Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

Michael J. Kent
KENT | PINCIN

Emily R. Pincin
KENT | PINCIN

Deposing the verifier of an entity-defendant's discovery responses

CORPORATE DEFENDANTS HAVE A STRAINED UNDERSTANDING OF THEIR DUTY WHEN IT COMES TO VERIFYING DISCOVERY. HERE'S WHY YOU SHOULD TAKE THE VERIFIER'S DEPOSITION

We've all seen it before: a discovery verification signed by an entity's officer or authorized agent, stating words to the effect of, "I am an officer of, managing agent of, or am otherwise authorized to make this verification on behalf of _____. I am informed and believe that the matters stated herein in these Responses are true and correct, and do declare as such under penalty of perjury."

An entity defendant, by and through its employees and agents, has a duty to obtain responsive information when responding to discovery, and plaintiffs' attorneys can and should be taking the deposition of the individual verifying the entity defendant's discovery responses. Doing so can help you establish defendant's lack of a rigorous investigation or failure to take sufficient steps to obtain responsive information. This practice is important both (1) for overcoming summary judgment (by creating a question of fact, if the defendant attempts to manufacture additional facts down the line), and (2) for use at trial (to create an issue of credibility and to ultimately argue attorney- driven defenses).

While this practice and strategy may certainly translate for use in personal-injury cases as well, for the purposes of this article, we will focus on its use in employment cases.

An entity defendant's discovery obligations

Based on the number and frequency of discovery disputes that have occurred over this practice, it has become clear that the defense bar has a strained understanding of its clients' responsibilities with regard to obtaining responsive information for discovery responses. It is important to have a grasp of a responding party's obligations under the code and corresponding case law.

Of course, unless only objections are served, a party must verify its responses to written discovery. A party can verify discovery responses with a declaration or affidavit. The responding party's verified signature on a response to discovery is a declaration that it has disclosed all the information available to it. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782.) Moreover, the responding party must review its responses before verifying the discovery to ensure that the answers are true. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1087.) If a party fails to verify its responses under oath as required, it is tantamount to receiving no response to discovery at all. (*Garber & Assocs. Eskandarian* (2007) 150 Cal.App.4th 813, 817.)

It is common sense when discovery is propounded on an entity defendant, particularly when it is a large business or government agency like a city, that no single person is likely to have personal knowledge of everything the entity collectively knows. Rather than have the entity respond with a chaotic dump of verifications from each and every individual who knows one piece of relevant information or another, the entity is permitted to authorize an agent or officer to verify the responses on its behalf. (Code Civ. Proc., §§ 2030.250, subd. (b), 2033.260, subd. (b).)

However, a corporate verification based on information and belief, while common practice, is not technically permitted by the Code of Civil Procedure, despite the inherent impossibility of finding an agent who has personal knowledge of *all* discoverable information. Nevertheless, it is clear that nothing in the Discovery Act authorizes verification of discovery on "information and belief."

In responding to written discovery, a corporation, public agency, or other entity is required to disclose information known to all persons under its employ or scope of agency – not just the particular officer or agent who is designated to verify the responses on its behalf. "While a corporation or public agency may select the person who answers interrogatories on its behalf, it has a corresponding duty to obtain information from *all sources under its control* – information which may not be personally known to the answering agent." (*Gordon v. Sup. Ct.* (1984) 161 Cal.App.3d 157, 167-68 (emphasis added).)

You may get pushback from the defense attorney when you notice the deposition of the verifier. "He/she only verified the responses – they have no personal knowledge of the information contained therein!" This necessarily poses the question: Why is that particular person verifying the responses at all then? This question aside, you should be prepared to explain the defendant's obligation to obtain responsive information and the relevance of verifier's deposition.

There are several reasons the verification is important. First, the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

defendant entity becomes bound by its verified responses. (*Gordon, supra,* 161 Cal.App.3d at 165-68 [explaining that a party will be held at trial to the responses made freely to a proper discovery request].)

