Litigating in California State Court, but Not a Local?

Plan for the Procedural Distinctions (Part 2)—Unique Discovery Procedures and Issues

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This fourth installment of the "Welcome to California Business Litigation" series—Part 2 in a two-part series dedicated to examining procedural distinctions between California state court civil procedures and Federal Rules-based procedures—provides a brief overview of some of the differences and distinctions between discovery in California state court and Federal Rules-based jurisdictions.

In this series of articles, Snell & Wilmer lawyers familiar with both California and non-California business litigation practices will share a series of tips—both procedural and substantive—that in-house counsel may find useful in navigating the shoals of California business litigation.

Under the Federal Rules of Civil Procedure, "any nonprivileged matter that is relevant to a party's claim or defense" is subject to discovery.[1] And information is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence. The permissible scope of discovery in California is similar: "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."[2]

Though the scope of discovery in California is similar to federal rules-based jurisdictions, the mechanisms for discovery can be different. For example, under the Federal Rules, parties must disclose, without a discovery request, the identity of persons likely to have discoverable information or that a party may use to support its claims or defenses, the existence of documents and other tangible things that a party may use to support its claims or defenses, a damages computation, and the existence of any pertinent insurance agreements.[3] Other jurisdictions, such as Arizona state court, also require robust disclosures.[4] California does not have any voluntary disclosure requirements as part of the discovery process, apart from the obligation to respond to discovery requests.

Because litigants in California are not obligated to make voluntary disclosures, properly utilizing the available discovery procedures is important. What follows is a brief discussion

1 Fed. R. Civ. P. 26(b)(1).

2 Cal. Code Civ. Proc. § 2017.010.

3 Fed. R. Civ. P. 26(a)(1)(A).

4 *See* Ariz. R. Civ. P. 26.1(a).

of the most commonly used discovery vehicles available to parties in litigation.

Interrogatories

In California, as elsewhere, interrogatories are a vital tool in discovery. These written questions, which must be answered under oath, "may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based."[5] And "[a]n 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 for trial."[6]

Though the federal rules recognize only one type of interrogatory,[7] two different types exist in California: special and form interrogatories. Special interrogatories are non-uniform interrogatories prepared by a party and served on another party. A party is limited to serving thirty-five special interrogatories on another party, unless the parties agree otherwise or if the propounding party declares, among other things, that additional interrogatories are necessary.[8] Form interrogatories are interrogatories, prepared by the Judicial Council, relating to certain actions.[9] A party may serve these form interrogatories so long as they are "relevant to the subject matter of the pending action."[10] These limits contrast with the twenty-five interrogatories allowed to each party (served on any other party) under the federal rules.[11]

A key distinction between California and federal rules-based jurisdictions is that, in California, a party has no duty to supplement its previous responses to interrogatories. Under the Federal Rules, of course, a party has a duty to timely supplement its disclosures or discovery responses if new information is learned or if ordered to do so by the court.[12] But what happens if a California litigant propounds its thirty-five special interrogatories early during the litigation and seeks to discover any updated information from its adversary? Enter the supplemental interrogatory, which "elicit[s] any later acquired information bearing on all answers previously made by any party in response to interrogatories."[13] But these too have limits: a party may propound a supplemental interrogatory twice before the initial trial setting and only once after this setting.[14]

Requests for Admission

California's procedures relating to requests for admission are similar to those relating to interrogatories. Much as under the Federal Rules, these written requests may ask any other party "to admit the genuineness of specified documents, or the truth of specified matter of

5 Cal. Code Civ. Proc. § 2030.010(b).

6 *Id.*

7 Fed. R. Civ. P. 33(a).

8 Cal. Code Civ. Proc. § 2030.030.

9 Cal. Code Civ. Proc. § 2033.710.

10 Cal. Code Civ. Proc. § 2030.030(a)(2).

11 Fed. R. Civ. P. 33(a).

12 Fed. R. Civ. P. 26(e).

13 Cal. Code Civ. Proc. § 2030.070(a).

14 Cal. Code Civ. Proc. § 2030.070(b).

fact, opinion relating to fact, or application of law to fact" even if that matter is in controversy between the parties.[15] But while the Federal Rules of Civil Procedure do not contain an express limit on requests for admission,[16] a litigant in California may propound an unlimited number of requests for admission that ask a party to admit the genuineness of a document; otherwise, a party is limited to thirty-five requests (unless the party declares additional requests are necessary).[17]

Demand for Inspection of Document or Thing

A demand for inspection of a document or thing is, essentially, California's version of a request for production.[18] The production demands automatically include the electronically stored information in the answering party's possession, custody, or control.[19] A party may make an unlimited number of inspection demands.

