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When Discovery Abuse is a Trial Strategy

By Katherine Gallo

During one of my discovery seminars, I was asked how do you handle discovery abuse when it is part of a deep pocket defendant's litigation strategy. His story went like this:



Plaintiff's counsel had been to court several times on motions to compel documents and motions to compel further documents from an international corporation. The court's most recent order was that the documents were to be served two weeks before the corporation's person most knowledgeable depositions were to take place in London. Instead, defendant produced 30,000 documents on a CD less than 24 hours before the London depositions were to begin. Plaintiff counsel went forward with the depositions as trial was in a month and his client could not afford for the lawyer to go to London another time. Plaintiff counsel expressed his frustrations that even though the court gave him \$6000 in sanctions he was severely handicapped in his preparation for the depositions and it impacted on what evidence he could obtain before trial.

Even though this is an extreme example, it is not unusual. The real question is what could he have done and what should you do if you find yourself in this situation.

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- First:** Make a cursory review of all the documents and determine whether they are produced pursuant to the document request or as they are kept in the normal course of business. C.C.P. §2031.280 Then determine if the document production is in compliance with the response. If anything is deficient then you need to prepare for a meet and confer session.
- Second:** Conduct the meet and confer session *on the record prior* to the deposition going forward. The transcript will memorialize the meet and confer to satisfy the statutory requirements as well as show opposing counsel's abuse of the discovery process. Be aware you are doing this for the court so detail is important. Discuss the following:
- A. Timeline from the request for production to the final receipt of the documents.
 - B. The numerous meet and confer attempts and their responses.
 - C. The court's orders and how many times they have been in violation of not just the current order, but also other discovery orders.
 - D. The flaws in the production (i.e., not responsive to the request, not categorized/or produced as kept in the normal course of business, no proper response document, garbage objections and insufficient privilege log). Also, determine whether or not the opposing party made a diligent search and a reasonable inquiry. See my discovery blogs "*The Document from Hell—aka The 'Privilege Log,'*" "*What is a Diligent Search*" and "*What is a Reasonable Inquiry.*"

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E. Whether or not opposing counsel will produce the deponent again once you have reviewed all the documents. If he is willing to produce the deponent again determine where the deposition will take place (London or California) and who is going to incur the travel expenses.

Third: If you can't get a hold of the court or your discovery referee for a ruling, then go forward with the deposition. Make sure you state at the beginning of the deposition that you are not prepared to fully take the deposition due to the tardiness of the production of the documents and will not be able to conclude the deposition at that time. Also, do this again at the end so your opponent will not be able to state that you concluded the deposition.

Finally: Go to court immediately and advise the court of the discovery abuse and how it has impacted your ability to prepare for trial. You can ask the court for a variety of remedies such as:

A. Motion to Compel the Continued Deposition of the deponent. Request that the opposing party incur all travel costs and expenditures in traveling to California for the deposition or request that opposing party pay for all your travel costs and any other expenditures in having to take the deposition a second time. In the alternative you can ask that the deponent be produced for deposition three (3) court days prior to their testimony at trial and the opposing party pay for the expedited transcript.



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- B. Motion to Compel Further Responses and Production of Documents if you have any issues with the document response, production or privilege log.
- C. Motion to Continue Trial and Reopen Discovery for the limited purpose of any discovery you need due to the tardiness of the production of documents including producing the deponent for a continued deposition.
- D. Motion for Issue and Evidence Sanctions which could include (1) excluding all testimony of the witnesses deposed in London; (2) excluding all documents produced in the late production; (3) excluding all witnesses who would testify on behalf of the opposing party regarding the issues that the deponent testified on; (4) opposing party being barred from entering evidence at trial on certain issues and/or affirmative defenses.
- E. Motion for Monetary Sanctions, which includes all your travel expenses to London as well as the cost of the motion. Also, ask the court to award sanctions pursuant to C.C.P. §177.5—up to \$1500 in sanctions payable to the court for violations of court orders.
- F. Ask the court to impose deadlines for discovery responses with a return date to the court to show compliance.
- G. Request the court appoint a C.C.P. §639(a)(5) to oversee the deposition and the compliance with the document requests.



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- H. If you don't have time to bring a motion or you are unsuccessful in the Law and Motion department, then turn the above motions into motions in limine for the trial department.

HINT: When you go to court bring a court reporter and be prepared to make a record for the Court of Appeal as you do have an appealable issue.

You may find this blog and additional blogs on California Discovery by Katherine Gallo at www.resolvingdiscoverydisputes.com

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