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INSPECTION DEMANDS—WHAT IS A “DILIGENT SEARCH”?
By Katherine Gallo

Have you ever received a response to requests for production of documents that says:

After a diligent search and a reasonable inquiry has been made in an effort to comply with this Request, there are no documents within RESPONDING PARTY’s possession, custody, or control

Yet you question the veracity of the verified response, because they have got to have documents. So what can you do? This is a two-prong inquiry. The first being

What is a “Diligent Search”?

The requirement of a “*diligent search*” in responses to requests for inspection and production of documents is one of the most fought over provisions of the Discovery Act. Part of the problem is that the Code of Civil Procedure isn’t really helpful in its definition as the only time the language comes up is in C.C.P. §2031.230 which states in part:

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 . . .

Also the typical treatises, Weil and Brown, Cal Prac. Guide: Civil Procedure Before Trial (TRG 2011) and California Civil Discovery Practice (CEB 4th Ed. 2011) don’t go into detail as to what the obligation really is. So, here is what I expect a party to do in responding to a request for production of documents.

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Good Faith Obligation

A party must make a good faith effort in obtaining documents responsive to the request. *Regency Health Services, Inc. v. Superior Court* (1998) 64 CA4th 1496 To me, this means that the obligation is well beyond an attorney dictating a response off the top of his head and looking through his file. See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 CA4th 390. The Code recognizes that the response and production are labor intensive. That is why you have 30 days.

“Possession, Custody or Control”

The case law is very clear when it comes to responses to interrogatories, requests for admissions and document requests – “A party cannot plead ignorance to information which can be obtained from sources under his control.” *Deyo v. Kilbourne* (1978) 84 CA 3d 771

It goes without saying that a party must produce documents in his or her possession and custody. However, even if a party that does not possess an item covered by an inspection demand the party may nonetheless control it. California and Federal courts have found that a party has control over the following individuals and entities for purposes of producing documents:

A Party’s Lawyer *Smith v. Superior Court* (1961) 189 CA2d 6

Family Members *Jones v. Superior Court* (1981) 119 CA 3d 534, 552

Experts *Sigerseth v. Superior Court* (1972) 23 CA 3d 427, 433

Insurers *Clark v. Superior Court* (1960) 177 Cal. App 2d 577

Agents or Employees *Gordon v. Superior Court* (1984) 161 CA 3d 151

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Officers, Shareholders and Managers *General Environmental Science Corp v. Horsfall* (1991, ND Ohio) 136 FRD 130, 133-134

Affiliated Corporations *Standard Ins., Co. v. Pittsburgh Electric Insulation, Inc.* (1961, WD Pa) 29 FRD 185; *Gerling Intern. Insur. Co. v. C.I.R.* (1988, CA3) 839 F2d 121, 140,141.

Tax Records *Reeves v. Pennsylvania Railroad Co.* (1948, D Del) 80 F Supp 107, 109.

I also expect the diligent search to include any third party institution where you can sign an authorization and obtain the records such as health care providers, financial institutions etc.

The statute and the case law make it very clear that a party and the attorney must be proactive in obtaining the information and documents in response to a request. Take the time and do the response and production correctly, because this is the discovery device where issue, evidence and terminating sanctions are mostly granted.

For more detailed discussion on what defines “*control*” by a party over non-parties see Hogan and Weber California Civil Discovery Second Edition at §6.5.

NEXT: INSPECTION DEMANDS—What is a Reasonable Inquiry?

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