, there were 809 different cites in the 516 studiable motions.

98. The “actions sanctioned” column of the chart was in part taken from 2 *Civil Discovery Practice*, p. 926 (Cal. CEB 1988).

The following represents the breakdown of the Discovery Act codes within the “studiable” motions:

	General Subject	Actions Sanctioned	Total Cited	% of Motions ⁹⁹	Number Granted	Number Denied	Success Rate
2017	Discoverable Matters		9	1.7 %	5	4	55 %
2019	Methods of Discovery	Unsuccessfully making or opposing motion for protective order	6	1.1 %	4	2	66 %
2023	Sanctions	Usually cited in conjunction with other sanctions provisions	315	61 %	212	103	67 %
(a)		Misuse of the discovery process	72		53	19	
(b)		Failure to comply with a section governing any particular discovery method or any provision of the Discovery Act where conduct is found to be misuse of Discovery	126		91	35	

99. This percentage reflects the number of times the stated code section appeared in the 516 studiable motions. These percentages will total more than 100% because often motions cited more than one code section. In total, there were 809 different citations in the 516 studiable motions.

CCP §	General Subject	Actions Sanctioned	Total Cited	% of Motions	Number Granted	Number Denied	Success Rate
2025	Depositions		82	15.9	55	27	67%
(e)		Unsuccessfully making or opposing motion to increase travel limits	2		0	2	
(g)		Unsuccessfully making or opposing motion to quash deposition notice	1		1	0	
(i)		Unsuccessfully making or opposing motion for protective order	6		1	5	
(j)		Party noticing deposition fails to attend or proceed (j)(1); or party failed to serve required deposition subpoena on deponent who then fails to appear (j)(2); or deponent served fails to attend or refuses to be sworn (j)(2); or losing motion to compel attendance, testimony, and production of documents (j)(3); or deponent fails to attend, to proceed, or to produce (j)(3); or failing to obey order compelling attendance, testimony, and/or production	48		36	12	
(o)		Unsuccessfully making or opposing motion to compel answer or production; or deponent fails to obey order	8		7	1	

CCP §	General Subject	Actions Sanctioned	Total Cited	% of Motions	Number Granted	Number Denied	Success Rate
2030	Interrogatories		182	35.2%	127	55	69%
(e)		Unsuccessfully making or opposing motion for protective order	4		1	3	
(k)		Unsuccessfully making or opposing motion compelling answer; or failing to obey order compelling answers	112		75	37	
(l)		Unsuccessfully making or opposing motion to compel further responses; or failing to obey order compelling further answers	34		26	8	
2031	Production of Documents		144	27.9%	97	47	67%
(e)		Unsuccessfully making or opposing motion for protective order	1		0	1	
(k)		Unsuccessfully making or opposing motion compelling responses; or failing to obey order compelling responses	71		46	25	
(l)		Unsuccessfully making or opposing motion to compel further responses; or failing to obey order compelling further responses	28		17	11	

CCP §	General Subject	Actions Sanctioned	Total Cited	% of Motions	Number Granted	Number Denied	Success Rate
(m)		Unsuccessfully making or opposing motion to compel compliance with inspection demand; or failing to obey order compelling inspection	14		9	5	
2032	Physical or Mental Examinations		23	44%	13	10	56%
(c)		Unsuccessfully making or opposing motion to compel response and compliance (c)(6); or failing to obey order compelling response and compliance (c)(6); or unsuccessfully making or opposing motion to compel compliance (c)(7)	7		4	3	
(f)		Party failing to submit to required exam	3		2	1	
2033	Requests for Admissions		35	6.7%	22	13	62%
(l)		Unsuccessfully making or opposing motion to compel further response; or failing to obey order compelling further response	3		1	2	

CCP §	General Subject	Actions Sanctioned	Total Cited	% of Motions	Number Granted	Number Denied	Success Rate
(k)		Failing to serve timely response to requests	22		17	5	
2034	Expert Witness Information		13	2.5 %	5	8	38 %
(k)		Unsuccessfully making or opposing motion to augment or amend expert witness information	2		0	2	
Totals			309		540	269	66.7 %

The breakdown below shows three significant clusters¹⁰⁰ of motions for sanctions and, therefore, perceived areas of discovery abuse:

1) Section 2025: depositions.

These 82 motions constituted 15.9% of motions for sanctions¹⁰¹ and 16.6% of the motions for sanctions involving discovery.¹⁰² Sanctions were granted in 67% of these motions.

2) Section 2030: interrogatories.

These 182 motions constituted 35.3% of motions for sanctions and 36.8% of the motions for sanctions involving discovery. Sanctions were granted in 69% of these motions.

3) Section 2031: requests for production of documents and inspection of tangible things.

These 144 motions constituted 27.9% of motions for sanctions and 29.1% of the motions for sanctions involving discovery. Sanctions were granted in 67% of these motions.

The clustering of the motions in the above-cited areas is not surprising since depositions, interrogatories, and document inspection requests are the most frequently used discovery devices and are, therefore, likely to lead to the most discovery disputes.

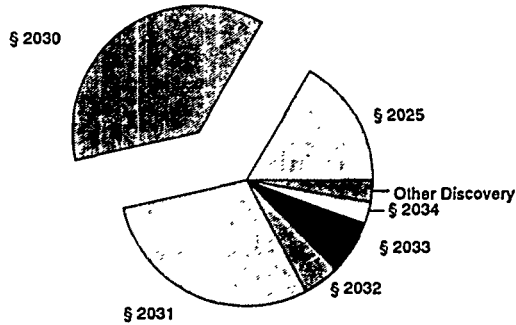
100. Section 2023, the general sanctions provision, was actually the most often cited code section. There were 315 motions of this type. Two hundred twelve were successful and 103 were unsuccessful.

101. This figure was computed based on the 516 studiable motions. Because the motions often cited more than one discovery sanctions provision, these numbers (when combined with the percentage of motions not involving discovery) will total more than 100%. What this figure reveals is that in 82, or 15.99%, of the 516 studiable motions, sanctions were sought for (perhaps among other things) violation of a discovery code provision involving depositions.

102. The percentage of "motions for sanctions involving discovery" computations were made by using a sample of 494 motions. This is the 809 discovery citations found in the studiable sample minus the 315 citations to § 2023, the general sanctions provision. The resulting figure of 494 reflects the number of times that specific discovery devices, such as depositions, were the subject of a motion for sanctions. Although 473 of the 516 studiable motions for sanctions involved discovery, this number would give misleading results since many motions involved more than one type of discovery device. The 494 number allows a more accurate analysis of the percentage of discovery disputes that pertained to a certain discovery device such as depositions.

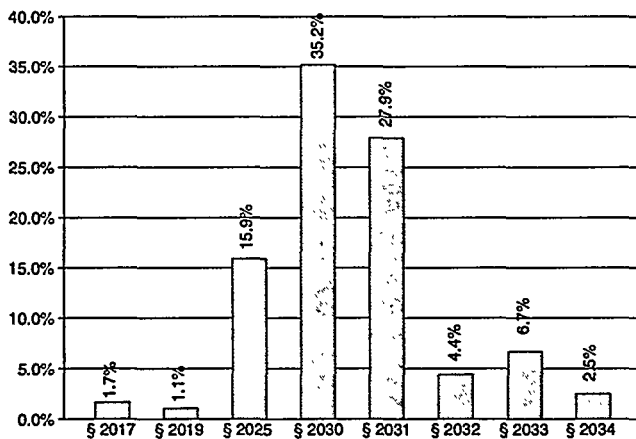
The following graphs illustrate the clustering of the discovery motions involving sanctions.

