Garbage Objections = Motion to Compel Further Responses and Further Production of Documents

Have you noticed that you are getting too many objections and very little documents to your document requests? Have you also noticed that despite months of meet and confers you still don't have a determination whether or not documents exist; and if they do exist, why they aren't being produced? Is this scenario more the norm then the exception?

A high percentage of cases turn on the existence or nonexistence of documents. So, it is important to recognize when the opposing party will not produce the documents you are entitled to. So, when you receive the following response to every one of your Requests for Production of documents, let your client know that expenses will be rising, and start preparing your motion to compel further response and further production as you are in for a fight:

> *Responding party hereby incorporates its general objections as if fully stated herein. Responding party objects to this request to the extent it seeks information protected from disclosure by the attorney-client privilege and/or work product doctrine, or any other applicable privilege. Responding party objects as it invades their and third parties' right of privacy. Responding party objects that the request fails to specifically describe each individual item sought or reasonably particularize each category of item sought. Responding party objects that it is unduly burdensome and overbroad. Responding party objects to this request as it does not seek relevant documents or documents reasonably calculated to the discovery of admissible evidence. Responding party objects that plaintiff has equal access to these documents. Responding party objects that the request seeks documents already in plaintiff's possession custody or control. Responding party objects to this request as it seeks documents that are not within defendants' possession, custody, or control.*

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In reviewing this response, a party should recognize that not only is this response full of garbage objections, but opposing counsel is doing everything they can so as to avoid providing you with the documents, a privilege log, or a code compliant response, which you are entitled to. Not only does such a response fail to meet the obligations set forth in Code of Civil Procedure and current case law; it is also a violation of Rule 5-220 of the Code of Professional Conduct titled Suppression of Evidence which states:

> *"A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or to produce."*

Though it sounds aggressive and potentially expensive to your client to start preparing your motion, remember that it is going to take, at a minimum, an additional seven weeks to get the documents you are requesting from the time you file your motion (a minimum of 16 court days + 6 weekend days) and then to get the documents you are requesting (courts usually grants two - four weeks for compliance). Preparing the motion will likely be time consuming in order to address factually and legally each of these garbage objections to your requests. Furthermore, there may be a need for a protective order to be negotiated and/or implemented by the court. There also may be documents that will require an in-camera review by the court or a court-appointed discovery referee. Unfortunately, there may be additional motions to get a code compliant response and all the documents produced that you are entitled to.

Meanwhile, you likely are facing discovery cutoffs and a trial date and you can't conduct meaningful discovery and prepare for trial. Keeping all of this in mind, you should draft your meet and confer letter as Exhibit A to your motion and use the following cases in your meet and confer, and ultimately in your motion, to compel further responses and further production of documents.

GOOD FAITH DUTY TO RESPOND

The code requires that a party must make a reasonable and good faith effort to obtain the information. Regency Health Services, Inc. v. Superior Court (1998) 64 CA4th 1496. "A party cannot plead ignorance to information which can be obtained from sources under his control." This includes a party's lawer, agents or employees, family members and experts. See *Deyo v. Superior Court (*1978) 84 CA3d 771, 782. This includes a party's lawyer; *Smith v. Sup. Ct*. (1961) 189 CA 2d 6; agents or employees; *Gordon v. Sup. Ct*. (1984) 161 CA 3d 151, 167-168; family members; *Jones v. Superior Court* (1981) 119 CA 3d 534, 552 and experts; *Sigerseth v. Superior Court* (1972) 23 CA 3d 427,433. See Weil and Brown, *Cal Prac. Guide: Civil Procedure Before Trial* (TRG 2019) §8:1051-1060 This means that counsel can't just pawn off the responses to their client or spend an hour and dictate off the top of your head and then answer with garbage objections. See *Sinaiko-Healthcare-Consulting-v.--Pacific-Healthcare (2007)* 148 Cal. App. 4th 390

Boilerplate general objections are sanctionable in California per *Korea Data Systems Co. Ltd. v. Superior Court* (1997) 51 Cal.App.4th 1513 and may result in waivers of privilege in the 9th Circuit per *Burlington Northern & Santa Fe Ry Co. v. U.S. Dist. Court* 408 F.3d 1142, 2005 WL 1175 922 (9th Cir.2005) [trial court affirmed in holding boilerplate objection without identification of documents is not the proper assertion of a privilege.]

Furthermore, it is highly unlikely that every category of the document request would have documents that fall within all of these objections. When you get a response like the one above, you should question whether the responding party did a "*diligent search*" and made a *"reasonable inquiry*" as required by the code. See C.C.P. §§ 3032.210-240.

The responding attorney must also be careful not to assert objections to requests for production of documents for documents that do not exist or are not in the attorney or party's possession, custody or control. Such a response violates an attorney's ethical duty under Bus & Prof Code §6068(d) to act truthfully and, therefore, constitutes bad faith. See *Bihun v. AT&T Info. Sys.* (1993) 13 CA4th 976, 991.

The point of *Bihun* is that by asserting a privilege to a document, the attorney impliedly represents that the responding attorney has reviewed the document and contends that the privilege applies; if the document does not exist or is not in the possession of the attorney, those implied representations are made in bad faith.

