DISCOVERY ACROSS THE STREET:

A Short Primer on Federal v. State Procedures

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INTRODUCTION

Discovery in Federal court is controlled by the Federal Rules of Civil Procedure (FRCP) and certain Local Rules promulgated by the District Court. While there are differences between the California Code of Civil Procedure and the FRCP, they are not so substantial as to be the sole or primary determinant of where to file, in most cases.

Plaintiff's option to file in federal court is generally controlled by the presence or absence of a Federal question or diversity jurisdiction. In certain "federal question" actions the attorney for plaintiff can choose the forum, either state or federal court and litigate all matters in either setting. For example, a plaintiff in California, alleging violation of civil rights under 42 U.S.C. section 1983, may elect to litigate in either forum and retain both state and federal causes of action.[1]

However, a state court defendant in an action for which the option of federal jurisdiction exists, may remove the action to federal court within a short time after service of the Summons and Complaint. Thus, a plaintiff and his or her counsel may find themselves involuntarily in federal court. This is not a cause for alarm.[2] Certain insurance carriers have recently sought to remove actions for breach of the covenant of good faith and fair dealing from state court to federal court on diversity grounds. Perhaps this is due to a perception that plaintiff's counsel will be intimidated by the unfamiliar forum.

Distinctions between the two arenas are beyond the scope of this article. It is the author's opinion that the choice of forum should not be based on the differences in discovery in U.S. District Court (particularly the Central District of California) from Superior Court of California.

This article will hopefully provide an overview of commonly used discovery under the Federal Rules of Civil Procedure ("FRCP")[3] and especially note distinctions from practice in state court in California under the California Code of Civil Procedure ("CCP"). In many respects discovery procedures are more streamlined in federal court; in others more balky.

CAVEAT

Certain aspects of the FRCP have been modified by "Local Rules" or the court has "opted out" and they are therefore not applicable. There may well be additional obligations not in the FRCP that are required by the Local Rules. Familiarize yourself with these by obtaining them from the legal newspaper, legal publisher or the court clerk's office.

For example, Rule 26(a)(1) Initial Disclosure, *i.e.* disclosure obligation without a discovery request, is not applicable in the Central District of California. However, Rule 26(a)(2) Disclosure of Expert Testimony applies only in part: 26(a)(2)(A&B) requiring disclosure of all experts, their qualifications, list of publications and a written report, disclosing all their opinions and the basis for same, *et cetera*, is required. However, 26(a)(2)(C), setting default dates for

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[1]See, *Williams v. Horvath,* (1976) 16 C.3d 834, 837; 28 U.S.C. § 1367

[2]Unless you have drawn a judge reputed to be hostile to your legal position.

[3]Unless otherwise noted, references to a "Rule" are intended to relate to the FRCP, *e.g.* Rule 26 is Federal Rules of Civil Procedure, Rule 26.

disclosure and relating to exclusively contradictory or rebuttal evidence is not in effect here. Nor are 26(a)(3), 26(d) or 26(f).[4]

As discussed below, the Local Rules impose other disclosure obligations. The point here is that merely reviewing the FRCP may not provide counsel with a full and accurate picture of all rights and duties under the Rules.

SCOPE AND TIMING OF DISCOVERY

A. Scope

The scope of discovery in federal court is very similar to that stated under the California Code of Civil Procedure. Rule 26(b)(1) states:

> ***In General.*** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party seeking discovery or to the claim or defense of any other party, including the existence, description of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Limitations upon discovery are set forth generally in 26(b)(2) which refers to the power of the court to limit the number of interrogatories, the length of depositions and generally prohibits "unreasonably cumulative" or discovery that is burdensome considering options to obtain it otherwise or its likely utility.

Work product is conditionally privileged and may not be obtained without a showing of "substantial need" and "undue hardship." Rule 26(b)(3).

Privileges which bar discovery will be discussed, *infra*, under Objections.

B. Timing

Although Rule 26 provides for obligatory exchange of certain information without awaiting a discovery request (Rule 26(a)(1)(A-D) the Central District of the United States District Court in Los Angeles has "opted out" of this requirement.[5]

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[4]Proposed amendments to Local Rules 6 and 9 would put into effect Rule 26(a)(1), 26(a)(2)(C), 26(a)(3), 26(d), and 26(f).