BREAKDOWN OF MOTIONS INVOLVING DISCOVERY



Motion Type	Number of Motions	Percent
§2025	82	16.6%
§2030	182	36.8%
§2031	144	29.2%
§2032	23	4.7%
§2033	35	7.1%
§2034	13	2.6%
Other Discovery	15	3.0%
Total	494	100.0%

OCURRENCE RATES OF DISCOVERY SECTIONS IN
STUDIABLE MOTIONS



Motion Type	Percent ¹⁰³
§2017	1.7%
§2019	1.1%
§2025	15.9%
§2030	35.2%
§2031	27.9%
§2032	4.4%
§2033	6.7%
§2034	2.5%

103. The percentages are based on the 516 studiable motions and total more than 100 percent because many motions cite more than one section.

1. Conduct Eliciting Sanctions

This section of the Article sets forth the raw statistics found by counting citations to discovery code sections and attempts to draw some generalizations about sanctioned conduct gleaned from reading and examining 516 motions for sanctions, responses, and minute orders.

As mandated by the discovery statutes, non-compliance with discovery rules or failure to cooperate in the discovery process without reason was the type of conduct sanctioned by the judges. Such conduct took many forms, ranging from the most obvious abuse, where “no response” was given to a request for discovery, to abuse involving responses that were so superficial that no true good faith compliance could be said to have been made with the discovery request.

The one motive that seemed to underlie these superficial responses was delay. In most cases, the actual response was not provided until after a six-month delay. Some litigants complied with the discovery request only after a motion for sanctions had been filed, thereby achieving their purpose of delay. Often judges viewed this conduct as unreasonable and gave sanctions. A few judges, however, denied sanctions unless the opposing party's responses were inadequate, despite the absence of substantial justification for the delay itself. One judge seemed inclined to deny sanctions outright when compliance occurred or was promised at the hearing, despite prior willful non-compliance.¹⁰⁴

a. The Section 2025 Cluster: Depositions

Eighty-two motions for sanctions involved alleged misconduct concerning depositions. This equalled 15.9% of all motions for sanctions¹⁰⁵ and 16.6% of motions for sanctions concerning

104. Judge E of the slow track denied 20 motions for sanctions based on his holding that there was “no opposition” to the underlying substantive motion. This behavior falls into the category of motions in which the substantive motion is granted but the sanction is denied.

105. See *supra* notes 5-6 and accompanying text (discussing studiable motions).

discovery.¹⁰⁶ The overall success rate of motions brought under section 2025 was 67%. If the subsection of section 2025 cited by a moving attorney is an indication of the specific conduct complained of, the following areas are those in which the most disputes occurred.

The most frequent complaint concerning depositions was the failure of a party or witness to attend a deposition. Section 2025(j) was cited forty-eight times and comprised 58.5% of all section 2025 citations. These motions had a success rate of 75%.

Motions for protective orders was another ground for dispute. Under section 2025(i), sanctions can be granted for unreasonably making or opposing a motion for a protective order. This subsection was cited six times and comprised 7.3% of all section 2025 citations. These motions had a success rate of 16.7%.

Motions for sanctions involving a deponent's failure to answer a question or produce a document or thing resulted in eight motions. This was 9.7% of all section 2025 citations. The success rate of motions citing section 2025(o) was 87.5%.

It is interesting to note that the parties sought sanctions more times for disagreements over whether the deposition would actually take place¹⁰⁷ than they did over conduct at the deposition. Once the deponent appeared and the deposition commenced, the requests for sanctions regarding disputes that occurred during the deposition¹⁰⁸ were relatively few.

Other areas of dispute involved motions for multiple failures to secure an integral component of a deposition, such as a court reporter or an interpreter, a deponent's conducting himself in a fashion that made the deposition meaningless, prolonging depositions due to adjournments and refusing to complete, and blaming failure to comply on the client or on an attorney who substituted out of the case. Of course, the variations within these

106. See *supra* note 105 (discussing the sanctions requested and awarded for violations of various provisions of the Discovery Act).

107. § 2025(j) (failure to attend) (58.5%) and § 2025(i) (protective orders) (7.3%).

108. § 2025(o) (failure to answer or proceed) (9.7%).

categories are as numerous as the varied factual patterns of the cases.

Most of the motions revealed many attempts by the moving parties to gain compliance. The respondent often provided guarantees and apologies until it became clear that the goal was one of delay. In the majority of these motions, compliance had not been achieved by the time sanctions were imposed. Some attorneys were able to bring the opposing parties in after one or two delays and were just as successful as those who waited for many months.

b. The Section 2030 Cluster: Interrogatories

This section represents the largest cluster of citations, indicating that most discovery disputes involve interrogatories. One hundred eighty-two motions for sanctions involved disputes over interrogatories. This was 35.3% of the total motions and 36.8% of discovery motions. Sanctions were awarded 69% of the time.

Subsection (k) of section 2030, which involves failure to serve responses, accounted for 112 motions. This was 61.5% of all motions for sanctions brought under section 2030. The success rate of these motions was 67%. Motions for sanctions brought to compel *further* responses to interrogatories under subsection (1) totalled thirty-four. This was 18.7% of the motions for sanctions brought under section 2030. The success rate was 76%.

Interestingly, the same trend regarding the timing of disputes that was seen with depositions was observed with interrogatories. The disputes predominately concerned obtaining an initial response. Most motions for sanctions were brought in connection with motions to compel responses to interrogatories.¹⁰⁹ Once answers were provided, sanction requests connected with motions to compel further answers were much fewer.¹¹⁰

While the most common type of conduct that drew a monetary sanction was providing responses which were untimely or

109. § 2030(k) (where the opponent refused to provide any answer at all) (61.5%).

110. § 2030(l) (to challenge the sufficiency of the response) (18.7%).

inadequate,¹¹¹ other types of conduct that judges found unreasonable fell into the following categories: (1) The response was “unverified” and later demands to correct it were ignored; (2) selected parts of interrogatories were answered, but the remainder were unanswered, even upon later demands to correct; (3) inadequate responses and objections were made to Judicial Council Form interrogatories; (4) after multiple extensions, a last minute inadequate response was provided after a motion to compel was served; (5) a response was withheld based on a completely unsupported legal position; and (6) the failure to respond was attributed to “heavy workload” or mistake.

For the most part, the declarations of the moving parties indicated that the respondents made excuses, apologies, and promises until the moving party decided to file a motion for sanctions.

c. The Section 2031 Cluster: Inspection of Documents, Places, and Things

Motions for sanctions involving requests for inspection of documents numbered 144. This was 27.9% of the total motions and 29.1% of the discovery motions. The success rate was 67%.

Motions for sanctions involving motions to compel an initial response to a request for production under section 2031(k) accounted for seventy-one motions. This was 49.3% of all section 2031 motions. The success rate was 64%. Motions for sanctions involving a motion to compel a further response under section 2031(l) numbered twenty-eight and comprised 19.4% of all section 2031 motions. The success rate was 61%. There were fourteen motions for sanctions accompanying motions to compel compliance with an inspection demand (actually produce the documents promised) under section 2031(m). This amounted to 9.7% of all section 2031 motions and had a success rate of 64%.