SPECIFIC OBJECTIONS:

* **Preliminary Statement and/or General Objections**—The Discovery Act does not authorize a preamble such as a preliminary statement or general objections for any discovery device. Even though several of the requests for documents may be objectionable on the same ground they may not be objected to as a group. See Hogan and Weber, *California Civil Discovery* (Lexis Nexis 2017) §5.18. Instead, a party must object "*to **the particular demand** for inspection, copying, testing, or sampling*" and See C.C.P. §2031.210(a)(3) and "***each** statement of compliance, **each** representation, and **each** objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand*." See C.C.P. §2031.210(a)(3) and (c).

* **Attorney-Client Privilege and Work Product**—Communications between client and counsel are usually privileged against discovery. See *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) §8:146 et seq. Attorney work product is subject to only qualified protection from discovery and a court may order disclosure under certain circumstances. See *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) §8:213 et seq. However, before asserting the privileges or stating the documents don't exist, counsel needs to review the documents ("*diligent search*") and speak to their client ("*reasonable inquiry*") to determine whether or not the privileges are applicable. See *Scottsdale Ins. Co v. Superior Cour*t (1997) 59 CA4th 263 Footnote 5.

*** Responding Party objects that this Request is compound.** Unlike C.C.P. §§2030.060(f) regarding special interrogatories which states **"***No specially prepared interrogatory shall contain subparts, or a compound, conjunctive, or disjunctive question;*" there is no similar statutory limitation regarding requests for production of documents. Thus, a request for production of document may be compound.

* **Not Reasonably Particularized**— C.C.P. §2031.030(c) states:

Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

***(1)** Designate the documents, tangible things, land or other property, or electronically stored information to be inspected, copied, tested, or sampled either by specifically describing each individual item or by reasonably particularizing each category of item.*

The case on point is *Calcor Space Facility, Inc. v. Superior Court (1997) 53 CA4th 216* which stated that "'*reasonably' in the statute implies a requirement such categories be reasonably particularized from the standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made."* When faced with this objection, the meet and confer process should be utilized to provide responding party with an understanding of what documents the demand is seeking and, if necessary, narrow the scope of the specific category.

* **Overbroad and Burdensome**—The showing required to sustain this objection is that the intent of the party was to create an unreasonable burden, or that burden created does not weigh equally with what requesting party is trying to obtain from it. See *Mead Reinsurance Co. v. Superior Court* (1986) CA3d 313. In the *Mead* case, the objecting party showed that it would require the review of over 13,000 claims files requiring five claims adjusters working full time for six weeks. It is questionable if a party can meet this burden in this electronic age. With most documents and information being stored in electronic form, responding parties can easily use search terms and software programs to locate the documents being requested. Thus, it will be difficult for this objection to be sustained.

* **Responding party objects as it invades their and third parties' right of privacy—**The right of privacy is protected by *Article I, Section 1 of the California Constitution* and the *U.S. Constitution* [*Griswold v. State of Connecticut* (1965) 381 US 479] However, the protection is not absolute. In each case, the court would carefully balance the interests involved—the claim of privacy vs. the public interest in obtaining just results in litigation. See *California Civil Discovery Practice*, 4th Edition, (CEB 2019) §3.157A citing Williamson v. Superior Court (1978) 21 Cal3d 829, 835; *Hill v. National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 15; and Binder v. Superior Court (1987) 196 CA3d 893, 901 for the test that the court will use. Also, the court most likely will take the documents in camera for a determination. See *California Practice Guide: Civil Procedure Before Trial* (TRG 2019) §8:322 citing *Schnabel v. Superior Court (Schnabel)* (1993) 5 C4th 704, 714.

* **Relevancy**—C.C.P. §2017.010 states that

"*Any party may obtain discovery regarding any matter, not privilege, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."*

"This means that the scope of discovery extends to any information that reasonably might lead to other evidence that would be admissible at trial. Thus, the scope of permissible discovery is one of reason, logic, and common sense." *California Discovery Citations* (TRG 2019) §2:1 citing *Seahaus La Jolla Owners Association v. Superior Court* (2014) 224 CA4th 754.

Relevancy may vary with size and complexity of the case and must be considered with regard to the burden and value of the information sought (among other factors). See *Bridgestone/Firestone, Inc. v. Sup Ct. (Rios*) (1992) 7 CA4th 1384, 1391. **Hint:** fishing trips are permissible. *Greyhound Corp v Superior Court* (1961) 56 C2d 355, 376] Just be prepared to state what you are fishing for.

* **Equal Access**--Unless the request is asking the responding part to obtain a public document or a statement from a third party, the objection on the grounds of "*Equal Access*" is improper. See *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) 8:1062-64 citing *Bunnel v. Superior Co*urt (1967) 254 CA2d 720, 723-724 and *Holguin v. Superior Court* (1972) 22 CA3d 812, 821.

*** Seeks documents already in Plaintiff's possession, custody or control**—The request is for responsive documents in responding party's possession, custody or control. Responding party is not relieved of their obligations because they believe propounding party has the documents. C.C.P.§§ 2031.210, 2031.220, 2031.230 and 2031.240. The exception is if the responsive documents have previously been produced in discovery by the responding party. At that point, responding party should identify the location (i.e., bates stamp number) of their previously produced responsive documents in their response.

* **Seeks documents that are not within Defendants' possession, custody, or control**— This one-line response fails to comply with C.C.P. §2031.230 which states:

> *'A representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.'*

REMEMBER THE PRIVILEGE LOG--The responding party must also list each of the documents being withheld or any portion of a document that has been redacted on the claim of privilege in a privilege log pursuant to C.C.P. §2031.240.