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Responding to written discovery

It's a balancing act between protecting your client, complying with the law and establishing a workable relationship with defense counsel

Responding to written discovery often feels like the most arduous, mundane and tedious task in all of civil litigation. It requires sifting through scores of questions that are sometimes poorly drafted and often seeks information that is private and questionably relevant. It requires the full cooperation of your client and for you to review every paper in the file. It is a minefield for potential future impeachment of your client. And, it comes with a deadline which, if not met, may result in serious consequences.

Responding to written discovery takes a lot of time and work, and lacks the excitement of thinking on your toes that comes with other parts of litigation, such as taking a deposition or examining a witness at trial. It doesn't appeal to the urge to be creative and persuasive as does arguing your case to the jury, or a motion before a judge. You can't really prepare a PowerPoint presentation on it, or put it to animation.

But one thing is for sure, properly responding to written discovery is crucial to your case, and to the protection of your client's interests. When assisting a client in preparing discovery responses, the attorney must dutifully:

- protect the client's privacy and confidentiality;
- secure the client's rights to use certain pieces of evidence at trial;
- give the client the greatest chance of possible settlement of the case by educating the defense.

The attorney can avoid making the case harder, more time consuming, and frustrating with the exercise of tact and professionalism, by:

- minimizing the chances of defense meet and confer and motion practice through the preparation of complete responses;
- crafting responses that lay the foundation for successfully opposing a future motion that cannot be avoided;

- establishing good rapport with opposing counsel;
- showing opposing counsel that you are a thorough and knowledgeable litigator.

The big picture

In responding to discovery, the attorney must engage in a balancing act between vigorously protecting the client, complying with what the law requires and establishing a professional and cordial working relationship with defense counsel. You shouldn't be a pushover, but you shouldn't be unnecessarily defiant either. Asserting proper objections when responding to discovery is necessary to protect the client's privacy, as well as protecting the client from having the responses used against him/her at trial. However, where information can be given, it should be given – of course, subject to and without waiving valid objections.

Assert all applicable objections

It is absolutely necessary to assert all applicable objections prior to each discovery response – not only when you believe the objections justify your withholding the information requested (such as those based on privacy or privilege), but even when you still intend to provide the responsive information or documents. At trial, interrogatory responses can be offered into evidence by any party against your client (regardless of whether your client is available to testify), but their admission is still subject to the Rules of Evidence. (Code Civ. Proc., § 2030.410). Therefore, proper objections may thwart the defense's ability to later use your client's responses against him or her at trial.

Objections should be served in a timely fashion, as most objections are waived if served untimely – including objections based on attorney work product and privilege. (Interrogatories - See

Code Civ. Proc., § 2030.290(a) and *Leach v. Sup.Ct.* (1980) 111 Cal.App.3d 902, 905-906 [169 Cal.Rptr. 42, 43-44]; Request for Production - See, § 2031.300: Requests for Admissions - See Code Civ. Proc., §2033.280(a).)

It is good practice to state the supporting authorities in the objections themselves. By doing so, you are laying the groundwork for your opposition to any future defense motion for further answers and/or production, and hopefully sending a strong enough message to defense counsel to prevent the motion in the first place.

However, only applicable and proper objections, which are not too general should be asserted, as a judge will look with disfavor upon a string of objections that appear to be mere boilerplate, and may even find it to be cause for sanctions. (Interrogatories - See Code Civ. Proc., § 2030.300(a)(3); and *Korea Data Systems Co. Ltd. v. Sup.Ct.* (Amazing Technologies Corp.) (1997) 51 Cal.App.4th 1513, 1516 [59 Cal.Rptr.2d 925, 926]; Request for Production- See Code Civ. Proc., § 2031.240(b); see – objections constitute implicit refusals to produce.)

Objections

The grounds for objections to interrogatories are fewer than those available at deposition because, unlike at deposition, counsel is active in participating in interpreting and responding to the questions. (See *Greyhound Corp. v. Sup.Ct. (Clay)* (1961) 56 Cal.2d 355, 392 [15 Cal.Rptr. 90, 110, fn. 16].)