Second, the verifier is able to testify about the sources and/or bases for his or her responses. Similarly, when an attorney verifies discovery responses on behalf of its entity client, such act constitutes a limited waiver of the attorney-client and work product privileges with respect to the identity of the sources of the information contained in the responses. (*Melendrez v. Sup. Ct.* (2013) 215 Cal.App.4th 1343, 1347.)

Using the entity's authorized agent to establish a question of material fact

When litigating an employment case, you may be faced with the hurdle of overcoming the defendant's motion for summary judgment. In discrimination and retaliation cases under the Fair Employment and Housing Act, it will be your burden to show that a triable issue of material fact exists as to any of the defendant's proffered legitimate non-discriminatory/non-retaliatory reasons for the adverse action(s) taken against your client.

One way to demonstrate pretext is to show shifting or changing reasons for the adverse actions taken against the plaintiff. Pretext may be inferred where the defendant employer has given shifting, contradictory, implausible, uninformed, or baseless justifications for its actions. (*Kwan v. Andalex Group LLC* (2013) 737 F.3d 834, 846-47; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 367.)

A good practice in these cases is to send written discovery early during the litigation. Hopefully, through a rigorous vetting process, you have already learned what defendant's purported reasons are for the adverse actions taken against plaintiff. Seek evidence regarding the employer's contentions and ask defendant to state all facts to support its stated reason for the adverse action taken against the plaintiff. Some examples are as follows:

- "State all facts to support your contention that Plaintiff was terminated due to performance concerns;"
- "State all facts to support your contention that accommodating Plaintiff between January 2023 and the present would have created an undue hardship for you;"

These interrogatories should be followed up with requests that defendant identify all witnesses and documents to support each contention. Alternatively, you could send requests for admission (e.g., "Admit that accommodating Plaintiff between January 2023 and the present would not have created an undue hardship on you") with a corresponding 217.1 Form Employment Interrogatory.

Once you receive verified responses regarding defendant's contentions and *all* supporting evidence for each contention, you may notice the deposition of the verifier of the discovery to further explore defendant's stated reasons for the adverse actions.

Lock the verifier into (1) what they were told by relevant decision makers; (2) what they were *not* told during their investigation to respond to the discovery; and (3) whether they saw any documents to support the statements made in the discovery responses. Be sure to lock the verifier into confirming that they did not find or identify *any other* documents other than what were already identified in the discovery responses.

Thereafter, if or when you then depose the actual fact witnesses identified in the discovery responses, you can cross-examine them about whether they spoke to the verifier before discovery responses were provided and, if so, what was discussed. If the fact witness testifies about alternative reasons for the adverse action taken against plaintiff, or provides additional facts that were not previously identified in defendant's contention responses, you can use the verifier's testimony and the written discovery responses to cross the fact witness.

Take for example the following scenario: An employee is terminated for performance concerns, and such is stated in the defendant's written discovery responses; however, plaintiff contends she was terminated for reporting sexual harassment. You can – and should – lock the verifier into confirming that she spoke to witnesses and performed a diligent search for the documents and information sought. If no corroborating documents were produced, box the verifier into agreeing that she saw no negative performance evaluations of plaintiff, no write-ups, no written discipline, etc., and that if she had seen those documents, she would have identified them in discovery. Thereafter, if plaintiff's supervisor tries to testify that he wrote plaintiff up multiple times during her employment, you can cross him on this testimony (e.g., "You spoke with [the verifier], correct? And you never told her that you wrote plaintiff up multiple times, did you? And you didn't provide [the verifier] with any documents evidencing those write ups, right?").

As another example: Consider an employer refusing to reasonably accommodate an employee because doing so would allegedly create an undue hardship on the employer. Written discovery regarding the hardship (and all facts, witnesses, and documents which support the contention) should be done immediately. In the likely scenario that the defendant does not produce or identify *any* documents to support an undue hardship defense, you can and should lock the verifier into that fact at deposition, and also have them confirm that *no one* told them that the accommodation would have been financially difficult, disruptive, or would otherwise fundamentally alter the nature or operation of the business.

