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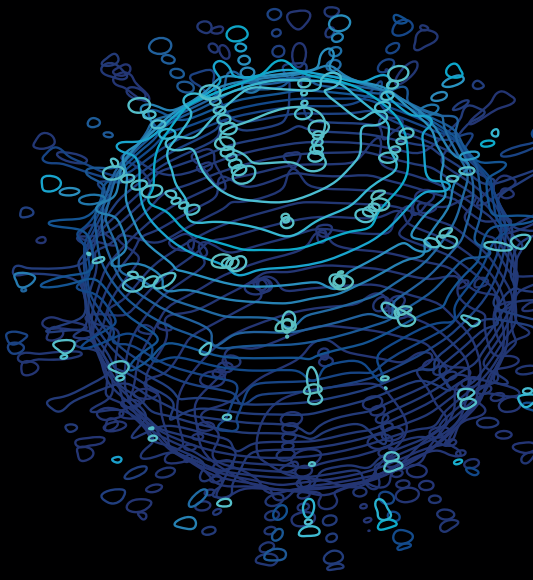

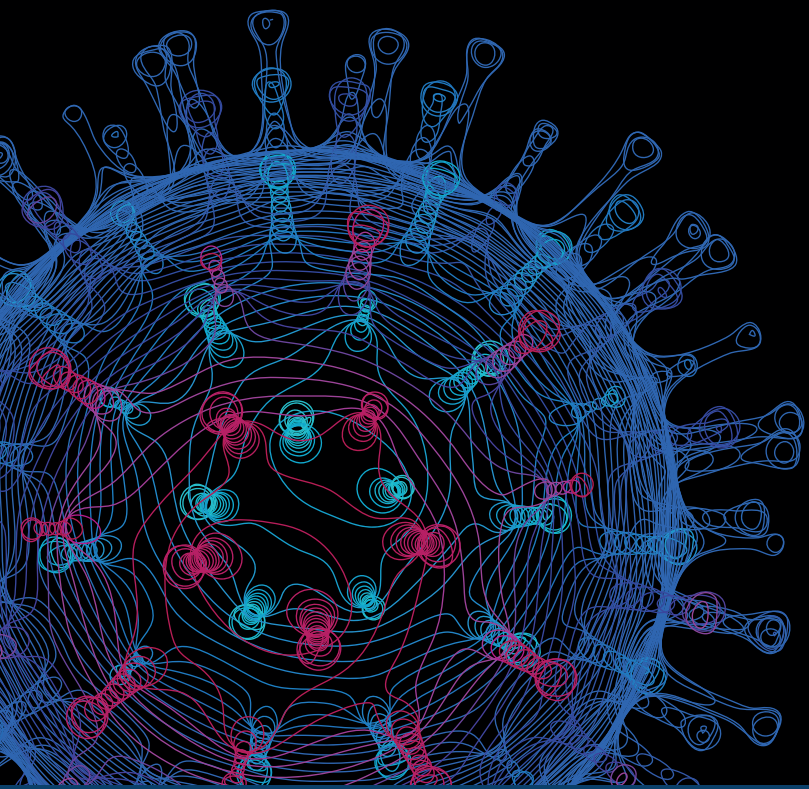

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How to Strike the Answer of a Non-Participating Defendant

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A "non-participating defendant" is a person who appears in an action by filing an answer, and is represented by counsel, but does not otherwise engage in the litigation. Non-participating defendant situations often occur in motor vehicle collision cases, but may also arise in breach of contract, family or estate litigation, or premises liability actions in which a defendant, for whatever reason, has little or no incentive to participate. This could be, for example, someone who borrows or rents a car and is then in an accident, a former employee whose conduct causes injury, or a former manager of a property where someone was injured due to a dangerous condition.