111. The untimeliness of a response also resulted in a waiver of the right to object to the interrogatories.

As with depositions and interrogatories, the requests for sanctions involving motions to compel initial compliance¹¹² far outnumbered the disputes concerning the sufficiency of the compliance.¹¹³

The majority of motions for sanctions regarding production of documents involved multiple delays by the opposing party in the face of a rapidly approaching trial date. The opposing parties in these situations would not comply at all or produced only limited documents. Other examples of unreasonable conduct drawing sanctions included objections based on the type of documents requested. Financial records were most often withheld. Other documents were withheld, claiming privileged protection ranging from attorney-client privilege and "work-product" to the Fifth Amendment to the United States Constitution.¹¹⁴

2. "Repeat Offenders:" Multiple Sanctions

The "Repeat Offenders" fell into two categories: Those who failed to comply with an earlier court order and those who had been sanctioned but for different conduct. There were thirty-four motions in this category, coming from twenty-eight different cases. Twenty-four motions cited non-compliance with previous court orders and ten involved different discovery violations.

112. § 2031(k)(responding to the request) (49.3%) and § 2031(m)(producing the documents) (9.7%).

113. § 2031(l)(obtaining further response)(19.4%).

114. Several motions for sanctions were granted in cases involving so-called "Cumis" counsel. The opposing attorneys were accused of inflating legal bills to insurance companies. The attorneys were unsuccessful in attempting to withhold their billing records. *See Rodoni v. Farmers Ins. Co.*, Case #C553394, July 7, 1989 motion; *People of the State of California v. California Target Enterprises*, Case #C643467, June 2, 1989 motion. Cumis counsel are lawyers retained by an insurance company to represent an insured when there may be a conflict of interest between the insured and the insurance company.

1991 / Pre-Trial Sanctions: An Empirical Study

Sanctions were granted in seventeen of the thirty-four motions and sanctions were denied in the remaining seventeen motions. The successful motions fell into the following categories:

- the sanction awarded equalled the amount requested: 5;
- the sanction awarded was greater than the amount requested: 3; and
- the sanction awarded was less than the amount requested: 9.

The thirty-four motions involved the following discovery code sections:

Section 2025 -- Depositions: 5;
Section 2030 -- Interrogatories: 13;
Section 2031 -- Production and Inspection Demands: 7; and
Other code sections: 9.

F. Utilization of Code of Civil Procedure Section 128.5

Code of Civil Procedure section 128.5¹¹⁵ allows the imposition of sanctions for any type of abuse of the pre-trial process. This code provision can be used to request sanctions for

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115. CAL. CIV. PROC. CODE § 128.5 (West 1990) provides in pertinent part:
- (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . . .
 - (b) For purposes of this section:
 - (1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.
 - (2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.
 - (c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.
 - (d) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

Id.

conduct not involving discovery disputes.¹¹⁶ Section 128.5 can also be utilized in discovery disputes,¹¹⁷ but then it is cited in conjunction with a discovery sanctions provision such as Code of Civil Procedure Section 2023.

Section 128.5 authorizes the imposition of a monetary sanction for actions or tactics that are taken in "bad faith" and are "frivolous or solely intended to cause unnecessary delay."¹¹⁸ "Frivolous" is defined as being "totally and completely without merit" or "for the sole purpose of harassing an opposing party."¹¹⁹

Of the studiable motions, only eighty-five motions involved section 128.5. This was 16.4% of the total.¹²⁰ Forty-two of the motions based on section 128.5, or 49.4%, involved discovery disputes and were coupled with a request for sanctions under a discovery sanctions provision.¹²¹

Only forty-three motions involved non-discovery pre-trial requests for sanctions.¹²² This was 8.3% of the total studiable motions and 50.6% of the eighty-five motions utilizing section 128.5. The breakdown of section 128.5 motions is illustrated below.

1. Non-Discovery Requests For Sanctions Under Code of Civil Procedure Section 128.5

The forty-three motions utilizing section 128.5 to obtain sanctions for non-discovery disputes had a low success rate. Only

116. For example, if an attorney files a frivolous motion to strike or brings a bad faith demurrer solely for the purpose of unnecessary delay, § 128.5 would be the code section under which sanctions could be obtained.

117. Even though the Code of Civil Procedure has specific sanctions provisions for discovery abuses, § 128.5 can also be used because it applies to any "actions or tactics" including but not limited to "the making or opposing of motions."

118. CAL. CIV. PROC. CODE § 128.5(a) (West 1990).

119. *Id.* at § 128.5(b) (West 1990).

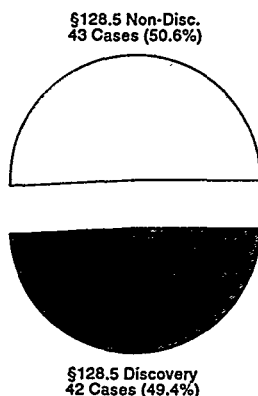
120. The number refers to the total studiable motions of 516.

121. In fact, two of the 43 motions involved discovery disputes and cited only Code of Civil Procedure § 128.5.

122. The 43 motions for sanctions in this category involved a full range of alleged sanctionable conduct. The most frequent type of motion coupled with a § 128.5 request for sanctions involved demurrers and/or motions to strike (6), and motions for summary judgment (4).

thirteen of these motions were granted. Thirty of the motions for sanctions were denied, amounting to a 70% denial rate. Of these denials, fifteen or 50% denied the substantive relief sought in conjunction with the motions, and fifteen or 50% granted substantive relief but denied sanctions,¹²³ as illustrated in the following graph.

A COMPARISON OF §128.5 NON-DISCOVERY MOTIONS
AND §128.5 DISCOVERY MOTIONS



Motion Type	Number of Cases	Percent
§128.5 Non-Discovery	43	50.6%
§128.5 Discovery	42	49.4%

123. Presumably, in granting substantive relief but denying sanctions under Code of Civil Procedure § 128.5, the court found the opposing counsel's action was non-meritorious but did not rise to the level of being in "bad faith," "frivolous," or "solely intended to cause unnecessary delay."

The total amount requested in sanctions for these forty-three motions was \$167,791, or an average of \$3,902 per motion.¹²⁴ This is much higher than the average amount requested for all motions in the study of \$1,608¹²⁵ and all successful motions in the study which was \$1,203.¹²⁶

The total amount awarded for the thirteen successful motions involving the section 128.5 nondiscovery requests was \$12,660, or an average of \$974 per motion.¹²⁷ This was more than the average for all successful motions in the study of \$824.

Of the successful motions, nine specified hours billed, fees, and costs. The average hourly rate requested in these motions was \$140 per hour. The average hourly rate awarded by the court under the allocation method was \$117,¹²⁸ as compared to \$100 for all motions in the study.¹²⁹ These figures are illustrated in the following graphs.

124. If two large requests of \$59,708 and \$34,900 are excluded from these figures, the total requested drops to \$73,183 and the average request becomes \$1,785.

125. See *supra* note 41 and accompanying text.

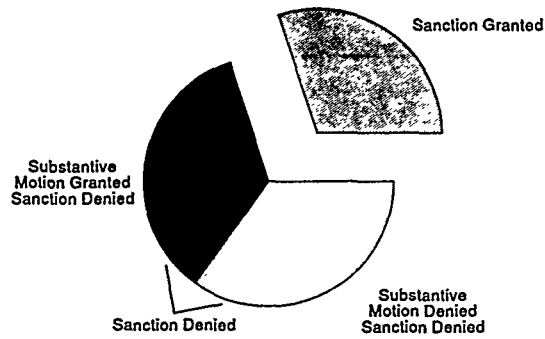
126. See *supra* note 46 and accompanying text.

127. This figure is the average of the successful non-discovery motions only and is the result of dividing \$12,660 by 13. If the total awarded of \$12,660 is divided by the 43 non-discovery motions, so that the average includes unsuccessful motions as well, then the average drops to \$294.

