

AUGUST 2021

Production line

Strategic uses for requests for production



Cooper

By Miles B. Cooper

The lawyer opened the file sent over by the defense. The lawyer had sent a request with 50 categories. The defendant's responsive documents? Nine pages, none responsive. Time to take a different approach.

The basics

Requests for production are one of the three written discovery tools. Unlike interrogatories and requests for admission, production requests are not bound by the Rule of 35. A party does not need a declaration to demonstrate why the case needs more than 35 different document categories. Write the requests in language that can be easily pasted from the production request to the deposition notice for persons most knowledgeable (PMK) depositions. That's as simple as titling each one as "Request 1," or "Category 1," instead of "Request for production 1." While it may seem redundant to ask for these again with a deposition notice, the latter allows one to question the witness about the search process used to locate the documents. That's important because — surprise, surprise — one generally finds the search efforts were meager. Inevitably, a PMK deposition is followed by a meet and confer demanding the defendant look in the places the witness described, and more documents then appear.

Responding to the defense categorically

The defense typically wants medical records, bills, property and bodily injury damage photos, repair bills, witness statements, and the like. If they're on their game, this laundry list arrives with the Answer. Responding involves some strategy. Lawyers sometimes get swept up in finding ways documents can be withheld. Consider being over-inclusive. If a document helps the defense understand and value the claim, give it to the defense even if it was not requested. We want the defense to understand why they should pay our client.

Those responsive documents now need to be categorized. The code changed as of January 1, 2020, to require "[a]ny documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond." (C.C.P. § 2031.280, subd. (a).) This means one now needs to respond to a category by stating "Documents PLTF00023-PLTF00047 are responsive to this request." Don't bemoan our fate. The defense tend to bear a much bigger burden with categoric identification.

Beep, beep, beep

Plaintiff's requests should be a wish list of everything the experts and lawyers can think of that they might want. That varies greatly depending on the case type. Ask for the full insurance policy language in every case. We learned this the hard way when we found out there was a depleting limits policy in what should have been a garden-variety insurance policy. This demand also discloses consent requirements and potentially problematic indemnifications.

Detailed demands run a few potential risks; for example, the dump truck effect. I remember one construction site case years ago where I was invited into a room with 60 bankers boxes. These were the documents related to the large construction project. They had already been Bates-stamped for a construction defect case. My job? I just needed to tab any of the documents I wanted for our case, that's all. Not a quick process. These days, one would invoke the categoric identification requirement in C.C.P. § 2031.280(a) and let the defense sort it out.

Yes, we have no documents, we have no documents today!

Another detailed demand risk is stonewalling. When stonewalled, consider the ultimate goal. That is not becoming a motion to compel specialist. There are indeed times to compel. Consider whether there may be another path to the same material, however. Sunshine Act requests and publicly available documents are great workarounds. Also, evaluate the strategy. Hunting for the hidden smoking gun that probably exists? By all means, move to compel. With many defendants, particularly in products cases, moving to compel is the only way materials get produced. On the other hand, proving absence can sometimes be just as effective as existence. A motion to compel is probably unnecessary for a "Safety First!" defendant who fails to produce any safety documents. No documents, no safety. Tie this up at the person most knowledgeable deposition to prevent "Oops, we just found this super helpful box of documents" days before trial. While judges should not allow this late-produced evidence in, slimy defendants and their counsel seem to get a pass in those situations.

Outro

Back to our lawyer and the deficient document production. The lawyer cut-and-pasted the document categories into a Custodian of Records deposition notice and sent it out with a cover letter. In the letter, the lawyer noted the responses were deficient and they'd now need to discuss the efforts, or lack thereof, put into searching for responsive material. There's more than one way to skin a cat, and more than one way to get a document.

Miles B. Cooper is a partner at Emison Cooper & Cooper LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*

Copyright © 2021 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**