The usual reason for the non-participating defendant's lack of incentive is often because he or she is not the named insured on the insurance policy providing the defense to the action. He or she did not pay the insurance premiums, has no relationship with the underwriter, and may no longer be in contact with the named insured/primary defendant. Whatever the reason, the non-participating defendant, often the central tortfeasor, is out of the picture while a principal defendant and its insurance carrier remain on the hook.

The existence of a non-participating defendant provides the defense with a significant tactical advantage. Insurers may retain separate counsel for the principal and non-participating defendants, a practice known as "splitting the file." This allows the defense two bites at the apple; both defense counsel may serve separate discovery and conduct separate examinations at deposition. At trial, both defense counsel may give separate opening statements, separately cross-examine witnesses, and make separate closing arguments. The result is that the plaintiff's side gets double-teamed, despite the fact, for all practical purposes, both the principal and non-participating defendants have a unity of interest and separate representations are unwarranted. This article offers a step-by-step approach on how to prevent this, and ensure

a fair and level playing field, by striking the answer of the non-participating defendant.

Defense Counsel's Ethical Duties

Defense counsel will argue they have a contractual right to defend the non-participating defendant under the insurance policy. Counsel arguably has no such right, however, because he or she cannot represent a client with the requisite competence and diligence required by the Rules of Professional Conduct. These rules, for example, require an attorney to communicate with a client, specifically to "reasonably consult ... about the means by which to accomplish the client's objectives" and to "keep the client reasonably informed about the significant developments relating to the representation." (Rules Prof. Conduct, rule 1.4(a)(2)-(3).) An attorney also has an absolute duty to communicate all settlement offers made to a client. (Rule 1.4.1(a)(2).) In fact, it is an ethical violation for defense counsel to participate in settlement negotiations without their client's consent. (*Sampson v. State Bar* (1974) 12 Cal.3d 70, 83; *Bodisco v. State Bar* (1962) 58 Cal.2d 495, 497.) Above all, an attorney shall not represent a client if she knows or reasonably should know that the representation will result in a violation of the rules. (Rule 1.16(a)(2).)

Counsel for a non-participating defendant cannot meet these ethical obligations. Moreover, the general purpose of discovery is to remove the "game" element from trial preparation, narrow the issues for trial, and promote settlement by providing both sides with information necessary to fully evaluate their dispute. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376 [superseded by statute].) Defense counsel attempting to represent a non-participating defendant is effectively engaging in what is properly considered "gamesmanship."

Indeed, more often than not, defense counsel quickly becomes aware that he has a client who will not participate in the litigation. If so, an answer should not have been filed for a client that cannot be effectively represented. But the defense is often looking to buy time in the hope that plaintiff's counsel will not proceed aggressively to expose that a defendant is not participating in the case. Once it becomes apparent that defense counsel cannot obtain verified discovery responses from his client, or produce the client for deposition or trial, defense counsel is arguably obligated to terminate the representation. (See *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App.3d 381, 385-386.) If defense counsel does not do this, however, the next steps are to set up the proverbial "doomsday" motion, which is to strike the answer of the non-participating defendant.

Step One: Serve Discovery On, and Notice the Deposition of, the Non-participating Defendant

The first indication of a non-participating defendant in the case may come from how the defense handles discovery responses. The timeline is usually as follows: Discovery is served, and defense counsel will ask for a not uncommon extension of time to respond. After the new deadline has come and gone, however, defense counsel may ask for yet another extension. By the time responses are received, which may be six weeks or more later, they will consist of boilerplate objections, non-responsive answers, and lack a signed verification. Typically, these responses are provided with a writing that says, "verifications to follow."

Another clue is unusual difficulty in setting a date for the defendant's deposition. If defense counsel does not respond to requests for convenient dates and times for a deposition, and does not respond to follow-up meet-and-

confer efforts, it may be that defense counsel is attempting to represent a non-participating defendant.