128. The lowest calculable rate and the allocation method rate are almost equal and are represented by the \$117 per hour figure. However, the highest calculable rate is \$122. These calculations exclude a \$6,000 request which only received \$800. Had it been included, the hourly rate awarded by the court under the allocation method would drop to \$83.

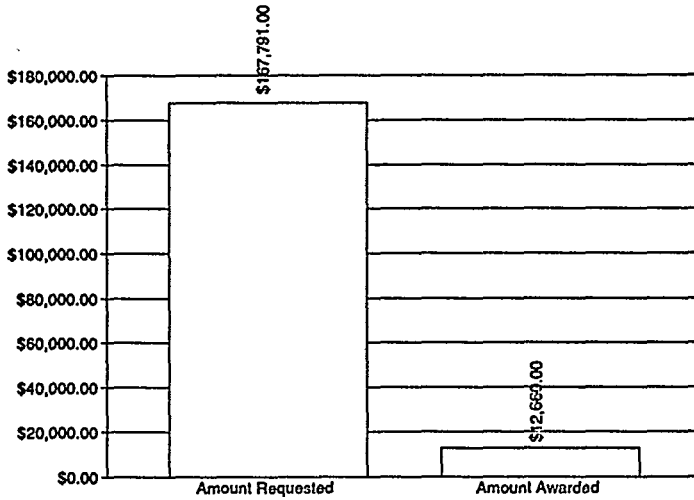
129. See *supra* page 23 (discussing the allocation method as applied to all successful motions for sanctions).

**DISPOSITION OF NON-DISCOVERY CASES
INVOLVING §128.5**



Disposition	Number	Percent
Sanction Granted	13	30.0%
Sanction Denied, Substantive Motion Granted	15	35.0%
Sanction Denied, Substantive Motion Denied	15	35.0%

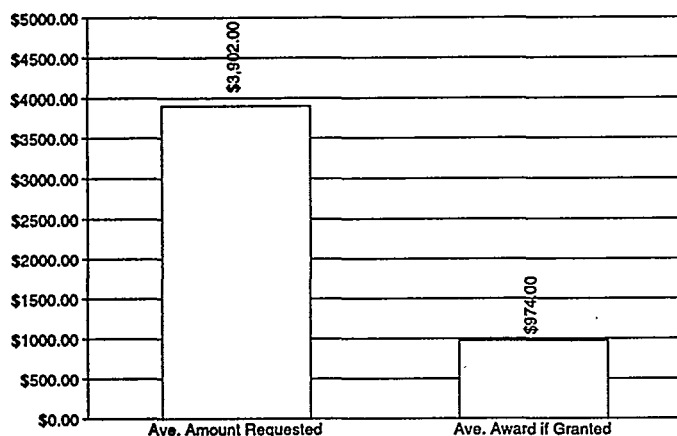
**A COMPARISON OF THE TOTAL AMOUNT REQUESTED AND THE
TOTAL AMOUNT AWARDED IN §128.5 NON-DISCOVERY MOTIONS**



Description	Amount
Total Amount Requested	\$167,791
Total Amount Awarded	\$12,660
Percent Awarded	7.5%

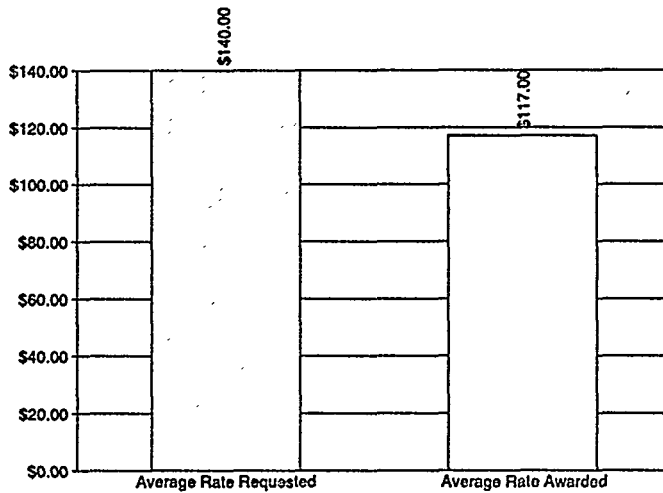
1991 / Pre-Trial Sanctions: An Empirical Study

**§128.5 NON-DISCOVERY MOTIONS: A COMPARISON OF THE
AVERAGE AMOUNT REQUESTED FOR ALL MOTIONS AND THE
AVERAGE AMOUNT AWARDED IN SUCCESSFUL MOTIONS**



Description	Amount
Average Amount Requested for all Motions	\$3,902
Average Amount Awarded in Successful Motions	\$974

**A COMPARISON OF THE §128.5 NON-DISCOVERY
MOTIONS AVERAGE HOURLY RATE REQUESTED AND
AVERAGE HOURLY RATE AWARDED**



Description	Amount
Average Hourly Rate Requested	\$140
Average Hourly Rate Awarded	\$117
Percent Awarded	83.6%

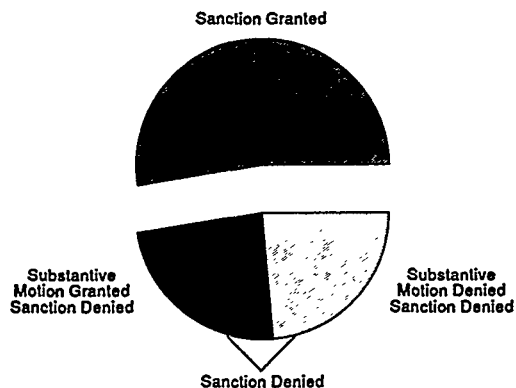
**2. Code of Civil Procedure Section 128.5 Used to Obtain
Sanctions for Discovery Disputes**

Forty-two motions utilized section 128.5 in conjunction with the discovery sanctions provisions to obtain sanctions for discovery disputes. Twenty-two or 52.4% of these requests were successful. Of the twenty unsuccessful motions for sanctions in this category,

1991 / Pre-Trial Sanctions: An Empirical Study

ten (50%) denied all relief and ten (50%) granted substantive relief but denied sanctions, as illustrated below.

DISPOSITION OF DISCOVERY MOTIONS INVOLVING §128.5



Description	Number	Percent
Sanction Granted	22	52.4%
Sanction Denied, Substantive Motion Granted	10	23.8%
Sanction Denied, Substantive Motion Denied	10	23.8%

The total amount requested in sanctions for these forty-two motions was \$96,107, or an average of \$2,288 per motion.¹³⁰ Again, this was higher than the average requested for all motions in the study of \$1,203.

The total amount awarded for the twenty-two successful motions was \$21,643. The average amount awarded per motion was \$984--higher than that awarded for non-discovery motions under section 128.5 (\$974) and greater than the average for all successful motions in the study (\$824).

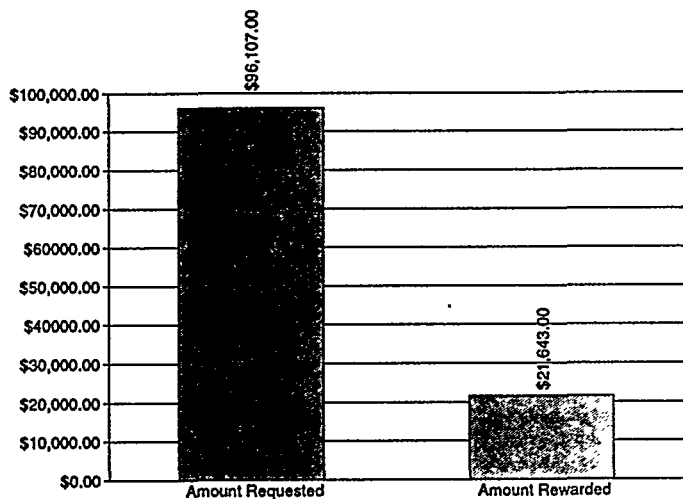
Of the successful motions, eighteen specified fees, costs, and billable hours. The average hourly rate requested was \$144. The average amount awarded was \$82¹³¹-- less than the \$117 per hour awarded when relief was sought for non-discovery motions under section 128.5 and less than the amount for all motions in the study (\$100). These figures are illustrated in the following graphs.

