Throw Away Those Erroneous Verification Forms

By Howard A. Kapp

It is traditional in California civil practice for attorneys to use a form verification recital using these words, more or less:

> I have read the foregoing [set of discovery responses] and know its contents. [¶] I am a [party] to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

The original source of this form is unknown; however, it has been identified as a "Wolcott's" form. No law or statute exists which requires this language to be used when verifying responses to discovery.

This form should be abandoned or, at the very least, the language should be updated to ensure that you do not put your client in an uncomfortable position. The problem is that the language promises too much and essentially guarantees that, from time to time, honest litigants will be labeled as "liars" due to no real fault of their own.

The reality, of course, is that a plaintiff who verifies discovery responses, is subject to direct impeachment and/or ridicule on the substance of the responses[1] even though, in many cases, the plaintiff is not the source – or even *a* source – of the information in the discovery response. Indeed, in many cases, the plaintiff has no personal knowledge, or relevant memory, of the questioned information. And yet, due to language used in the form verification, the plaintiff is subject to personal attack because of information which he or she did not supply.

A. The Proper Form of Verification

A verification form which modifies the language – just a bit – would protect your client a lot more. Language such as:

> I am the [plaintiff] in the above-captioned matter. I am familiar with the contents of the foregoing [set of discovery responses]. The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and/or compiled from available documents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters which were provided by my attorneys or other agents or compiled from available documents, including all contentions and opinions, and, as to those matters, I am informed and believe that they are true.

This form has many advantages, including the fact that the modified language tracks the legal requirements for a verification and *tells the literal truth.*

The Forms, Compared

Traditional Form	Proposed Form
I have read the foregoing [set of discovery responses] and know its contents. [¶] I am a [party] to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.	I am the [plaintiff] in the above-captioned matter. I am familiar with the contents of the foregoing [set of discovery responses]. The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters which were provided by my attorneys or other agents, and, as to those matters, I am informed and believe that they are true.

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B. The Law on Verifications

Unlike the recitals in the traditional form verification, the law does not restrict answers to interrogatories to the litigant's "personal knowledge." In fact, the law expressly requires information which is necessarily beyond the litigant's knowledge:

> If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party. (Code Civ. Proc. § 2031(f)(1).)

The case law is the same. For example, in *Southern Pacific Co. vs Superior Court* (1969) 3 Cal.App.3d 195, 199 [83 Cal.Rptr. 231], it was held that "[t]he facts sought, those presently relied upon by plaintiffs to prove their case, are discoverable no matter how they came into the attorney's possession."

Moreover, many interrogatories, by their very nature do not ask for the litigant's knowledge, but rather the knowledge of the litigant's attorney. The textbook example of that is contention interrogatories.[2] (Code Civ. Proc. § 2030 (c)(6).)[3]

There is likewise no law requiring the litigant to verify that he or she has "read" the discovery responses, "know its contents" or even have any "information and belief" as to the contents.[4] "This is what lawyers are for." (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1260.) In fact, in many forms of civil litigation, the plaintiff may have no knowledge, or basis for any knowledge, in the complex subject matter of the litigation or the discovery. Moreover, if the plaintiff did not have such knowledge at the beginning of the litigation, later-acquired knowledge is usually the direct and sole result of explanatory – and privileged – conversations with their counsel.

Code of Civil Procedure § 2031(g), requires, in relevant part, that the "[t]he party to whom the interrogatories are directed shall sign the response under oath unless the response contains only objections." There is no statutory requirement that the litigant has "personal knowledge" of anything or have any specific level of involvement – including reading – in the preparation of the discovery responses. The verification of discovery responses is understood to be largely a formality, *albeit* a significant one. The fundamental purpose of such verification, obviously, is to insure that the answers are, at least, *authorized* by the party and that, as to that information which is presumably known to the party, subject to impeachment. It is also understood that personal knowledge of the details of a case may be beyond the memory, ability, experience or interest of many, if not the vast majority of, litigants. People hire lawyers to handle their cases. A litigant does not have to acquire, or have, the knowledge of a brain surgeon, or become an expert in brain surgery, to sue one.

