

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 1, Honorable Jacqueline Duong, Presiding**  
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113  
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 Or Email at  
Department1@scscourt.org before 4:00 P.M.**

**PROBATE LAW AND MOTION TENTATIVE RULINGS**

**DATE: November 22, 2024      TIME: 10:00 A.M.**

**\*\*\*NOTICE\*\*\***

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	17PR181676	Trust of Wedelin Wessbecher	Click on <a href="#">LINE 1</a> or scroll down for attached Tentative Ruling.

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**PROBATE LAW AND MOTION TENTATIVE RULINGS**

<a href="#">LINE 2</a>			Click on <a href="#">LINE 2</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 3</a>			Click on <a href="#">LINE 3</a> or scroll down for attached Tentative Ruling.
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<a href="#">LINE 6</a>			

Line 1

Case Name: The Wendelin Wessbecher Trust dated September 22, 2004

Case No.: 17PR181676

Hearing date, time, and department: November 22, 2024, at 10:00 a.m. in  
Department 1

## INTRODUCTION

On August 4, 2017, Uwe Wessbecher (“Respondent”), trustee of the Wendelin Wessbecher Trust dated September 22, 2004 (“the trust”) initiated this case by filing a petition for modification of trust terms to add an additional section to the trust. The petition indicated that the settlor, Wendelin Wessbecher (“Wendel”), was incapacitated, rendering the trust irrevocable. The court granted that modification. Wendel passed away in 2021.

On September 21, 2023, Roy Wessbecher (“Petitioner”) filed a petition to redress breaches of trust and to compel Respondent to produce Wendel’s tax returns. The petition alleged that Respondent became Wendel’s conservator and that, in his capacity as a fiduciary, he entered into transactions benefiting himself and his family, at the expense of the other trust beneficiaries.

Currently before the court is Petitioner’s motion to compel compliance with an agreement to comply with requests for production of documents. Respondent has opposed the motion and Petitioner has filed a reply.

## DISCUSSION

### I. Respondent’s Opposition

Respondent served and filed his opposition on November 12, 2024. In it, he indicates that he provided several of the documents Petitioner sought via his motion after the motion had been filed. Petitioner contends that the opposition is late and requests that the court decline to consider it. Opposition papers are due nine court days prior to the hearing. (Code Civ. Proc., § 1005, subd. (b).)<sup>1</sup> Here, the motion is scheduled to be heard on November 22, 2024. Accordingly, Petitioner is correct that the opposition is untimely. However, the court has discretion to consider late-filed papers. (See Cal. Rules of Court, rule 3.1300(c).) Here, Petitioner was able to provide a substantive reply before the hearing and, in any event, Petitioner does not contend that Respondent did not provide him with the documents Respondent represents that he provided. Accordingly, the court will consider the opposition.

## II. Analysis

### A. Legal Background

“If a party filing a response to a demand for inspection, copying, testing, or sampling under Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280 thereafter fails to permit the inspection, copying, testing, or sampling in accordance with that party’s statement of compliance, the demanding party may move for an order compelling compliance.” (§ 2031.320, subd. (a).)

### B. Merits of the Motion

Petitioner contends that he served requests for production of documents, numbers 35 and 36 on Respondent. Respondent answered both requests with objections but also stated as to both requests, “Without waiving said objections, Responding Party agrees to and will produce all non-privileged responsive documents in his possession, custody and/or control.” In his opposition, Respondent does not assert that he did not agree to comply with the requests at issue. Instead, he indicates that he did not have the items requested, namely Wendel’s tax returns from the years 2015 to 2020 in his possession and he had to request them. He maintains that he provided the tax returns from 2016 to 2020 to Petitioner after the motion had been filed. In reply, Petitioner does not dispute that Respondent provided the tax returns from 2016 to 2020, nor does he contend that there is anything deficient about those documents. Neither Petitioner nor Respondent indicates whether Petitioner received the 2015 tax returns after the filing of the motion.

In his motion, Petitioner also requested an order that Respondent provide a production log. Petitioner relies on section 2031.280, subdivision (a), which provides “Any documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond.” Respondent indicates in his opposition that he provided a production log to the best of his ability. Petitioner does not argue in reply that the production log is deficient.

To the extent the 2015 tax returns remain outstanding and to the extent Respondent has the ability to produce same, the court orders him to do so within 20 calendar days of the date of this court’s order. The court finds that the remainder of motion is MOOT save for Petitioner’s sanctions request.

### C. Petitioner’s Request for Sanctions

Petitioner requests monetary sanctions in the amount of \$6,665.00 for his attorney fees incurred in making the motion. Section 2031.320, subdivision (b), on which Petitioner relies, provides “Except as provided in subdivision (d), the court shall

impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand, 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.” Even where the discovery at issue is provided

before the hearing on a motion to compel, the court retains discretion to hear the motion and order sanctions. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 408-409.)

Here, despite Petitioner’s meet and confer efforts, Respondent did not produce the documents he agreed to produce until after the motion had been filed. He contends in his opposition that he did not have access to the documents at issue and needed to request them from Wendel’s accountant. However, he did not inform Petitioner of that fact during meet and confer, thereby saving Petitioner and the court the time and expense of filing and hearing the instant motion. Accordingly, sanctions are appropriate.

Petitioner explains that two attorneys worked on the instant motion. One attorney, Sean McKissick, bills at \$460 per hour and declares that he spent three hours working on the motion. The other attorney, Joshua Dalavai bills at \$350 per hour and expended 7.1 hours on drafting the motion. Petitioner’s counsel anticipated in his declaration filed concurrently with the motion that Mr. Dalavai would spend a further five hours working on the reply. Thus, Petitioner’s counsel indicates that 15.1 hours were billed in connection with the motion and the reply. However, no updated declaration was provided and the court cannot determine the amount of time spent on the reply.

The court declines to award sanctions for the time spent in preparing the reply considering that it only has before it an estimate of the time actually incurred. The court does not award sanctions for anticipated time. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551.) Further, counsel does not provide the level of experience of either attorney for the court to evaluate the reasonableness of their hourly rates. Accordingly, the court will award sanctions based on the lower hourly rate. Finally, the 10.1 hours expended on preparing the motion is unreasonable for such a straightforward motion. Accordingly, the court will award sanctions in the amount of \$2,800 (eight hours at \$350 per hour). Respondent is ordered to pay Petitioner’s counsel \$2,800 in sanctions within 20 calendar days of the date of this court’s order.

## CONCLUSION

The motion is MOOT except to the extent it seeks the 2015 tax returns and monetary sanctions. To the extent the 2015 tax returns remain outstanding and to the extent

Respondent has the ability to produce same, the court orders him to do so within 20 calendar days of the date of this court's order. Respondent is ordered to pay Petitioner's counsel \$2,800 in sanctions within 20 calendar days of the date of this court's order.

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