130. If two large requests of \$24,714 and \$14,362 are excluded, the total is \$57,031 or an average amount requested of \$1,426.

131. This number is based upon the allocation method. The lowest calculable amount was \$72 per hour and the highest was \$95. See *supra* pages 22-23 for the basis of these calculations.

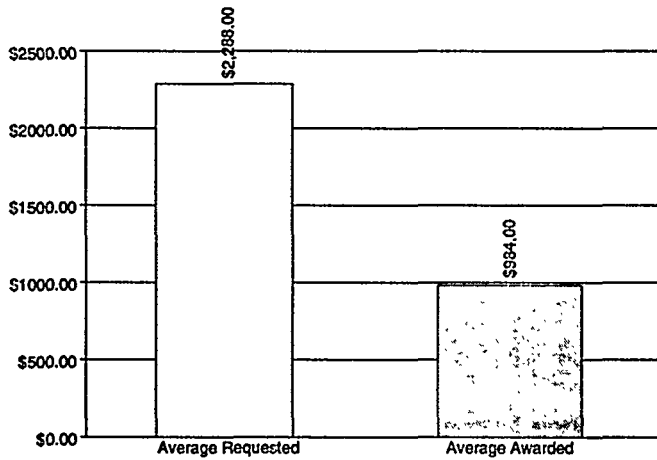
1991 / Pre-Trial Sanctions: An Empirical Study

A COMPARISON OF THE TOTAL AMOUNT REQUESTED AND THE TOTAL AMOUNT AWARDED IN §128.5 DISCOVERY MOTIONS



Description	Amount
Total Amount Requested	\$96,107
Total Amount Awarded	\$21,643
Percent Awarded	22.5%

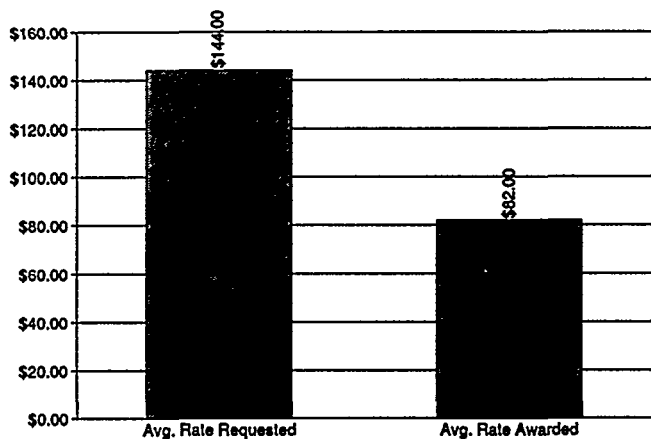
**§128.5 DISCOVERY MOTIONS: A COMPARISON OF THE
AVERAGE AMOUNT REQUESTED FOR ALL MOTIONS AND
THE AVERAGE AMOUNT AWARDED IN SUCCESSFUL MOTIONS**



Description	Amount
Average Amount Requested for all Motions	\$2,288
Average Amount Awarded in Successful Motions	\$984

1991 / Pre-Trial Sanctions: An Empirical Study

A COMPARISON OF THE §128.5 DISCOVERY MOTIONS AVERAGE HOURLY RATE REQUESTED AND AVERAGE HOURLY RATE AWARDED



Description	Amount
Average Hourly Rate Requested	\$144
Average Hourly Rate Awarded	\$82
Percent Awarded	56.9%

3. Time Breakdown of Code of Civil Procedure Section 128.5 Requests

Set forth below is the percentage of time attributed by the moving attorneys to various aspects of their sanction requests. There is a slight difference in the breakdown between non-discovery motions utilizing section 128.5 and discovery motions

using section 128.5. However, both indicate a heavier emphasis in the categories of time attributed to the preparation of the motions and appearance time as compared to the breakdown for all of the motions in the study.¹³²

The percentage of time reported was categorized as follows:

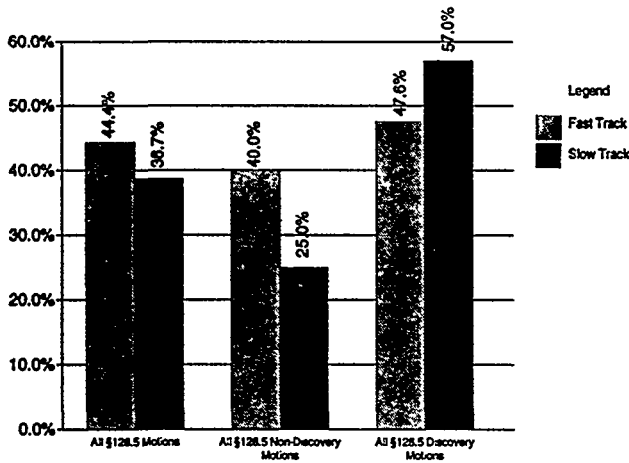
	Non-Discovery § 128.5	Discovery § 128.5
Preparation of Motion	79%	69%
Appearance Time	16%	24%
Travel Time	5%	3.5%
Miscellaneous	0%	3.5%

4. Fast Track v. Slow Track

The success rates of the section 128.5 motions for sanctions differ depending on whether they were heard on the Fast Track or the Slow Track. The Fast Track judges granted 44.4% of the section 128.5 motions (discovery and non-discovery) while the Slow Track judges granted 38.7% of the motions. If the motions were based on section 128.5 alone and did not involve discovery, there was a 40% success rate on the Fast Track and a 25% success rate on the Slow Track. If the motion was a discovery motion utilizing section 128.5, there was a 47.6% success rate on the Fast Track and a 57% success rate on the Slow Track. This comparison is displayed below.

132. The time breakdown for all motions in the study is contained in Part IIIB(1)(a).

A COMPARISON OF THE SUCCESS RATES OF §128.5
MOTIONS ON THE FAST TRACK AND ON THE SLOW TRACK



Disposition	Fast Track	Slow Track
Success Rate of All §128.5 Motions	44.4%	38.7%
Success Rate of §128.5 Non-Discovery Motions	40.0%	25.0%
Success Rate of §128.5 Discovery Motions	47.6%	57.0%

G. Days of the Week

The computerization of the information allowed an analysis of grant, denial, and off-calendar patterns by different days of the week. The computations were performed more out of curiosity and

do not purport to establish any causal correlations. Six hundred twelve motions for sanctions were suitable for analysis.¹³³

Total numbers could not be compared because there were two court holidays in the nine week study.¹³⁴ The study period consisted of eight Mondays and Tuesdays and nine Wednesdays, Thursdays, and Fridays. Therefore, comparisons were made using average daily figures.

The day on which the greatest average number of motions for pre-trial sanctions were brought was Wednesday.¹³⁵ This was followed by Friday,¹³⁶ Tuesday,¹³⁷ Thursday,¹³⁸ and Monday.¹³⁹

In percentage terms, the best chance for successful motions was on Tuesday, when 59.1% of the motions for sanctions were granted. Wednesday, Thursday, and Friday had about the same grant rate.¹⁴⁰ The lowest percentage of sanctions motions were granted on Monday, with a 42.2% grant rate. Not surprisingly, the highest percentage of sanctions motions were removed from calendar on Friday.

