Using the teeth of the statute to get the most out of RFPs

How the crafty defense lawyer hides things by avoiding the details in Requests for Production of Documents

By Patrick Nolan

I was a high school teacher in East LA for 13 years before I became an attorney, and many of the lessons I learned as a teacher about human nature have served me well as an attorney. For one thing, interacting with a jury is much like interacting with a class of students. I taught at a continuation school in Boyle Heights, so my job was to take ideas that could be slightly confusing and make them as simple as possible for a group of people who often were not that bright, and actually did not want to be there in the first place.

Another lesson I have learned applies more to conducting discovery with opposing counsel rather than examining jurors. I have learned that defense attorneys will produce only as much as you insist upon from them. They are under no obligation to give you more than you insist upon. In fact, it is in their interest to do the opposite. And like many disinterested students in my classroom, they will give you the bare minimum … if you let them get away with it.

Years ago when I was learning effective discovery techniques from my then-bosses, now-partners, Mark and Ernie Algorri, they taught me a very basic rule in reviewing defense responses to Request for Production of Documents: "All the tools you need were given to you by the Legislature," the brothers Algorri told me. They explained how defense attorneys will telegraph their intent to withhold documents by purposely failing to include in their responses the magic language required by section 2031.220 et seq., of the Code of Civil Procedure, which deals with responses to Requests for Production of Documents ("RFPs".)

Certainly, defense attorneys have other less ethical ways to keep the dogged plaintiff's attorney off the scent of damaging material. Unscrupulous defense attorneys may even be willing to put their careers at risk by doing something as outrageous as shredding damaging documents. But most defense attorneys who value their license over one lawsuit will provide meaningful responses and produce the responsive documents *if* their feet are held to the fire.

And that fire in RFP responses is the language required by the Code.

RFP responses that do not employ the required language are the legal equivalent to a defense attorney keeping his fingers crossed behind his back while he provides you the responses. Ask the following questions, and you can effectively use the tools the Legislature provided when drafting and enacting the Code.

Are they complying in full or in part?

Look first to the words required by section 2031.220. If the words required by this section are not in the defendant's responses, you immediately know whether defense is giving you everything you requested or not. Why? Because *it literally requires them to tell you if they are giving you everything you requested or not.* Section 2031.220 states that the responding party must tell you whether your inspection "will be allowed in whole or in part." It requires them to tell you "that all the documents that are in

the possession, custody, or control of that party and to which no objection is being made will be included in the production." If you do not get those magic words – that '*all* the documents in their custody or control are included' – you know they are holding out on something.

However, the crafty defense lawyer will instead attempt to distract you from what you seek by instead saying something deceptively satiating like: "Responding party complies with this request by producing Exhibits A, B and C." But do you see what they just did there? They did not say they were complying *in full*. And they did not say they were producing *all* the documents in their custody and control.

If you are tearing through the defendant's discovery responses to see if they gave you what you asked for, it is easy to be fooled by the illusionist's misdirection. You immediately start flipping to the exhibits to see what presents are under the tree. But without the language required by the Code, the gifts are usually socks and underwear rather than those shiny incriminating incident reports and witness statements you had been hoping for.

Obviously, you now have to write a meet-and-confer letter to the defense in order to get the required language. Writing a letter demanding that defense put specific words in their responses can make you seem a little bit like Rain Man demanding his favorite K-Mart clothes. But keep in mind, 90 percent of the time that they fail to use the language, they know what they are doing and have done it intentionally. Nonetheless, just like when I was cajoling gangsters to participate in a classroom exercise, honey tends to elicit more cooperation than vinegar. Sure I had their probation officers' phone numbers on speed dial, in the same way that we can all get tough and file motions to compel. But of course that brings everything to a screeching halt until the authorities arrive.

So I try to keep my meet-and-confer letters civil and good-natured. Keep in mind, everything you write could end up being read by the judge on your case. So write with your judge in mind as much as opposing counsel. In my meet-and-confer letters, I blame my need for Code-compliant language not on any distrust in their responses (heaven forbid!), but instead on my own (feigned) obsessive/ compulsive disorder driven by my Rain Man-esque compulsion with the Code of Civil Procedure. Or like Tom Cruise's character asking Jack Nicholson for a copy of Santiago's transfer order in *A Few Good Men*, I ask defense to "just throw in that required language for the file" and we can move on to bigger issues. Funny how I usually receive further responses with the magic language … and more exhibits attached.

Statement of inability to comply … is not enough

On the other hand, if the defense attorney chooses not to give you anything, she will say something like "Responding party is unable to comply with this request because no responsive documents are in their custody or control." Again, this language sounds like the official end of the road in obtaining the documents you want. It even sounds like they are complying with the Code; but they are not.

The Legislature anticipated this ruse as well. So when the responding party has nothing to produce, section 2031.230 requires them to tell you *why*. Per the Code, when they cannot provide you any responsive documents, they must state:

> [W]hether the inability to comply is because the particular item 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. (§ 2031.230.)

This information can be very illuminating. If you are litigating, for example, a routine slip-and-fall case in a supermarket, and defense is claiming they do not have the surveillance video of your client falling on their premises, this is where they will have to admit that they destroyed the video, or that it is recorded over every 48 hours, or whatever other permutation of spoliation of evidence they have employed. Armed with that information, you get to use CACI 204, the jury instruction that expressly allows jurors to infer that the evidence they destroyed would have been unfavorable for the defendant.