[5]*Implementation of Disclosure in United States District Courts, With Specific Attention to Court's Responses to Selected Amendments to Federal Rules of Civil Procedure 26*, Donna Stienstra, Research

Unlike California procedure, a plaintiff may serve written discovery with the Summons and Complaint. However, the applicable statutory period to respond is extended to 45 days when this is done.[6]

Service of discovery by mail extends the time for response by three days (Rule 6(e)] unlike state court where five days extension are provided by the Code of Civil Procedure.

C. Discovery Obligations at the Early Meeting of Counsel

Local Rule 6 requires that within a prescribed period following the filing of an answer, counsel for the parties shall meet at the office of plaintiff's counsel to provide, *inter alia*, names and addresses of witnesses, and exchange relevant discoverable documents in their possession and that of their clients.

Because there is a tendency for counsel unfamiliar with the Local Rules to overlook[7] this *requirement* imposed by the Local Rules of the Central District, it is suggested that counsel send a letter to opposing counsel upon receipt of the answer. In addition to setting forth the meeting requirement, counsel may want to set forth the documents which are known to exist for which there is no applicable privilege and indicate that it is mandatory for counsel to bring them to the meeting for production. Keep in mind this is a two way street and prepare yourself to comply by making copies of documentary evidence for delivery. It is quite likely that a substantial amount of discovery will not need to be propounded by simple observance of the Local Rule and this suggestion.

Should opposing counsel evade their responsibility to provide discovery at the Early Meeting, you now have a letter which may serve as the basis for a motion to compel compliance. When there is little question over the nature and existence of certain documents, counsel is in a position to demand another meeting (pursuant to Local Rule 7.15) preparatory to a motion to compel production of those items with a request for the imposition of sanctions.

INTERROGATORIES

Rule 33(a) provides:

> Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if, if partnership or association or governmental agency, by any available to the party. ...

Rule 33(b) requires each answer to be "answered separately and fully in writing, unless objected

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Division, Federal Judicial Center, March 24, 1995, 1995 Supplement to Vol 8 of *Federal Practice and Procedure, Civil 2d,* Wright-Miller-Marcus. But see, fn 3, *supra.*

[6]Note that a written response is due in 20 days to a Summons and Complaint in federal court.

[7]Some counsel attempt to avoid or delay compliance by professing to have forgotten.

to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

Rule 33(d) allows identification of business records in lieu of a written response to an interrogatory if the answer may be derived from the records and "the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party served" and a reasonable opportunity is provided to "examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification must be sufficient to allow the party served to readily locate and identify the records from which the answers can be ascertained.

Unlike state court, the responding party is required to include the interrogatory with the response.

Furthermore, an important distinction from state court is that there is a continuing duty to supplement incomplete or inaccurate responses. *See* FRCP 26(e)(1) In state court, a response that is accurate and truthful when made need not be supplemented.[8]

Verification must be made under penalty of perjury under the laws of the United States.

DEPOSITIONS

Rule 30(a)(1) provides:

> A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

Generally, the number of depositions in a non-complex case is limited to ten. Leave of court must be obtained to exceed this number, depose a person in prison or who has already been deposed in the action, if there is no written stipulation by the parties. An order must be obtained to take an early deposition before the time specified in Rule 26, for example to preserve testimony of a person who will later be unavailable to give testimony because of leaving the United States. FRCP 30(2)(C)

A distinction from state court practice is that "reasonable notice in writing" of deposition is all that is required. It, of course, must set forth the date, time and place of the proceeding, as well as the method by which the testimony will be preserved. This is a noteworthy departure from state court practice in that a minimum of 10 days notice is prescribed.[9] Counsel pressing against a discovery cutoff that would preclude a timely notice of deposition under California procedure may well be able to give "reasonable notice" to obtain the testimony under the federal rules.

Another interesting departure from state court practice relates to how the testimony may be preserved:

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[8]Unless a request for supplementation is propounded pursuant to Code of Civil Procedure §2030(c)(8).