The chart below demonstrates these figures, as well as the percentages of unsuccessful motions both where the underlying substantive motion was granted and denied.

133. This is more than the 516 studiable motions because this figure includes off calendar motions.

134. The court was closed on Memorial Day (Monday) and Independence Day, July 4 (Tuesday).

135. 154 total for the 9 Wednesdays in the study for a daily average of 17.

136. 136 total for the 9 Fridays for a daily average of 15.

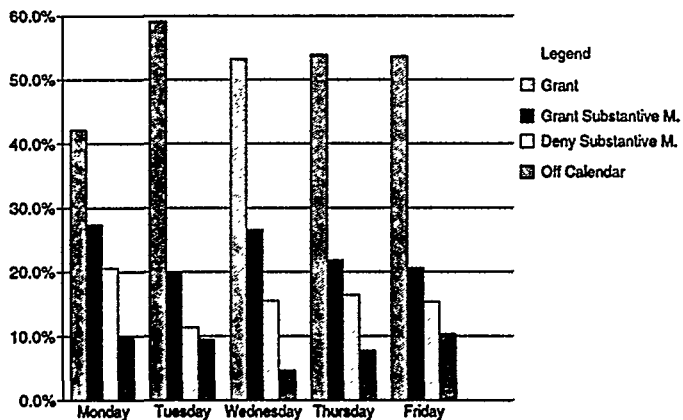
137. 105 total for the 8 Tuesday for a daily average of 13.

138. 115 total for the 9 Thursdays for a daily average of 12.

139. 102 total for the 8 Mondays for a daily average of 12.

140. 53.2%, 53.9% and 53.7% respectively.

A COMPARISON OF MOTION DISPOSITION
BY THE DAYS OF THE WEEK



The table shows the motion disposition in percent (and the actual number of motions). The highlighted cells show the maximum percent in each field.

Day	Grant	No \$ Sanc Sub Motion Granted	No \$ Sanc Sub Motion Denied	Off Calendar	Total Number Motions Per Day*	Average Number Motions Per Day
Monday	42.2% (43)	27.4% (26)	20.8% (21)	9.8% (10)	102	12.8
Tuesday	59.1% (62)	20.0% (21)	11.4% (12)	9.5% (10)	106	13.1
Wednesday	53.2% (62)	26.6% (41)	15.6% (24)	4.6% (7)	154	17.1
Thursday Thursday	53.9% (62)	21.8% (25)	16.5% (18)	7.8% (9)	115	12.8
Friday	53.7% (73)	20.6% (28)	15.4% (21)	10.3% (14)	136	15.1

* Because of two court holidays during the study period, the study compared eight Mondays and Tuesdays; and nine Wednesdays, Thursdays, and Fridays.

IV. CONCLUSION -- THOUGHTS ON THE JUDICIAL ATTITUDE TOWARD AWARDING SANCTIONS

This Article has attempted to set forth the results of the study on pre-trial sanctions in a way that will be helpful to judges and practitioners. This concluding section will not summarize the study. Rather, it will outline the history and purpose of the sanctions provisions and comment on the judges' use of their sanctioning power with reference to the study's findings.

The discussion will focus on the sanctions provisions of the Discovery Act. While Code of Civil Procedure section 128.5 is also applicable to this discussion, the discovery code sections will be addressed for simplicity, since 93% of the sanctions requests studied involved discovery.

Although this study did not analyze the judges' decisions as to correctness, certain trends were evident which revealed that the judges may not be using their power to sanction to the full extent possible in order to prevent discovery and other pre-trial abuse. In the study period, motions for sanctions were granted 54% of the time and denied 46% of the time. The study isolated four categories of judicial rulings:¹⁴¹

- (1) Sanctions which were awarded and equalled the amount requested (27% of the cases);
- (2) Sanctions which were awarded but the amount requested was reduced by the judge (25% of the cases);
- (3) The substantive motion was denied so no sanction was given (24% of the cases);
- (4) The substantive motion was granted but no sanction was given (23% of the cases).¹⁴²

141. See *supra* notes 13-18 and accompanying text (discussing motions for monetary sanctions in which the amount awarded equalled or was less than the amount requested); page 32-33 (discussing motions in which sanctions were denied and the substantive motion was denied, and motions in which the substantive motion was granted but no sanction was given).

142. These figures do not total 100% because in 1% of the cases the amount awarded was greater than the amount requested.

A. *Potential Problem Areas*

Two of the above-stated categories present no problems. Certainly, no one can quarrel with the decisions in category three where the sanction was denied and the substantive motion was denied. Of course, if an attorney is unsuccessful in a motion, his adversary's position has been vindicated and the moving attorney is not entitled to sanctions.

Similarly, the motions falling within category one where the motion was granted and the amount of the sanction awarded was the amount requested by the moving party are not problematic. This category of motions will be discussed in Part E, below.¹⁴³

The other two categories may evidence a problem -- category four comprising 23% of the cases where the substantive motion was granted but the sanction request was denied,¹⁴⁴ and category two comprising 25% of the cases where the substantive motion was granted, a sanction was given, but it was less (53.3% less on the average)¹⁴⁵ than the amount requested.

In these two categories of cases, it is undisputed that a discovery rule violation had occurred because the motion for substantive relief was granted. However, for some reason the judges failed to grant the amount of sanctions requested by the moving party and sworn to in his or her declaration as being the amount of the moving party's expenses of bringing the motion.

B. *Purposes of The Discovery Sanctions Provisions*

The California Civil Discovery Act¹⁴⁶ was revised in 1987 to achieve the purpose, among others, of strengthening the sanctions provisions for failure to comply with the discovery rules and to

143. See *infra* page 189.

144. See *supra* page 33 discussing cases where the substantive motion was granted but the sanction request was denied).

145. See *supra* note 55 and accompanying text (discussing the cases where the substantive motion was granted, but the sanction award was less than the amount requested).

146. The California Civil Discovery Act of 1986 became effective on July 1, 1987. The Act was the result of the efforts of a joint commission of the State Bar and Judicial Council to revise the original 1957 system of civil discovery.

prevent discovery abuse by the increased use of sanctions.¹⁴⁷ The drafters perceived a problem with judges being reluctant to utilize their power to impose sanctions.¹⁴⁸ To remedy this problem, the Discovery Act of 1986 authorized various degrees of sanctions for discovery abuses and attempted to clarify what constituted discovery abuse. The revised sanctions provisions of the Act gave judges a tool by which they could limit discovery abuse by imposing meaningful and mandatory monetary sanctions. In creating the sanctions provisions of the Act, the drafters did not intend to "narrow the discretion of the court, but rather [to press] the court to address itself to abusive practices."¹⁴⁹ By passing the Discovery Act of 1986, the legislature seems to have challenged the judicial branch to put the lid on rampant discovery abuse by employing meaningful monetary sanctions to an extent far greater than in the past.¹⁵⁰

The Discovery Act made two significant changes strengthening the likelihood of monetary sanctions. First, it shifted the focus of "substantial justification" for delay or abusive acts. Previously, an award of sanctions was made only if the losing party was found to have acted *without* substantial justification. The Discovery Act now requires imposition of a monetary sanction for various forms of conduct¹⁵¹ "unless it finds that the one subject to the sanction acted *with* substantial justification or that other circumstances make the imposition of the sanction unjust."¹⁵² The test of "substantial justification" remains the same, but the change in language was

147. Smith, "Early Reflections on the Discovery Act of 1986" from *Preparing Now for Discovery Under the New Act*, California Continuing Education of the Bar Program Material, Oct./Nov. 1986, p. 9.

