DISCOVERY REFRESHER: EXCHANGING RELEVANT INFORMATION AND AVOIDING GAMESMANSHIP

Discovery disputes are unfortunately common in litigation. The purpose of discovery is to exchange relevant information and admissible evidence to aid in resolution of the issues in the action. Ideally, this is a collaborative effort that is handled between counsel and outside of court. However, counsel and parties often do not allow the discovery process sufficient time and attention, resulting in avoidable disputes and delays in litigation. This article will highlight some common issues found in the construction of discovery requests and responses, and outline the meet and confer process prior to filing a motion to compel further discovery responses.

Discovery Requests:

Prefaces or instructions are not permitted in special interrogatories or requests for admission.[1] The requests should begin immediately below the party names and the discovery set number—without instructions to the responding party, a preliminary statement, or a list of definitions. If the document contains specially defined terms, consider including the definition inside a parenthesis directly in the first interrogatory in which it appears, rather than at the beginning of the document. Specially defined terms must be capitalized wherever they appear in the document.[2] Requests for production of documents and things must specify a reasonable time and place for the inspection or production.[3] A propounding party will sometimes issue discovery requests that do not meet these specifications, providing the responding party with an opportunity to serve evasive or incomplete responses.

In unlimited civil cases, parties are generally limited to propounding 35 special interrogatories and 35 requests for admission. This limitation does not apply to requests for production of documents or things. Requests for admission or special interrogatories in excess of 35 must be accompanied by a declaration for additional discovery.[4] A template declaration for additional discovery can be found at Code of Civil Procedure sections 2030.050 and 2033.050. Before issuing more than 35 interrogatories or requests, consider whether it is necessary. Can the requests be trimmed down in number by wording each request more broadly, so that more information is provided in response to a single request? Can the information sought in the discovery requests be obtained by oral deposition or document requests?

These construction issues may seem relatively minor, but are all easy fixes which will avoid objections, or incomplete responses, simplifying the discovery process. A second pair of eyes should look over the requests before they are served to make sure that all requests are sequentially numbered[5] and comply with all provisions of the Discovery Act.

A discovery request template is not excellent or objection-proof simply because counsel has been using it in their practice for several years. If counsel receives the same objections to

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[1] Code Civ. Proc., §§ 2030.060(d), 2033.060(d)
[2] Code Civ. Proc., §§ 2030.060(e), 2033.060(e)
[3] Code Civ. Proc., § 2031.030(c)(2)(3)
[4] Code Civ. Proc., §§ 2030.030, 2033.030
[5] Code Civ. Proc., §§ 2030.060(a), 2033.060(a)

certain requests over and over, impeding their access to discoverable information, it may be time to critically reevaluate the request template to see if its language can be improved. Crafting stronger templates now will streamline the discovery process for all future cases, and prevent many meet and confer efforts.

Discovery Responses:

"General objections" are never okay. The same goes for "preliminary statements." Indeed, any sort of preface or preamble to discovery responses is ineffective as it is not a "separate" response to "each interrogatory,"[6] nor is a general objection an "objection to the particular interrogatory."[7] If an interrogatory or request is objectionable, the grounds for that objection should be stated in response to the specific request. They most often state that discovery is just beginning or ongoing, that investigation is not complete, facts are still being developed, and the responding party is answering based on what they currently know, and may amend their response at a later date if new information comes to light. If counsel believes it is critical to explicitly reserve the responding party's right to amend the responses at a later date, then a brief statement to the effect of "Discovery is ongoing and responding party reserves the right to supplement and/or amend this response in the event that further information is revealed" provided at the end of each individual response should suffice.

"Boilerplate" objections are disfavored as well. Only objections that are relevant to the specific interrogatory/request should be asserted. For example, it is improper to state an objection of "vague and ambiguous, overbroad, unintelligible, and calls for attorney-client privileged information" in response to a straightforward special interrogatory in a medical malpractice action that reads "State the date that Defendant performed Plaintiff's knee replacement surgery." Not every interrogatory or request will call for privileged information. Very few discovery requests are so vague or ambiguous that they cannot be responded to at least in part, and even fewer are completely unintelligible. "If an interrogatory cannot be answered completely, it shall be answered to the extent possible."[8] "If only a part of an interrogatory is objectionable, the remainder of the interrogatory shall be answered."[9]

Properly responding to requests for production of documents is a bit more involved. In addition to stating any pertinent objections, the responding party must specify whether they will or will not comply with the request (in whole or in part), and state that all of the documents that are in the "possession, custody, or control" of the responding party and to which no objections are being made will be produced.[10] If documents are withheld pursuant to an objection, the response must "identify with particularity" any such document, and "set forth the extent of and ground for the objection."[11] Note that the responding party must identify withheld documents even if the propounding party did not expressly request a privilege log. Although a party may refuse to produce documents based on an objection, the documents must be identified if requested in an

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[6] Code Civ. Proc., § 2030.210(a)
[7] Code Civ. Proc., § 2030.210(a)(3)
[8] Code Civ. Proc., §§ 2030.220(b)
[9] Code Civ. Proc., §§ 2030.240(a)
[10] Code Civ. Proc., §§ 2031.210(a), 2031.220
[11] Code Civ. Proc., §§ 2031.240(b)(1-2)

interrogatory.[12] A responding party cannot merely state that they do not have documents. Instead, the responding party must affirm that a diligent search and reasonable inquiry has been made to comply with the request, and state whether the documents (1) never existed, (2) were destroyed, (3) have been lost, misplaced, or stolen, or (4) have never been, or no longer are, in the possession, custody, or control of the responding party. The responding party must also name any individual or organization known or believed to have a copy of the documents.[13] Finally, a recent amendment to the Discovery Act requires that all documents which are produced be labeled to identify the requests to which they correspond.[14]