[9]Code of Civil Procedure, § 2025

> Unless the court orders otherwise *it may be recorded by sound, sound-and-visual, or stenographic means*, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. Rule 30(b)(2)
> *emphasis added*

However, where the deponent's testimony is preserved by non-stenographic means, *i.e.* audio or videotape, unless stipulated by the parties, "a deposition shall be conducted before an officer appointed or designated under Rule 28 ..."

Rule 28 provides that within the United States a deposition must be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. However, such a person may additionally be designated by the parties, so long as the stipulation of the parties is written. Rule 29.

In other words, if you want to depose someone without the expense of a court reporter, you are allowed to do so with some recording medium and a person authorized to administer oaths. A Notary Public would appear to suffice. However, that person must make the requisite pronouncements at the beginning and end of each tape or other recording medium and indicate at the end the completion thereof and any stipulations as to custody of the transcript or recording, and the exhibits or other pertinent matters. Rule 30(b)(4)

Optionally, the parties may take a telephonic deposition or "other remote electronic means" upon a written stipulation of the parties or order of court pursuant to a motion. Rule 30(b)(7) further provides that for purposes of Rule 30 (regarding depositions), Rule 28 (regarding the oath giver) and Rule 37 (regarding enforcement and sanctions for discovery abuse) a telephonic or other remote electronic deposition is taken in the district and at the place where the deponent is to answer questions.

Notice of deposition may be accompanied by a request to produce documents or other tangible things, subject to the limitations of Rule 34 which governs the timing and scope of Requests for Production or Inspection. A non-party may be subpoenaed to produce materials at the deposition and the *subpoena duces tecum* must be attached to the notice of deposition.

Unlike state court, where it often seems anything goes during a deposition, Rule 30(d)(1) states:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. *A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court or to present a motion ...* (emphasis added)

Thus, instructing a deponent not to answer because a question has been asked and answered, is vague and ambiguous, calls for an opinion, is irrelevant and the whole litany of exasperating time-wasters or obstructionist tactics by counsel in state court actions are clearly sanctionable conduct in a deposition under the federal rules. Surprisingly, many counsel are unfamiliar with the strictures under which they may instruct a deponent not to answer. It is frequently useful to inform such counsel on the record that they are in violation of the FRCP by their conduct and may well be sanctioned, if they persist.

The permissible privileges available are generally restricted to those arising under federal rules of evidence. State law privileges not available under federal law are generally not upheld. This will be discussed in more detail, *infra*.

A deponent does *not* have the absolute right to confer with his or her counsel during a deposition or during recesses. It has been held that such conferences are improper unless to determine whether a privilege applies. Nor may a witness be coached by comments by counsel regarding a document shown to counsel before the deponent. *See Hall v. Clifton Precision* (E.D. PA 1993) 150 F.R.D. 525

Conversely, where a deposition is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the deposition officer to cease the deposition. "Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order." Rule 30(d)

Another big difference with state court deposition procedure is that many Magistrate Judges[10] will take a telephone call in their chambers to give a legal opinion or advise counsel regarding a disputed matter arising during a deposition taken during business hours. Generally, this is to be done on the record of the deposition and preferably on a speakerphone so that all present, including the court reporter, if any, may hear and record what is said by all. It is not uncommon for the Magistrate Judge to make an order or, at least, give an opinion which will obviate the need for a motion and effectively resolve the matter right there. Naturally, there are some situations and some counsel for whom a motion will be required, but this option is extremely valuable. It would be a good practice before a deposition in a federal matter to inquire of the court clerk for the Magistrate Judge, if he or she is amenable to taking such calls and, if so, keeping the telephone number handy should the legitimate need arise.

REQUESTS FOR PRODUCTION OF DOCUMENTS, ETC.

Rule 34(a) provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilation from which information can be obtained translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any

[10]A judicial officer, not the trial judge, assigned by the court to oversee discovery matters. The designation in the case number to the extreme right within the parentheses indicates who is the Magistrate Judge assigned to the case.

> designated object or operation thereon, within the scope of Rule 26(b).

There would appear to be little difference between what is subject to production or inspection under federal versus California state law. A 30 day period is prescribed for the response under either (not counting time added if the Request was propounded by mail.)

