



Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

I DECLARE, IT IS NECESSARY

By Katherine Gallo

As every lawyer is aware, a party may propound more than 35 specially prepared interrogatories or requests for admissions simply by attaching a *Declaration of Necessity* pursuant to C.C.P. §2030.040 and C.C.P. §2033.040 stating the reasons why they need more. See C.C.P. §§2030.050 and 2033.050 for example declarations. However, when you receive more than 35 specially prepared interrogatories or requests for admissions, before responding you should ask yourself the question **"IS IT REALLY NECESSARY?"**

Weil and Brown, Cal. Prac. Guide: Civil Procedure Before Trial (TRG 2010), ¶8:953 advise in their practice pointer: "Don't let the fact that you may be 'vouching' personally for the excess interrogatories defer you from full discovery. It is highly unlikely a court will impose sanctions against you for asking whatever number of questions is realistically required." They also give another helpful hint by stating "even if a protective order is sought, you still have an escape-hatch to avoid sanctions . . . you can use the meet and confer process to scale back the number of interrogatories and minimize the risk of sanctions" Weil and Brown's practice pointer is not in the spirit of the Discovery Act. The purpose of discovery is to take the "game" element out of trial preparation by enabling the parties to obtain evidence necessary to evaluate and resolve their dispute before a trial is necessary [Weil and Brown, Cal Prac. Guide: Civil Procedure Before Trial (TRG 2010) ¶ 8:1, citing *Greyhound Corp v. Superior Court* (1961) 56 C2d 355; **not to club them into submission.**

So with the above being said, here are some scenarios and some helpful hints for the party on the receiving end of the *"Declaration of Necessity."*

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com



Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

At the beginning of a case, opposing counsel serves, form interrogatories with all the appropriate boxes including 17.1 checked, 35 special interrogatories, 35 requests for admissions and 25 requests for production of documents.

Though the above discovery is permitted by code, the total number of interrogatories (remember the subparts in the form interrogatories) and requests are going to be in the hundreds. In responding to this discovery, you are going to spend tens of hours and cost your client thousands of dollars and this is just the initial volley of discovery.

Do not ignore the abusive tactic from opposing counsel. It is important that you set the tone of the case immediately. Send a meet and confer letter to opposing counsel asking him to withdraw the 35 special interrogatories and/or requests for admissions. Advise counsel that:

1. The total of form interrogatories (add subparts including the 17.1 series for each request for admission) the special interrogatories, requests for admissions and the requests for documents are in the hundreds and it will take you tens of hours to respond;
2. Specially prepared interrogatories and requests for admissions are more appropriate for later stages of discovery;
3. Deposition of your client is a more efficient use of time and money at this stage of the litigation;
4. The specially prepared interrogatories and requests for admissions coupled with the other discovery requests are harassing and are intended to waste time and money;
5. the facts and issues in the case are not complex; and
6. If the requests for admissions and specially prepared interrogatories are not withdrawn, you will file a protective order or you will file a protective order when any additional specially prepared interrogatories or requests for admissions are served (if the facts and issues are not complex).

Be prepared to file the protective order asking the court for limiting the discovery and/or more time to respond. It is important that you let the court know that opposing counsel is using discovery as a weapon. If you anticipate future discovery problems with opposing counsel, you may want to request that the court appoint a discovery referee.

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com



Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

After settlement discussions have failed, you are soon served with a slew of discovery including a second set of specially prepared interrogatories and a second set of requests for admissions; both exceed the 35 total limits allowed by the Code of Civil Procedure and both with a "Declaration of Necessity." It is your strong belief that the purpose of the newly propounded discovery is to force you back to the negotiating table.

This is a common tactic and possibly a justifiable one if trial is approaching. However, instead of responding, take a closer look if the propounding party can justify the "*Declaration of Necessity*." Is the case complex? Would a deposition or subpoena of a third party be more time efficient or cost effective? And, why should your client pay the additional litigation cost because the opposition failed to take into account the limitations in C.C.P. §§ 2030.030(a)(1) and 2033.030(a)(1) in developing their discovery plan?

Send a meet and confer letter to opposing counsel objecting to all specially prepared interrogatories and requests for admissions that exceed 35 because:

1. The facts and issues of the case are not complex;
2. All the other discovery that already has been done;
3. Other discovery devices (i.e., depositions, third party subpoenas, expert witnesses' depositions) would be more efficient and/or cost effective; and/or
4. The Code of Civil Procedure limits discovery to 35 specially prepared interrogatories and requests for admissions and the fact that opposing counsel has used them all is not your problem. The opposing party needs to take responsibility for their discovery plan.

If you go to court on a motion for protective order, be careful in accusing the opposition of abusing discovery because you wouldn't settle. The accusation may hurt you more than help you. Let the court come to that conclusion on its own.



Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

Two years into a complex case you are served with Specially Prepared Interrogatories Set #5-- Interrogatories 152-185, Requests for Admissions Set #3--Requests #57-91, Form Interrogatories Set #4 with 17.1 checked and Requests for Production of Documents, Set #5-- Requests 180-222.

This is a frequent problem in complex cases that last years. The propounding party has either forgotten what they have already served or new attorneys are working on the file and haven't taken the time to review previous discovery that was propounded. Nonetheless, the only way to handle this is for you to research what discovery you have responded to and how the present propounded discovery is duplicative. Once you have that information, send a meet and confer letter stating:

1. Which interrogatory, request for admission and/or request for documents are duplicative or a subset of which interrogatory, request for admission and/or request for documents that have already been propounded;
2. Suggest what other discovery devices would be more efficient or cost effective (i.e., depositions, expert testimony, site inspections, subpoenas of third party records . . .); and/or
3. Advise the propounding party that if they are not withdrawn you will seek a protective order and/or request a discovery referee to oversee the remaining discovery in the matter in order to get it to trial.

Even though you can object stating that the discovery is duplicative, this is the type of case that you want to be proactive and go to court so you won't spiral into ***Discovery Hell***.

REMEMBER: If a party does not withdraw their excessive specially prepared interrogatories or requests for admissions, you must file a protective order as an objection is not sufficient if a declaration of necessity is attached. See C.C.P. §§ 2030.040(b) and 2033.040(b).

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com