There is no statute or rule that a litigant must have personal knowledge – i.e., that knowledge which is subject to impeachment – even of the details of their own case. In most cases, we would not assume that the plaintiff remembers the dates of each doctor visit, the precise things done on each doctor's visit, or the first and last names of every nurse, doctor or therapist seen as a result of the accident. Yet, of course, this information may be disclosed in response to discovery requests.

Of course, some information disclosed in verified discovery responses (e.g., date of birth) should be indisputably within the knowledge of the litigant; some information (e.g., the identities of long-ago treating doctors) may fall into a gray area.

Indeed, this distinction has been recognized rather powerfully in a series of summary judgment cases that refuse to treat a "factually devoid" answer to a *deposition question* the same as a "factually devoid" answer to interrogatory. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th

573 [37 Cal.Rptr.2d 653]. See *Villa v. McFerren* (1995) 35 Cal.App.4th 733 [41 Cal.Rptr.2d 719]; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591 [50 Cal.Rptr.2d 431]; *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168 [48 Cal.Rptr.2d 197]. See also, generally, Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Summary Judgment", ¶ 10:245.30, et seq.) Depositions are the established vehicle for discovering a litigant's personal knowledge, not verified answers to paper discovery. (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255 [27 Cal.Rptr.2d 822].)[5]

C. The Advantages of the Proposed Verification Form

Neither form, of course, has been "approved" by anybody. Nor is there any agency designated to "approve" recitals in verifications. The suggested language in the form does not purport to promise what the plaintiff cannot and is not, by law, required to deliver. Likewise, this form does not presuppose that any lawyer actually includes specific references to "information and belief" in answers to interrogatories.

On the positive side, the proposed form not only explicitly follows the precise duties required by law, but then sets forth, on the face of the response, what those duties are, i.e., "and/or has been supplied by my attorneys or other agents and is therefore provided as required by law." The proposed language neither under-, nor over-states, the legal and practical standard.

The proposed language in the form has several advantages. First, the plaintiff is notified immediately – and in the very writing he or she is signing – that the verification includes non-personal knowledge material. The expressed language assures the most careful and even untrusting client that it is proper to sign the verification. Secondly, the language provides a truthful and immediate escape hatch for the most cynical use of non-personal knowledge discovery responses to impeach the plaintiff at trial or in deposition.[6] Finally, by tracking to the bare legal requirements – and acknowledging the attorney's all-important (and sometimes imperfect) role in this process – it provides the basis for lay litigants and jurors to understand that the blame for erroneous discovery answers is frequently the fault of the attorney or staff and that the credibility of the plaintiff is not necessarily, or even generally, involved in erroneous discovery responses. ■

[1] The parallel is technically true of verifying defendants, but, for a lot of reasons, the plaintiff is usually the one subject to legitimate attack on erroneous – false – answers, which most jurors assume is nothing less than deliberate perjury.

[2] "As one commentator put it, legal contention questions require the party interrogated to make a 'law-to-fact application that is beyond the competence of most lay persons.'" (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1262 [27 Cal.Rptr.2d 822].)

[3] "An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation of trial."

[4] It is, of course, unethical to use pre-signed verification forms. (*Dorciak v. State Bar* (1991) 52 Cal.3d 1085 [278 Cal.Rptr.2d 86] [attorney presented pre-signed verifications for "missing" client, who, unknown to the attorney, had died in the interim; Bar discipline imposed].)

[5] This is, of course, one reason why deponents must be warned about claiming personal knowledge when they don't have any and to candidly relate the true extent of their memory.

[6] On the few occasions when, at trial, opponents have insisted on trying to impeach plaintiff with answers out of the witness-litigant's personal knowledge, I have successfully insisted that the plaintiff be permitted to read the entire verification form to the jury, so that it can know what the plaintiff actually signed. On several of those occasions, the opposing lawyer recognized that the benign and truthful verification was so effective in defusing a possible line of attack that it was abandoned.

It also provides a ready-made reminder to the plaintiff, while on the stand, of what he or she signed a long time ago and how it verified matter that was not within his or her personal knowledge and gives the litigant the opportunity to credibly, and truthfully, testify that erroneous matter was included due to the fault of another (including, possibly, counsel).