However, under California law a responding party must file a written response prior to the time set for production. Generally, this is 20 days after the Request was propounded, indicating what will be produced and setting forth any objections to production, in whole or in particular part.[11] No such statement of compliance or objection is required under federal law prior to the date set for production in the notice. Rule 34(b)

Another distinction from state law practice appears to be that Rule 34(c) provides for production or inspection or examination directed to *non-parties* in conjunction with Rule 45.

REQUESTS FOR ADMISSIONS

Rule 36(a) provides in part:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or available for inspection and copying. ...

The rule goes on to require a written response within 30 days of service and that each matter of which an admission is requested is admitted unless, the responding party serves a written objection with the reasons stated.

> The answer shall specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or

[11]California Code of Civil Procedure, Section 2031(h)

deny it. Rule 36(a)

In state court a party who fails to respond to requests for admissions does not automatically admit the matters contained therein, but only waives the right to object.[12] The propounding party in state court must then move for an order to have the matters admitted.[13] By contrast, in federal court, a default in response is an admission. Rule 36(b) provides that any matter admitted is conclusively established for that action "unless the court on motion permits withdrawal or amendment of the admission."

It should be noted that in both state and federal court, recovery of costs incident to proving a a request for admission which was denied will result.

OBJECTIONS TO DISCOVERY

The prevalent practice of stating an objection to discovery, then providing an answer subject to the objection has no vitality in federal court. When an answer is accompanied by an objection, the objection is deemed waived. *Meese v. Eaton*, 35 F.R.D. 162, 166 (N.D. Ohio 1964).

In federal cases, the burden of resisting discovery is on the party opposing discovery. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975) (parties opposing discovery are required to carry a heavy burden of showing why discovery should be denied).

In *Spell v. McDaniel*, 591 F.Supp. 1090 (E.D.N.C. 1984), *later decision aff'd and rev'd in part*, 824 F.2d 1380 (4th Cir. 1987), *cert. den.*, 424 U.S. 1027 (1988), the court holds the party resisting disclosure bears the burden of showing information sought is not relevant.

A party's objections must be specific and supported by a detailed explanation of why an item or class is objectionable. *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 264-65 (N.D. Ill. 1979); *United States v. Nysco Laboratories, Inc*, 26 F.R.D. 159, 161 (E.D.N.Y. 1960); *see Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). Objections must show specifically how the discovery requested is objectionable, e.g., overly broad or burdensome, by offering evidence which reveals the nature, e.g., of the burden. *Chubb Integrated Systems Ltd., v. National BK of Washington*, 103 F.R.D. 52, 59-60 (D.D.C. 1984); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. at 265.

A party asserting privilege bears the burden of showing that a privilege, as defined by the Federal Rules, exists and applies. *Campbell v. Gerrans*, 592 F.2d 1054, 1056 (9th Cir. 1979); *Heathman v. United States District Court*, 503 F.2d 1032, 1034 (9th Cir. 1974) (government information privilege, under F.R.E. 501). That burden includes laying a foundation for the objection by specifically identifying each item claimed to be privilege, and demonstrating the existence of the privilege through competent declarations or other evidence. *Kelly v. City of San Jose*, 114 F.R.D. 653, 669 (N.D.Cal. 1987) (government information privilege); *Virginia Elec. & Pow. Co. v. Sun Shipbuilding & D. Co.*, 68 F.R.D. 397, 410 (E.D.Vir. 1975) (work product); *Willemijn Houdstermaatschaapi, BV v. Appollo Computer*, 707 F.Supp. 1429, 1439-40 (D.Del. 1989) (work product); *Grossman v. Schwartz*, 125 F.R.D. 376, 385-390 (S.D.N.Y. 1989) (governmental privilege, attorney-client, and work product).