The following objections to interrogatories are generally *not sustained* by the courts and therefore *should not be used*:

- Assumes facts not in evidence. (*West Pico Furn. Co. v. Sup.Ct. (Pacific Finance Loans)*, supra, 56 Cal.2d at p.421 [15 Cal.Rptr. at 126].)

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- Hearsay. (*Greyhound Corp. v. Sup.Ct. (Clay)*, *supra* – hearsay discoverable as long as it may lead to admissible evidence)
- Asked and answered at deposition. (*Coy v. Sup.Ct. (Wolcher)* (1962) 58 Cal.2d 210, 218 [23 Cal.Rptr. 393, 397].)
- Calls for opinion or conclusion. (*West Pico Furn. Co. v. Sup.Ct. (Pacific Finance Loans)* (1961) 56 Cal.2d 407, 416-417 [15 Cal.Rptr. 119, 123].)
- Vague, ambiguous and overbroad. Such an objection may be treated as a “nuisance” objection, and may subject the objecting party to sanctions. (See *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 901 [275 Cal.Rptr. 833].) Therefore this objection should not be used to avoid a response unless the interrogatory is completely unintelligible — because the answering party owes a duty to *respond in good faith as best he or she can*. (See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783 [149 Cal.Rptr. 499, 509].)

If the interrogatory is so overly broad so as to render it burdensome, oppressive or harassing, the objection is more likely to be sustained on these grounds. However, an effort should be made to provide at least the information that would have been responsive to a more reasonably limited interrogatory because even if interrogatories are found to be “burdensome and oppressive,” the court is not supposed to simply sustain the objection and thereby excuse any answer. Rather, the trial court is supposed to limit the question to a reasonable scope. (*Borse v. Sup.Ct. (Southern Pac. Co.)* (1970) 7 Cal.App.3d 286, 289 [86 Cal.Rptr. 559, 561].)

Be forthcoming

Unless there is a serious privacy or privilege issue, failing to provide responsive information or documents just because you believe there are strong and meritorious objections to the request, doesn’t do you or your client any favors. By not providing the information/documents, subject to your objections, you are begging for a motion to compel (or at least a meet-and-confer letter requesting further answers) from your opposing counsel, that you’ll have to waste much time responding to. And if the judge dis-

agrees with you, he may impose monetary, or worse, evidentiary sanctions.

Further, you’ll be ruining rapport with opposing counsel, who is effectively the one holding the money you are trying to obtain. Despite the opportunity for billable hours, most defense counsel would rather not spend hours writing meet-and-confer letters or squabbling about discovery responses.

If you’ve gotten meaningless discovery responses and baseless objections from your opposing counsel, resist the temptation to respond in kind. If you have to go to court to compel responses from the defendant, your position will be much stronger if you haven’t used the identical tactics about which you are complaining in your motion.

Also, you shouldn’t forget that unless you give the defense the information supporting your claims, the principal with the authority to settle will be unable to evaluate the claim or make an offer. If you’ve preserved your objections, and there’s nothing to hide, why not give them what they’re asking for? Don’t cut off your nose to spite your face.

Not only is it wise strategically to be forthcoming, but the law requires it:

Interrogatories:

“Objections to interrogatories should be based on a good faith belief in their merit and *not be made for the purpose of withholding relevant information*. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.” (Super. Ct. L.A. County, Local Rules, rule 7.12(g)(3) (emphasis added).) (Note: These rules “relate to” discovery and are likely preempted by Rule 3.20(a) of the California Rules of Court. But this conduct may still be sanctionable as an abuse of discovery under Code Civ. Proc., § 2023.010.)

Answers must be complete and straightforward

The Code of Civil Procedure requires that each response to interrogatories be “as *complete and straightforward* as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possi-

ble.” (Code Civ. Proc., § 2030.220(a),(b) (emphasis added).) To set forth only some of the information sought by a specific and explicit request, is improper as is providing “defily worded conclusory answers designed to evade a series of explicit questions.” (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783 [149 Cal.Rptr. 499, 509].)