148. It was said that "some law and motion courts demonstrate[d] timidity or inflexibility over discovery abuses and sanctions, with a good deal of unhealthy divergence in treatment from county to county." *Id.* at 4.

149. Hogan, Reporter's Notes to Proposed California Civil Discovery Act of 1986.

150. Smith, *supra* note 150, at 9.

151. CAL. CIV. PROC. CODE §§ 2017(c)-(d); 2019(b)(2); 2023(a)(9); 2025(e), (g), (i), (j)(1)-(3), (n), (o), (q)(1)-(2); 2028(d)(1)-(2); 2030(e), (k), (l), (m); 2031(e), (k), (l), (m); 2032(c)(6)-(7), (g)(1), (h), (j); 2033(e), (k), (l), (o); 2034(e), (i), (j), (k), (l) (West 1990).

152. CAL. CIV. PROC. CODE §§ 2017(c)-(d); 2019(b)(2); 2025(e)(3)(G), (g), (i), (j)(1)-(3), (n), (o), (q)(1)-(2); 2028(d)(1)-(2); 2030(e), (k), (l), (m); 2031(e), (k), (l), (m); 2032(c)(6)-(7), (g)(1), (h), (j); 2033(e), (k), (l), (o); 2034(e), (i), (j), (k), (l) (West 1990) (emphasis added).

intended to make judges more alert to abuses occurring in the discovery process.¹⁵³ Second, the Discovery Act makes the imposition of sanctions mandatory, whereas, prior to the revisions, sanctions were discretionary.¹⁵⁴

The Discovery Act reflects the “legislative intent to shift fees and costs to the party who has failed to comply with the act.”¹⁵⁵ “If the sanction provisions of the Discovery Act are to be a credible deterrent to discovery abuses, they must be applied to prevent a losing party from accomplishing indirectly that which it is expressly prohibited from doing directly -- forcing a party who deals fairly to pay for the abusive tactics of one who does not.”¹⁵⁶ If a discovery abuser is not forced to pay for his or her tactics, then the abusive approach has been successful. The abuser has managed to harass and delay the opposition and make the opposing party incur uncompensated fees and costs to obtain discovery compliance.

C. Motions In Which The Substantive Motion Was Granted And The Sanction Was Denied

In light of the strong legislative and judicial¹⁵⁷ support for the expanded use of sanctions, the 117 cases in the study in which the substantive motion was granted but the sanction was denied should be examined. Since the judges in the study granted the underlying motion, they must have found that the moving party’s position was correct. However, the key to whether the judges were utilizing their sanctioning powers correctly involves whether they also actually

153. Hogan, Reporter’s Notes to Proposed California Civil Discovery Act of 1986.

154. *Id.* The court “shall” impose a monetary sanction “unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust.” CAL. CIV. PROC. CODE §§ 2017(c)-(d); 2019(b)(2); 2023(a)(9); 2025(e), (g), (i), (j)(1)-(3), (n), (o), (q)(1)-(2); 2028(d)(1)-(2); 2030(e), (k), (l), (m); 2031(e), (k), (l), (m); 2032(c)(6)-(7), (g)(1), (h), (j); 2033(e), (k), (l), (o); 2034(e), (i), (j), (k), (l) (West 1990).

155. *Mattco Forge, Inc. et al v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1441, 273 Cal. Rptr. 262, 268 (1990).

156. *Id.*

157. *See Waicis v. Superior Court*, 226 Cal. App. 3d 283, 288, 276 Cal. Rptr. 45, 48 (1990) (stating that the trial court should exercise its inherent powers to prevent discovery abuse).

found in these motions that the responding party's conduct was substantially justified.¹⁵⁸

If the judges actually made such determinations in the 117 cases (23% of the cases in the study), then the "no sanction" result is correct. This is impossible to determine from most of the minute orders. Regularly the judge simply said "motion granted/sanction denied." However, if the non-imposition of the sanction was due instead to a reluctance to grant sanctions¹⁵⁹ or a desire to compromise by granting the moving party's motion but allowing the responding party to win in the area of sanctions, then the judge was not carrying out the mandate of the Discovery Act.

As the "Judges Breakdown" portion of this study¹⁶⁰ indicates, some judges do indeed seem reluctant to award sanctions.¹⁶¹ However, it must be emphasized that this study did not delve into the merits of any individual sanctions requests. Therefore, judges who appear in the study to be disinclined to award sanctions may have coincidentally received many non-meritorious motions for sanctions during the study period.

D. Motions In Which Sanctions Were Awarded But Reduced

A similar concern is present in the category of motions in which sanctions were granted but the amount was significantly reduced from the amount requested. This may be an even more troubling problem. Because a sanction was awarded, the judge must have found that the opposing party did not prove that his conduct was substantially justified. Yet the judge did not award the total sanction requested.

158. The new discovery rules make the imposition of monetary sanctions mandatory *unless* the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

159. This has been the topic of a law review article by a judge. *See*, Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 271 (1979).

160. *See supra* notes 85-96 and accompanying text (setting forth the awarding pattern of each of the judges analyzed).

161. *See, e.g.*, Judge 23 on the Fast Track and Judge E on the Slow Track.

The study reveals that many of the judges systematically reduce the awards when they do award sanctions.¹⁶² In the subcategory of motions in which sanctions were awarded but the amount awarded was reduced from the amount requested, the judges reduced 54% of the awards or granted 46% of the amount requested. The average hourly rate awarded was \$80 per hour.¹⁶³ While this may be the billing rate of some attorneys, it is far below the average hourly rates of other attorneys bringing motions in Los Angeles and thereby reduces the award to an amount that is not reasonable.¹⁶⁴ The average billing rate requested by attorneys and presumably believed by them to be reasonable was \$146 per hour, 45% more than the rate awarded.¹⁶⁵

If the *total* cost of the discovery abuser's conduct is not borne by the abuser in the form of sanctions, then again the purpose of harassment and delay by forcing uncompensated costs on the opposing party has been achieved. As stated by one court:

Far more consonant with the rationale of the rule is a "but for" concept: If opposition to discovery efforts is not substantially justified, the "expenses incurred in obtaining the order" should encompass *all expenses, whenever incurred*, that would not have been sustained had the opponent conducted itself properly.¹⁶⁶

162. The "slugging percentages" of each judge were set forth in Part IIID of this article.

163. See *supra* IIIB(2)(c). This is the subcategory of motions in which the amount awarded was less than the amount requested.

164. It is interesting to note that when the judges do not reduce the amount of sanctions requested, the attorneys have asked for less initially and are awarded more. (\$122). See *supra* notes 52-55 and accompanying text. This is the subcategory of motions in which the amount awarded equalled the amount requested.

165. See *supra* notes 56-64 and accompanying text. This is the subcategory of motions in which the amount awarded was less than the amount requested.

166. *Aerway Laboratories v. Arco Polymers, Inc.*, 90 F.R.D. 563, 565-6, (1981) (emphasis added) (construing F.R.C.P. 37(a)(4) which served as a model for the California discovery sanction provisions).