Judges occasionally fail to understand the import of this required language as well. In one case in which my elderly client had fallen due to a recently mopped floor in a fast food restaurant, defense counsel had responded to my request for surveillance video by stating that it was "unable to produce the requested documents because no such documents exist." The elderly client had undergone two back surgeries as a result of the fall. The surveillance video would have been particularly damning to the defense because it would have not only shown the absence of any warnings of the wet floor, but it would have also shown the employee literally asking my client to sign a release while he was still on the ground grimacing in pain.

The judge at the hearing on my motion to compel further responses said in frustration, "Mr. Nolan, I can't shake them by the ankles and force them to produce something that doesn't exist!" But by drawing the court's attention to the language of the Code, he quickly understood that I could not use CACI 204 at trial if I were not given the language the Legislature required.

Statement that the documents are not in their custody or control

The Code requires the responding party to produce everything "in their custody and control." Defense attorneys love to determine they do not have what we are demanding and leave it at that. But again, that is not enough. Section 2031.230 also requires that when the responding party has no documents to produce, they must identify who *may* be in possession of the

requested documents. Per the Code, a representation of an inability to comply is not enough: "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." (§ 2031.230.)

So, to use the example of the missing surveillance video of your client's fall, requiring the defendant to identify anyone who *would* have that video prevents them from hiding the fact that the footage is actually in the possession of a separate company who handles their security and surveillance.

Or, as in the case of a recent forklift product case I handled where negligent maintenance of the lift led to a paralyzed plaintiff, training videos for the servicing of the forklift were actually in the possession of the manufacturer via an on-line training portal maintained by the manufacturer, rather than any classes conducted by the service company. The company authorized to service the forklift became "authorized" only if its technicians completed the manufacturer's on-line training program. In this case, the service technician had not completed the on-line training program. But the defendant's discovery responses simply stated that all training documents in defendant's custody and control had already been produced. If that response had been accepted, the defendant would have never been forced to admit that other documents existed, they just happened to be in someone else's control.

Not only did this result in the ultimate production of the evidence from the other defendant, but it also established that its technician was lacking training. It also demonstrated a closer business relationship between the two separate corporations. None of that would have been uncovered had the defendant not been held to the required language of the Code.

While all of this may seem like a tremendous battle for the evidence, the initial stages really are not. A form letter that includes the paragraphs demanding the Code-compliant language should be saved on your desktop, and copy-and-pasted into a meet-and-confer letter in a matter of seconds.

Privilege logs required

Defense will also assert a cavalcade of objections in the response, keeping it vague as to which documents they are not producing based on those legal objections. You can't blame them. What poker player would want to identify the cards in their hands that they are *not* showing you? It kind of undermines the purpose of keeping your cards close to your vest, right? And yet the Code requires them to do just that!

If a responding party refuses to produce something based upon an objection, they have to actually tell you *with specificity* which items they are not producing. (§ 2031.240(b).) Yes, the Code requires them in essence to admit, "I'm holding Queens and Aces." More often than not, however, they have no legal basis for withholding the documents. And requiring them to explain the basis for withholding the documents will often result either in the eventual production of those documents, or great fodder for a motion to compel.

Enforcing the requirement for Code-compliant language

On occasion, defense will call your bluff and refuse to provide the Code-compliant language. At that point, one has to conduct a cost/benefit analysis to determine if a motion to compel is worthwhile. And remember, your time is ticking to file a Motion to Compel the Production of Documents.

Or is it?

Here's a tip: If you are up against the 45-day deadline to employ law and motion in response to defendant's RFP production, this may be one of the rare times when the congestion in superior courts can work to your advantage. Remember, the 45-day deadline is not the deadline for filing the Motion; it is the deadline for filing the *Notice* of the Motion. You are not required to file and serve the actual motion itself until 16 days prior to the hearing of the motion.

More often than not, the soonest date available on the court's calendar for the actual hearing of your motion will be months in the future. So file and serve your Notice of Motion before the 45-day deadline. That fires the shot over defendant's bow, and shows you mean business. But you then can spend more time crafting your most effective motion, filing and serving it later, but no less than 16 days before the hearing of the matter. In the meantime, you and opposing counsel can continue to meet and confer over the disputed responses while the loaded gun of the motion hearing looms in the defendant's future.

A note of caution: make sure your Notice of Motion sets forth the grounds for compelling further responses and production, which you will expand upon and support with evidence with the actual motion. But once again, the Code provides you with all you need. Section 2031.310 states that in a Notice for further responses, grounds for a motion exist if the demanding party deems that any of the following apply:

- A statement of compliance with the demand is incomplete.
- A representation of inability to comply is inadequate, incomplete, or evasive.
- An objection in the response is without merit or too general.

Include one or more of those grounds in your Notice, along with the good cause basis for the production of documents you seek, and you have preserved the statute on your motion and hearing date.

Whether you are following the Code by getting that Notice of Motion out before the deadline, or you are forcing defense to comply with the Code to get the information to which you are entitled, the language provided by the Legislature can

be a priceless tool in obtaining crucial documents. Like so many of the students in my classroom in the Pico-Aliso projects in East LA, defense attorneys can be forced to rise to the level of clear expectations you set for them.

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