Duty to obtain information

“If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, *but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party.*” (Code Civ. Proc., § 2030.220(c) (emphasis added); *Regency Health Services, Inc. v. Sup.Ct. (Settles)* (1998) 64 Cal.App.4th 1496, 1504 [76 Cal.Rptr.2d 95, 100].)

A party must furnish information available from all sources under the party’s control. “(A party) cannot plead ignorance to information which can be obtained from sources under his control.” (*Deyo v. Kilbourne*, *supra*, 84 Cal.App.3d at 782 [149 Cal.Rptr. at 509] (parentheses added); *Regency Health Services, Inc. v. Sup.Ct. (Settles)* (1998) 64 Cal.App.4th 1496, 1504 [76 Cal.Rptr.2d 95, 100].)

A party is also expected to make a good faith and reasonable inquiry of family members ... at least where they are shown to be *cooperating* with the party in the lawsuit. (*Jones v. Sup.Ct. (Benny)* (1981) 119 Cal.App.3d 534, 552, [174 Cal.Rptr. 148, 159].)

Because of the duty to attempt to obtain information, answers such as “unknown” or “I don’t know” are *not sufficient* answers to matters which are presumably known to the responding party. The responding party must make a reasonable effort to obtain whatever information is sought; and if unable to do so, must *set forth with specificity* why the information is unavailable and *what efforts he or she made to obtain it*. (See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782 [149 Cal.Rptr. 499, 509].)

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When there is no duty to obtain information

However, the duty to make reasonable efforts to obtain requested information *does not apply* to “information equally available to the propounding party.” (Code Civ. Proc., § 2030.220(c).) Thus, there is no duty to:

- Search out matters of *public record*. (See *Bunnell v. Sup.Ct. (California Life Ins. Co.)* (1967) 254 Cal.App.2d 720, 723-724 [62 Cal.Rptr. 458, 461]); or
- Make inquiry from *independent witnesses* (other than agents or employees) in order to answer interrogatories. (*Holguin v. Sup.Ct. (Hoage)* (1972) 22 Cal.App.3d 812, 821 [99 Cal.Rptr. 653, 658].)

Inspection of documents as alternative to answers

A party has the option to answer an interrogatory by allowing inspection and copying of documents containing the responsive information, if answering the interrogatory would necessitate making a *compilation or summary* of the information contained therein. (Code Civ. Proc., § 2030.230.) However, a party’s duty to provide “complete and straightforward” answers still exists even if the information sought is contained in documents in the party’s possession. (Code Civ. Proc., § 2030.220(a).) In order to exercise the option, the responding party must refer to Code Civ. Proc., § 2030.230, and specify the documents from which the answers may be ascertained. (Code Civ. Proc., § 2030.230.) Further, if the responses are not timely, a party *waives* the right to respond in this manner. (Code Civ. Proc., § 2030.290(a).)

Consequences of not providing complete responses

There can be consequences to not providing full and complete answers to interrogatories. Where an interrogatory asks the names of *all* witnesses to a particular event then known to the responding party, a response omitting the name of a known witness could subject the adversary to unfair surprise at trial and therefore may result in an order exclud-

ing that witness’s testimony. (See *R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 356 [44 Cal.Rptr.3d 426, 450].)

The *Rutter Group’s* treatise on *Civil Procedure Before Trial*, Ch. 8F-5, explains: Interrogatory responses lacking in fact, may later serve as a detriment to the responding party if the opposing party moves for summary judgment. The responding party’s devoid answers may be used to satisfy the moving party’s burden on summary judgment to show there is *no evidence* of a triable issue of fact.

(See *Union Bank v. Sup.Ct. (Demetry)* (1995) 31 Cal.App.4th 573, 580-581 [37 Cal.Rptr.2d 653, 657].)

Requests for production:

If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or representation of inability to comply. (Code Civ. Proc., § 2031.240(a).)

When responding to requests for production of documents, the attorney should state all applicable objections, whether he will comply and, if complying, whether in whole or in part.

