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## **Give Me All Your Documents**

**By Katherine Gallo**

I recently reviewed a case management order in a complex construction case venued in Southern California. The order required all parties to produce:

*Any and all relevant non-privileged and non-protected documents (consistent with California Evidence Code Section 250), including but not limited to job files, building contracts, agreements, notes, correspondence, photographs, videotapes, diagrams, plans, specifications, shop drawings, “as-built” plans, calculations, journals, invoices, purchase orders, change orders, addenda reports (including reports prepared by consultants and design professionals for the original construction), job diaries, receipts, project files, site records, daily job logs, field orders, superintendent reports, requests for clarification, requests for information, time cards, governmental inspection punch lists and sign off sheets and invoices relating to the construction, repair, or maintenance of the real property involved in this lawsuit.*

There are so many things wrong with this request I do not know where to begin.

**FIRST: This request fails miserably to comply with the Code of Civil Procedure.**

What the above request is really stating asking for “Any and all . . . documents . . . relating to the construction, repair, or maintenance of the real property involved in this lawsuit.” In other words everything including the kitchen sink. No pun intended. Even though the demand describes what could be inclusive of that demand. It still is not “**specifically describing each individual item**” or by “**reasonably particularizing each category of item**” as required by C.C.P. §2030.010.

Even though discovery requests are liberally interpreted, that does not mean that the court will enforce such “blanket” or “omnibus” inspection demands. In *Flora Crane Service Inc. v. Superior Court* (1965) 234 Cal 2d 767, 786-787, the Supreme Court stated that the identification of the documents to be produced is inadequate

“when the books and documents sought to be produced are designated by or included within a so-called omnibus description. The unlimited characteristics of such a description may impair or destroy exactitude so that the custodian of the records is not reasonably apprised of what he must produce. In fact a Federal court interpreted these kinds of requests as “not merely a ‘fishing expedition, but, as one court described it, an effort to ‘drain the pond and

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collect the fish from the bottom,” *Amcast Industrial Corp. v. Detrex Corp.* (1991, ND Ind) 138 F.D. 115, 121 quoting *In re IAB Peripheral EDP Devices Anti-Trust Litigation* (1977, ND CAL0 77 F.D. 39, 41-42. SEE Hogan and Weber *California Civil Discovery* (2nd Ed.) §6.4

In *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 CA4th 216 at 222 the Fourth District Court of Appeal defined “**reasonable particularity**” to mean that degree of specification that they are “**reasonably particularized from the standpoint of the party on whom the demand is made.**”

**SECOND Lumping all the categories in one request**

There is no rhyme or reason to lump “*job files, building contracts, . . .*” into one document demand as there is no statutory limit on the number of times a party can make an inspection demand on another party or the number of requests within each demand. See C.C.P. §2031.010. This is different from the other written discovery methods (only 35 interrogatories or 35 requests for admissions without a declaration of need for additional discovery.) So why do it?

**THIRD “Relevant non-privileged and non-protected documents”**

Inserting this language into the request only hurts you. §2031.240(b) states:

(b) If the responding party objects to the demand for inspection, copying, testing, or sampling of an item or category of item, the response shall do both of the following:

(1) Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted.

Having the language “relevant non-privileged and non-protected documents” implies that you don’t have to comply with this code section.



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#### **FOURTH    You are not going to get issue and evidence sanctions**

In imposing issue and evidence sanctions, the court must tailor the sanction to fit the conduct. *McArthur v. Bockman* (1989) 208 Cal. App. 3d 1076, 1080-1081. The aggrieved party cannot receive more by way of a sanction than it would have received if it had received the discovery. *Rail Services of America v. State Comp. Insurance Fund* (2003) 110 Cal App. 4th 323, 332. So, if you don't draft your categories in a manner that they are "***reasonably particularized from the standpoint of the party on whom the demand is made***", how is the judge who is not as familiar with the case going to be able to tailor the sanction?

#### **HINTS:**

Counsel should take care in identifying the materials to be produced. A description that is too broad may be the basis for granting a protective order. If the request appears to be boilerplate language (i.e., not crafted to the specific witness and materials to be produced), the court will be much more inclined to restrict the production request or quash it all together. *California Civil Discovery Practice* (CEB 4th Ed. 2011) §8:48.

Although it is important to be inclusive, demands that try to do too much often draw objections. Consider avoiding demand for all documents that "relate" to a subject or demands that are so wordy that they must be carefully parsed. *California Civil Discovery Practice* (CEB 4th Ed. 2011) PRACTICE TIP at 8:48.

Draft your requests from the standpoint of the responding party. Many clients are not sophisticated enough to understand what exact documents you are seeking. Don't assume that the partner on the file is going to be doing the grunt work on the production as that is usually delegated to the newbie associate. Unfortunately, the newbie associate is probably not going to know where to look for the documents, who to ask, and/or the organizational scheme of his client's business. Having "***reasonably particularized***" categories will allow the opposing side to collect and produce the documents you seek.

Finally, having your requests "***reasonably particularized***" will help the court pull the trigger on issue and evidence sanctions as the judge need only incorporate the request into the "tailored" order.

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