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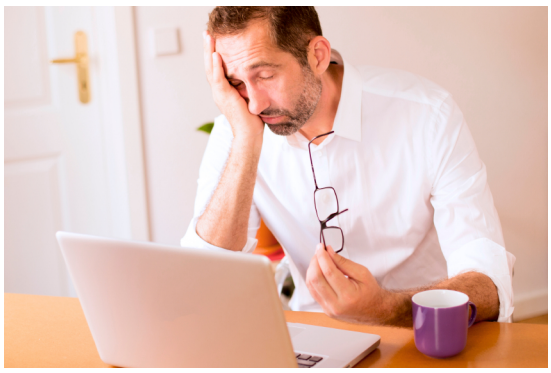

The Pitfalls of Bad Discovery Habits

By Katherine Gallo

For years I have been blogging about bad discovery habits from my blog on Garbage Objections to my blog on unauthorized General Objections, and preached that attorneys must play by the rules. As you know if you have read my blogs, I am quite the supporter of the 1986 Discovery Act, and often express my opinions on a party's responsibility during the discovery process. More importantly, I attempt to educate lawyers about the Discovery Act so they can be well prepared with their arguments when the court makes a wrong turn (yes, it does happen).

The case of *Biles v. Exxon Mobil Corp*. (2004) 124 CA4th 1315 is an example of the court's misunderstanding of the Discovery Act and reacting erroneously to a garbage discovery response. The facts are as follows:

> Defendant Exxon served a special interrogatory asking plaintiff to identify "*each person who has knowledge specifically of the work at [the Humble refinery] that you contend created your exposure to asbestos fibers.*"
>
> Plaintiff responded: " *After a reasonable and good faith inquiry, plaintiff currently has no further information responsive to this Interrogatory. Plaintiff expressly reserves the right to amend or supplement this Response based on the outcome of such investigation. Plaintiff's investigation and discovery are continuing*."

Five months later, Exxon filed a motion for summary judgment. Plaintiff's opposition to the summary judgment included a declaration from a witness, which should have arguably defeated Exxon's motion. Exxon objected to the declaration of the witness on the ground that the witness had not been identified in plaintiff's interrogatories responses. The court sustained the objection and granted motion for summary judgment to Exxon. The court rationalized its decision to strike the declaration stating:

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> **"*Look, when you answer an interrogatory and you don't give any names at all but say you are going to supplement it, the obligation is on you to supplement it as soon as you find out.*"**

The First District Court of Appeal reversed the trial court on three grounds: (1) there was no evidence that plaintiff's initial response **was willfully false at the time it was served**, (2) there is **no obligation to supplement without a court order** [or having been served with a supplemental interrogatory pursuant to C.C.P. §2030.070] and (3) the appropriate sanction if there was any discovery abuse, absent unusual circumstances or a violation of court order, was monetary sanctions, not evidence sanctions.

It took a year for the Court of Appeal to right this wrong and probably thousands of dollars in attorney time that the attorney probably wrote off. All because of the unnecessary language, "*Plaintiff expressly reserves the right to amend or supplement this Response based on the outcome of such investigation*," included in the discovery response, and due to plaintiff's encounter with a judge who didn't know the finer points of the Discovery Act (or ignored them).

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