Meet and Confer Process

Despite well-crafted request templates and good-faith objections and responses, legitimate discovery disputes may still arise. Before filing a motion to compel further responses, counsel must meet and confer regarding the dispute[15] (except in cases of no response whatsoever,[16] or of unverified responses[17]). However, it is not enough to simply demand further responses from the responding party. A single brief letter that doesn't explain why the discovery is proper does not constitute a reasonable and good faith attempt at informal resolution.[18] Instead, the letter should address each specific response that is at issue, lay out the supporting legal authority, and clarify the information sought by the propounding party. If the letter articulates exactly how the responding party's answer can be improved, the propounding party is more likely to receive the information they seek. The meet and confer letter should indicate that if amended responses are not provided, the moving party will seek sanctions. It is also important to provide counsel a deadline to respond to the letter, as there is limited time to file a motion to compel further responses.

When amending incomplete discovery responses as part of the meet and confer process, it is best to clearly label them as "amended." This distinguishes them from "supplemental" responses, which provide later acquired information at the request of the propounding party.[19]

Motion to Compel Further Responses

If the meet and confer process does not result in a full resolution of the dispute, then a propounding party's final recourse is to file a motion to compel further responses. The notice of motion should specify the code sections authorizing a motion to compel and sanctions for each discovery tool. Many judges consider an "et seq." reference in the notice to be inadequate and will decline to award sanctions if not clearly indicated. If the moving party's meet and confer letter was well-structured and thorough, drafting the motion to compel should be straightforward. A meet

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[12] *Best Products, Inc. v. Superior Court* (2004) Cal.App.4th 1181, 1190
[13] Code Civ. Proc., § 2031.230
[14] Code Civ. Proc., § 2031.280(a)
[15] Code Civ. Proc., §§ 2016.040 generally, 2030.300 (special interrogatories), 2033.290 (requests for admission), 2031.310 (requests for production of documents or things)
[16] Code Civ. Proc., §§ 2030.290(b) (interrogatories), 2031.300(b) (requests for production of documents or things), 2033.280(b) (requests for admission)
[17] *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636
[18] *Obregon v. Superior Court* (1998) 67 Cal.App.4th 427.
[19] Code Civ. Proc., § 2030.070

and confer declaration "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion" is required.[20] It is not unusual for the responding party to provide full and complete responses after the filing of the motion but before the hearing date. However, if the hearing proceeds, the moving party should be prepared with the underlying discovery requests and responses, and to meet and confer once again to reach a resolution during the hearing.

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[20] Code Civ. Proc., § 2016.040

Quiz Questions:

1. Discovery disputes are common in litigation.

2. Prefaces and instructions are permitted in special interrogatories.

3. It is best to include the definition of a specially defined term in a parenthesis directly in the first interrogatory in which the term appears.

4. Specially defined terms must be capitalized wherever they appear in the set of interrogatories.

5. Requests for production of documents and things must specify a time and place for the production or inspection.

6. Parties are limited to propounding 35 special interrogatories in unlimited civil cases.

7. Parties are limited to propounding 35 requests for production of documents in unlimited civil cases.

8. There is no limitation on the number of requests for admission that a party may propound in unlimited civil cases.

9. Special interrogatories in excess of 35 may be propounded in unlimited civil cases if accompanied by a declaration for additional discovery.

10. General objections are improper because they do not object to a particular interrogatory.

11. Only objections that are relevant to the specific interrogatory or request should be asserted.

12. If an interrogatory cannot be answered completely, then the responding party does not need to answer it at all.

13. If part of an interrogatory is objectionable, then the responding party does not need to answer the interrogatory at all.

14. A party responding to requests for production of documents or things must state whether they will comply with the request in whole or in part.

15. A responding party who withholds documents from production on the basis of a privilege objection does not need to provide the propounding party with a privilege log.

16. A party may refuse to produce documents on the basis of an objection, but must still identify those documents if asked in an interrogatory.

17. If a responding party does not have any documents responsive to a particular request for production or inspection, then it is sufficient for their answer to simply state that they have no such documents.

18. All documents produced in response to a request for production of documents must be labeled to identify the requests to which they correspond.

19. Parties must meet and confer with one another before filing a motion to compel further discovery responses.

20. Parties must meet and confer with one another before filing a motion to compel discovery responses, even if the propounding party did not receive any responses whatsoever.

21. Parties must meet and confer with one another before filing a motion to compel further discovery responses, even if the responding party didn't provide signed verifications.

22. A single brief meet and confer letter that doesn't explain why the discovery is proper does not constitute a reasonable and good faith attempt at informal resolution of the discovery dispute.

23. When amending incomplete discovery responses, it is best to label them as "amended," which distinguishes them from "supplemental" responses which provide later acquired information prior to trial.

24. A request for sanctions should be clearly indicated in the notice for a motion to compel discovery responses.

25. A motion to compel further discovery responses does not need to show an attempt at informal resolution for each and every separate discovery issue presented in the motion.