Step Two: File Motions to Compel

After exhausting meet-and-confer obligations, and ensuring that such motions would be timely, the next step is to file motions to compel the deposition or further discovery responses, or both. Some jurisdictions require attendance at an Informal Discovery Conference (IDC) before moving to compel, so check applicable rules. If you must attend an IDC, be sure to secure an extension of time to bring the motion to compel.

After filing the motion, defense counsel may reach out and admit that their client is nowhere to be found, is not cooperating, or that the defense just needs more time. Counsel may even oppose the motion with such excuses. Moving papers should emphasize that defense counsel has no right to defend a client with whom she admittedly cannot communicate. Your papers should also set forth the prejudice suffered by the plaintiff due to the inability to fully engage in the discovery process. The defense, of course, should not be able to deny liability or the damages sustained by your client, yet fail to produce any evidence.

You should be confident going into the hearing on such a motion. Most courts have little tolerance or sympathy for defense counsels' claims they cannot communicate with their client. This is especially true when defense counsel filed an answer, but served unverified discovery responses or objected to a deposition claiming it was set "unilaterally" after previous requests for dates went unanswered. This is further strengthened by evidence from social media posts or other sources showing that the non-participating defendant is not really impossible to find or to reach by either mail or telephone.

Step Three: Move to Strike the Non-participating Defendant's Answer

Assuming the court grants your motion to compel and the defense fails to comply with the order, the next motion is for sanctions in the form of striking the answer. (Code Civ. Proc., §§ 2023.030, 2030.290, subd. (c), 2025.450, subd. (h).) Whether to bring such a motion is a tactical decision, and while striking the answer could potentially lead to the insurer's denial of coverage, our experience suggests it is better to be proactive and resolve such issues as early as possible to evaluate collectability. Otherwise, the defense could force you to try the case to verdict, only to then move for declaratory relief on coverage issues after the fact. (*Bank of N.Y. Mellon v. Citibank, N.A.* (2017) 8 Cal. App.5th 935, 943; *Maguire v. Hibernia Sav. & Loan Soc.* (1944) 23 Cal.2d 719, 734.) On the other hand, if the answer is not stricken, there is always the danger that the non-participating defendant could be allowed to testify at trial and present new evidence.

Well-settled cases support striking an answer and entering a default where a defendant fails to participate in the discovery process. For example, in *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, the court upheld the order striking an answer and issuing a default judgment for the plaintiff. That order came after the defendant engaged in "gamesmanship," served incomplete discovery responses, and failed to comply with a prior discovery order. (*Id.* at p. 1615.) The Court of Appeal explained that nothing persuaded the defendant to respond appropriately and, therefore, striking its answer was necessary to protect the interests of the public and the judicial system. (*Id.* at p. 1620.) As the court put it, "[w]hat we have here is defendants' persistent refusal to share with plaintiff the facts underly-

ing their denial of liability and their purported affirmative defenses." (*Id.* at p. 1619.)

Lang v. Hochman (2000) 77 Cal.App.4th 1225 also involved incomplete responses to written discovery that resulted in a stricken answer and a $22 million default judgment. Following *Collison,* the *Lang* court noted that defendant's conduct was " 'disingenuous at best,' " and that it failed to comply with multiple discovery orders. (*Lang,* at p. 1247.) Adopting the discovery referee's and trial court's findings, the Court of Appeal found defendant's "lack of diligence to be willful, tactical, egregious, and inexcusable." (*Ibid.*)

Based on these well-established principles, the key in persuading a court to strike the answer of a non-participating defendant is to show "gamesmanship" or "disingenuous" discovery conduct that prejudices the plaintiff. By proactively and aggressively following the steps outlined here — proper propounding of discovery and/or deposition notices, timely motions to compel, and a motion for sanctions — combined with a showing that defense counsel cannot ethically represent his or her client, a compelling showing will be made that the non-participating defendant's answer should be stricken. Such a sanction, while severe, will serve to protect the integrity of the judicial process and help to ensure that trial proceeds fairly.