If complying with the request, the responding party is required to state that he will produce the documents which are in his possession, custody or control (Code Civ. Proc., § 2031.220); must produce the documents as they are kept in the usual course of business; and, must sort and label them to correspond with the categories in the request for production. (Code Civ. Proc., § 2031.280(a).)

If the responding party is not complying with the request, he must state that a diligent search and reasonable inquiry has been made in an effort to locate the items requested, and set forth the reason the party is not able to comply (i.e. the document never existed; or, has been lost or stolen; or, was inadvertently destroyed; or, is not in the possession, custody or control of the responding party. If the latter response is made, it must also state the name and address of any person or entity believed to be in possession of the document (Code Civ. Proc., § 2031.230).)

Further, all responsive non-privileged/private documents should be produced:

[See Super.Ct. Local Rules, rule 7.12(f)(3) – counsel should not strain to interpret document demands restrictively in order to avoid disclosure] Because local rules relating to discovery are preempted by CRC 3.20, a court may not sanction a party for violation of these guidelines. Nonetheless, the prohibited conduct may be sanctionable as discovery abuse (Code Civ. Proc., § 2023.010; see ¶ 8:8). (*The Rutter Group’s Civil Procedure Before Trial*, CH. 8H-6.)

Consequences of not producing complete documents

As with responding to interrogatories, there can be similar consequences to not producing all responsive documents.

Documents concealed during discovery may be excluded at trial even where there was no prior order compelling production. The propounding party would have no reason to seek such an order where discovery responses falsely state such documents do not exist. (*Pate v. Channel Lumber Co., supra*, 51 Cal.App.4th at 1456 [59 Cal.Rptr.2d at 924].)

(*Civil Procedure Before Trial*, CH. 8H-7.)

Therefore, it is essential that the attorney take the time to review all documents in the client’s possession, custody and control, including those documents obtained through the attorney’s own efforts, to ensure production of any document the admission of which would benefit the client at trial.

Request for Admissions:

If only part of a request is objectionable, the remainder must be answered. (Code Civ. Proc., § 2033.230(a).) With respect to RFA’s, the Code of Civil Procedure requires that, absent an objection, either an admission, denial or a statement claiming inability to admit or deny be stated. (Code Civ. Proc., § 2033.220(b).) The answer must be “as complete and straightforward” as the information available reasonably permits ... and shall “(a) admit so much of the matter as is true ... or as reasonably and clearly qualified by

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the responding party.” (Code Civ. Proc., § 2033.220 (b)(1) (emphasis added).)

The Discovery Act thus requires the responding party to undertake a “good faith” obligation to investigate sources reasonably available to him or her in formulating answers to RFAs (similar to the duty owed in responding to interrogatories). (Code Civ. Proc., § 2033.220(c); see *Chodos v. Sup.Cl. (Lowe)* (1963) 215 Cal.App.2d 318, 322 [30 Cal.Rptr 303, 305].) (*Civil Procedure Before Trial*, Ch. 8-5.)

Consequences of failing to admit requests

“Cost of proof sanctions may be awarded after trial against a party for failure to inform himself or herself before answering.” (Code Civ. Proc., § 2033.420(a).) The court may find there was no “good reason” for the failure to admit. (*Smith v. Circle P Ranch Co., Inc.* (1978) 87 Cal.App.3d 267, 276 [150 Cal.Rptr 828, 834].) There, proof that the responding party failed to investi-

gate, when the means of obtaining the information were at hand, supported a finding there were *no* “good reasons” for its denial; hence cost-of-proof sanctions were held proper.

Thus, if there are facts that to which there is no reasonable dispute, they should be admitted, for if proven at trial by the defense, your failure to admit them can cost you or the client money. Further, why give the defense any momentum at trial by allowing it to prove to the jury something you could have or should have admitted?

Conclusion

Although it is not the most rewarding aspect of being a litigator, responding to written discovery requires the attorney to be diligent, thorough and keen to the potential pitfalls of a response deficient in either the proper objections or responsive information. In that the quality of the responses can very well affect the potential for settlement, and the evi-

dence at trial, careful attention should be dedicated to this daunting, but essential part to working up your client’s case.

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