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[12]California Code of Civil Procedure, section 2033(k)

[13]Ibid

As former Chief Magistrate Judge Geffen of the Central District states in *Youngblood v. Gates* 112 F.R.D. 342, 345 (C.D. Cal. 1985), a governmental entity can not indiscriminately raise privilege without specifying what documents are privileged and why. A claimed governmental privilege must be perfected in response to the discovery propounded by competent declarations, by a responsible person within the governmental entity who has reviewed the material claimed privileged, "delineating in clear and precise terms" why confidentiality must be maintained. *Youngblood*, 112 F.R.D. at 345. Failure to do so will result in waiver of the purported privilege and the court will not analyze its applicability if it has not been timely and properly asserted. *Miller v. Pancucci*, 141 F.R.D. 292 (C.D. Cal. 1992)[14]

Additionally, federal law regarding privilege controls and, especially in § 1983 actions, state court privileges that are in conflict with federal law will not be honored. A prime example of this is discovery of peace officer personnel files and internal affairs investigation files. Under California law a motion for disclosure is mandatory (Evidence Code § 1043 *et seq.*) and a responding party has been held under California law not to have waived its objection / privilege by an untimely response. However, under federal law such a motion[15] is unnecessary and a party need only serve a Request for Production to be entitled to this material (provided it is relevant.) Though municipal attorneys routinely assert state court privileges to this discovery even in federal court, the objections are usually overturned on a motion to compel often with monetary sanctions for the improper assertion of state court privilege. *Miller v. Pancucci, supra*.

MOTIONS TO COMPEL

In federal court, there are no motion fees (or jury fees or daily court reporter fees to be paid by counsel or the parties for that matter.)

Additionally, there is no prescribed limitation on when a party aggrieved by an evasive response or objection to discovery may move for relief. This is a major distinction from state court practice in California which, absent a stipulation from opposing counsel, a party generally has 45 days in which to file a motion to compel or is barred from pursuing the insufficiency of those responses for the balance of that suit.

The obligation to meet and confer is a prerequisite under Local Rule 7.15 before a motion to compel may be filed. Another distinction with state court practice is that motions to compel discovery in federal court are filed in a "Joint Stipulation" which contains the contentions of both parties as to the disputed discovery.

Generally, the party demanding more sufficient responses sends a letter to the opposing counsel, demanding a meeting within 10 days, setting forth the nature of the dispute and invoking Local Rule 7.15. An agreed date is set, under compulsion that if it is not done that a Declaration of Non-Compliance will be filed with the court, which almost certainly will result in the imposition of sanctions against the recalcitrant counselor.

At the meeting the attorneys attempt to resolve the disputed matters, explain ambiguities

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[14]*Miller* is probably the leading federal case regarding the right to production of police officer personnel, internal affairs files and government tort claims overriding claims of state court privileges under California Evidence Code section 1043 *et seq.* It analyzes the so-called governmental privileges.

[15]Generally referred to as a "Pitchess" motion, named after the former Los Angeles County Sheriff.

(claimed or otherwise) and identify the unresolved discovery issues. Contentions are then provided to the moving party, who then prepares a document with the text of the disputed discovery, the response thereto and each party's contentions and supporting authority for same. In this fashion, *seriatim*, the dispute is presented. Counsel for the parties sign the document, stipulating that this is the matter to be ruled upon.

The stipulation along with a notice of motion is filed with the court, to be reviewed by the Magistrate Judge assigned to that case. Such a motion is generally heard on ten days notice, as opposed to the 15 days for a state court motion.

Rule 37 provides for motions to compel disclosure or discovery. It sets forth the types of discovery which may be compelled and sets forth available sanctions, including costs and attorney's fees, as well as issue and terminating sanctions similar to state court practice.

If you come across truly virulent Rambo-esque opposing counsel, you may want to consider a motion pursuant to 28 U.S.C. § 1927. This provides for attorney fees and costs as sanctions for a party or its counsel who unnecessarily multiply the proceedings. Case law holds that the motion may be brought after resolution of the underlying case (at least in this federal circuit.)

CONCLUSION

Substantial advantages exist for those who litigate in federal court due to the liberal discovery allowed. The state/federal distinctions appear to favor the federal forum. Counsel should be encouraged to utilize the procedures to help obtain what is needed for a successful outcome.

While this article is obviously just an overview with some practical suggestions, counsel may wish to review one of several treatises, including *Federal Civil Procedure Before Trial*, Swartzer, Tashima, Wagstaffe, The Rutter Group; *Federal Practice and Procedure,* Wright, Miller & Marcus, West Publishing Co.