While there is no "correct amount"¹⁶⁷ for a monetary sanction, it must be enough to compensate the moving party fully for the costs occasioned by the other side's unjustified conduct. In deciding how much to award as a sanction, the judge has virtually unlimited discretion. The sanction (or lack thereof) is subject to reversal only when "arbitrary, capricious or whimsical" and "will be upheld if it is based on a reasoned judgment and complies with the legal principles and policies appropriate to the particular matter at issue."¹⁶⁸

One appellate court has fashioned a two-part test for the imposition and the amount of sanctions. In *In re Marriage of Milas*, the Second District Court of Appeal stated that:

(1) The evidence must be sufficient to support a finding that the amount of sanctions . . . reflects the amount spent or incurred by [the moving party] in an attempt to obtain compliance with discovery, and (2) the record must reflect a determination by the trial court that such amount spent or incurred was reasonable.¹⁶⁹

Therefore, the judges in the study who reduced the amount requested by the moving party in 130 sanctions awards should have found either that the amounts specified in the sworn declarations of the attorneys were false or that the amounts were unreasonable. Again, the minute orders reviewed for this study do not reflect whether such determinations were made.

If the judges reduced the sanction amounts because they actually found that the attorney was untruthful or that the amount was unreasonable, then the reduction was justified. If, however, the reduction was made because of an inclination to compromise or to give the responding attorney "a slap on the hand" without making

167. There is no limitation on the amount of a sanction under the Discovery Act. *Caldwell v. Samuels Jewelers*, 222 Cal. App. 3d 970, 272 Cal. Rptr. 126 (1990). Compare *Mattco Forge, Inc., et al v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1437, 273 Cal. Rptr. 262, 265, (1990) (holding a sanction of \$750 was found to be "fair and legally correct") with *In Re Marriage of Niklas*, 211 Cal. App. 3d 28, 38, 258 Cal. Rptr. 921, 927 (1989) (holding an award of \$45,000 not to be excessive).

168. *In Re Marriage of Economu*, 224 Cal. App. 3d 1466, 1475-76, 274 Cal. Rptr. 473, 478 (1990)

169. *In Re Marriage of Niklas*, 211 Cal. App. 3d 28, 38, 258 Cal. Rptr. 921, 927 (1989).

him absorb the full costs of his unjustified¹⁷⁰ conduct, then the reduction defeats the purpose of the Discovery Act.

It would be surprising if attorney untruthfulness was the reason for the reduction. Attorneys must submit their itemized sanctions requests in declarations under penalty of perjury. Such itemization of costs and attorney's fees under penalty of perjury has been held to constitute sufficient proof for the court to award sanctions.¹⁷¹ If a judge believed an attorney was untruthful in a sworn declaration, one would expect the judge to do something other than merely reduce the amount of a requested sanction without comment.

In all probability, the judges who reduced the sanctions requests thought the amounts requested were unreasonable. While the Discovery Act specifically calls for the imposition of sanctions in an amount that is reasonable,¹⁷² what is reasonable is difficult to determine.

One problem in the area of the proper dollar amount of sanctions arises because the 1986 Code revisions fail to address the issue.¹⁷³ The Act does not define "reasonable expenses." One commentator has argued that this failure to give more direction could possibly render the monetary sanction provisions of the Discovery Act "just another paper tiger."¹⁷⁴ Others suggest that practitioners call the court clerk to find out the "going rate" and draft moving papers with that in mind.¹⁷⁵

Perhaps also adding to a judge's inclination to reduce the amount of monetary sanctions is the recently amended Code of

170. The award of *some* sanctions precludes the argument that the conduct was substantially justified.

171. *Bily v. Arthur Young & Co.*, 222 Cal. App. 3d 289, 324, 271 Cal. Rptr. 470, 490 (1990).

172. Section 2023(b)(1) provides that: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process . . . pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." CAL. CIV. PROC. CODE § 2023(b)(1) (West 1990).

173. The code's only guidance is that the amount paid should be the "reasonable expenses, including attorney's fees." *Id.*

174. Donovan, *Sanctions Under the Civil Discovery Act of 1986, Section 2023: Will it Make a Difference or Is It Just Another "Paper Tiger,"?* 15 PEPP. L. REV. 401 (1988).

175. *Weil & Brown, California Practice Guide, Civil Procedure Before Trial*, Chap. 8 Discovery, ¶ 8:1189, p. 8F-65 (1990).

Civil Procedure section 904.1, which allows appeals of orders for monetary sanctions that exceed \$750.¹⁷⁶

E. Exemplary Sanction Procedures

One hundred forty or 27% of the sanction awards in the study were noteworthy in that the award exactly equalled the amount requested by the moving party. Assuming the judges were not merely “rubber-stamping” the request, these awards can be attributed to attorneys whose requests were reasonable and to the judges with the highest “slugging percentages” who demonstrated a willingness to grant the amount the moving attorney said had been incurred. When the discovery misconduct was proven, these judges found the sworn declaration of the attorney as to his expenses to be both believable and reasonable. This category of cases indicates a judicial willingness to award the moving attorneys their full expenses of bringing the motion as a means to prevent discovery abuse. In these cases the purpose of the sanction provisions of the Discovery Act was fully achieved by shifting the total cost of the discovery abuse to the losing party. This is the way the sanctioning power of the court is intended to work.

Unfortunately, because of a probable combination of attorneys bringing non-meritorious motions for sanctions, judges not awarding sanctions when they should, attorneys asking for unreasonable amounts of sanctions, and judges awarding unreasonably low sanctions, in 73% of the motions for sanctions examined by this study, the sanctions procedures did not operate optimally.

176. CAL. CIV. PROC. CODE § 904.1 (West 1990). Section 904.1 was amended in 1989 to include sub-section (k) as a situation where an appeal, rather than a petition for an extraordinary writ, is proper:

(k) From a superior court judgment directing payment of monetary sanctions by a party or an attorney for a party only if the amount exceeds seven hundred fifty dollars (\$750). Lesser sanction judgments against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

Id. § 904.1(k) (West 1990).

F. Suggestion As To Amount Of Sanctions To Be Awarded

It is apparent from the study that judges are not consistent in their interpretation of what amounts to “reasonable” expenses and attorney fees. While an individual judge may have a “going rate” in mind, certainly one judge’s perception may not be shared by his colleagues. Perhaps a workable alternative to inconsistent interpretations of reasonableness could be solved by the establishment of two local court rules.

One proposed rule would require attorneys to specify in their declarations the exact *number of hours expended* because of the alleged abuse and a detailed description of the work performed. A local Law and Discovery rule presently requires attorneys seeking sanctions to present a declaration “detailing the calculation of the amount sought.”¹⁷⁷ However, this rule has not gone far enough to elicit a comprehensive breakdown of attorneys’ time. In 19% of the motions for sanctions, the attorneys did not differentiate between fees and costs and specify the total number of hours expended.¹⁷⁸ Although attorneys were usually more successful when they specified billable hours and fees, the failure to do so did not result in an automatic denial of sanctions.¹⁷⁹ The rule should be redrafted to clarify that hours expended, total fees requested, and costs requested should be designated.

Once this is accomplished, the judges can examine the declarations to determine whether the hours expended and work performed were reasonable. It is in this area that the judge should exercise discretion.

However, the hourly rate awarded by the judge when the need for sanctions is evident should not be discretionary. Thus, a second local rule should establish the hourly rate to be awarded. The rule could adopt either one set hourly rate or a fee schedule based on the number of years of experience of the attorney. The judge would

177. Law and Discovery Policy Manual, Rule IVD paragraph 256, p. 34 (1990).

178. See *supra* page 18 (specifying that in ninety-six cases the attorneys did not specify the hours expended or differentiate fees from costs).

179. See *supra* notes 44-64 (discussing the cases in which attorneys differentiated between fees and costs and also cases in which they did not differentiate between fees and costs).

then apply this non-discretionary hourly rate to the hours determined by the judge in his discretion to have been expended by the moving party as a result of the sanctioned parties' abusive conduct. In this way a judge's discretion is preserved where it is important and sanction awards would become more consistent and better suited to deter abuse.