Later, if the defendant tries to manufacture documents or other evidence to support this defense, you will likely be able to succeed in raising a triable issue of material fact regarding the legitimacy of this reason. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715 ["[E]vidence that the employer's claimed reason […] is *false* – such as that it conflicts with other evidence, or appears to be contrived after the fact – will tend to suggest that the employer seeks to conceal

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

the real reason for its actions, and this in turn may support an inference that the real reason was unlawful."].)

Not only is this practice particularly important for creating a triable issue of material fact, it is also useful for trial down the line, where you will then be able to argue that (1) defendant's stated reasons cannot be trusted and (2) any affirmative defense is entirely attorney driven. If presented properly, jurors will be able to see right through the employer's lack of evidence or, alternately, will be able to smell right through a fishy, manufactured defense which was not created until after the adverse actions taken against the plaintiff.

Initially, when you first notice the deposition of the verifier (assuming he or she is not a percipient witness for some other reason in the case), defense counsel will undoubtedly pound their fists and try to get you to the pull the deposition on the ground that the verifier "does not have personal knowledge" of the allegations in the case, and that he or she was utilized only to verify the discovery. Again, do not give in to this – remember, the entity had a duty to obtain information from all sources under its control. A verifier who has absolutely no knowledge of the veracity of the statements made in discovery responses has no business signing the declaration.

Sample questions for the verifier's deposition

While the discovery verifier does not necessarily maintain the status of a "person most qualified," practically speaking, he or she does wear a similar hat. In signing, under oath, that the facts presented in discovery responses are true and correct, the verifier is swearing that the defendant has disclosed all information available to it. Further, the verifier is confirming that he or she reviewed the responses before verifying to ensure that the answers are true. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1087.) The verifier, in effect, has the ability to bind the entity defendant to the discovery responses.

You will want to lay the foundation for the verifier's understanding of his or her duty as an authorized agent, inquire about what exactly was done prior to verifying the responses, and then lock the verifier in to those responses. You may consider setting up your line of questioning as follows:

Q: Mr. _____/Ms._____, is it correct that you were designated by Defendant to verify its responses to Plaintiff's [specific written discovery requests]?

A: Yes.

Q: In carrying out your duties to respond to the written discovery, did you have the understanding that you were required to collect all responsive information from all sources under Defendant's control? [NOTE: even if the verifier did not have this understanding, it is unlikely that he or she will deny this.]

A: Yes.

Q: Did you understand that collecting information from all sources under Defendant's control included gathering and reviewing documents?

A: Yes.

Q: Did you understand that collecting information from all sources under Defendant's control included speaking to all witnesses who information responsive to Plaintiff's discovery requests?

A: Yes.

Q: Did you understand that you had a duty to review the responses before signing the verification to ensure the answers were true and correct based upon the information you gathered while speaking to witnesses and reviewing and collecting documents?

A: Yes.

Q: Did you understand that you had a duty to review the responses to ensure that Defendant disclosed all responsive information presently available to Defendant?

A: Yes.

Q: In responding to this discovery, did you in fact gather all the information under Defendant's control to respond to the discovery?

A: Yes.

Q: Did you gather all the documents responsive to the discovery?

A: Yes.

Q: Did you review the documents responsive to the discovery?

A: Yes.

Q: Did you speak to witnesses? (NOTE: at some point, you will need to nail down which witnesses told the verifier which facts. Additionally, if you are aware of additional witnesses not identified in discovery as having knowledge of a particular fact, you may want to inquire into *why* the verifier did not believe it was important to speak with the additional witnesses.)

A: Yes.

Q: Did you review the responses to make sure they were complete?

A: Yes.

Q: Did you review the responses to make sure they provided all the information which you acquired during your review?

A: Yes.

Q: Did you review the responses to make sure they were true?

A: Yes.

Once you have this basic foundation laid that the verifier did in fact review documents, speak to witnesses, and confirm that the responses are true and correct based on the universe of things he or she learned, you can jump into the meat of the deposition.

Michael J. Kent and Emily R. Pincin are co-founders of the Redondo Beach-based law firm, Kent | Pincin. *They litigate personal-injury cases and employment cases throughout the state of California.*