The California Code of Civil Procedure contemplates that a party might make one of three responses to an inspection demand: that the party will comply with the demand by the date set by the propounding party, a statement that the party cannot comply with the demand, or an objection.[20] If a party states that it cannot comply, it must affirm that it made a diligent search and reasonable inquiry in an effort to comply and state whether the inability exists because the requested items never existed, because they have been destroyed, or because the items are not—or never have been—in the responding party's possession, custody, or control.[21]

Depositions

In California, a party may depose any person, including any other party. Notice of the deposition must be served at least ten days prior to the date of the deposition. The Code of Civil Procedure sets forth the requirements for the deposition notice and sets forth geographic limits on the location of a deposition.[22]

Until recently, California did not have a presumptive limit on the duration of a party's testimony. But now, similar to the Federal Rules, a California deposition presumptively is limited to seven hours of testimony, unless more time is necessary to fairly examine the witness or other specific exceptions are met.[23] And under the Code of Civil Procedure, a natural person may only be deposed once unless good cause is shown. This means that, generally, in multi-party actions, any party that receives notice of a deposition of a natural person must also plan to take that person's deposition on that day.[24]

15 Fed. R. Civ. P. 36(a)(1); Cal. Code Civ. Proc. § 2033.010.

16 *See* Fed. R. Civ. P. 33.

17 Cal. Code Civ. Proc. §2033.030.

18 *See* Fed. R. Civ. P. 34.

19 Cal. Code Civ. Proc. § 2031.010(a).

20 Cal. Code Civ. Proc. § 2031.210(a).

21 Cal. Code Civ. Proc. § 2031.230 (noting also that the party must identify the person known or believed to have possession, custody, or control over the item(s) requested).

22 Cal. Code Civ. Proc. §§ 2025.220(a), 2025.250.

23 Cal. Code Civ. Proc. § 2025.290(a); Fed. R. Civ. P. 30(d)(1).

24 Cal. Code Civ. Proc. § 2025.610.

Depositions of entities and organizations under the California Code of Civil Procedure also are slightly different than under the Federal Rules. If the deposition notice is not directed to a natural person, it must describe with reasonable particularity the matters for deposition testimony so that the deponent may designate "those of its officers, directors, managing agents, employees, or agents who are *most qualified* to testify on its behalf as to those matters[.]"[25] Under the Code of Civil Procedure, in other words, a party may not simply designate persons with knowledge to testify on its behalf; it must instead designate the persons most knowledgeable. This requirement stands in contrast to the Federal Rules of Civil Procedure, which requires that an entity or organization must produce a person prepared to testify about information known or reasonably available to the organization, upon matters for examination provided by the deposing party with reasonable particularity.[26]

Expert discovery

The procedures for expert witness disclosures in California also are governed by the Code of Civil Procedure. Any party may demand that all parties *simultaneously exchange* information concerning each other's expert trial witnesses.[27] This demand must be made after the setting of the initial trial date, and "no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date."[28] A demand must specify the date for the exchange, which must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date.[29] This timing generally is different than that mandated by the Federal Rules, which requires disclosure of an expert at least ninety days before the date set for trial or thirty days after a party's opponent's disclosure, if the party's disclosure is of rebuttal evidence.[30]

While the Federal Rules require disclosure, generally, of the expert's opinions, the data considered by the expert, his qualifications, and compensation,[31] the Code of Civil Procedure provides a detailed list of information that must be exchanged by the parties.[32] For instance, under the Code, a party must provide the identification of the experts, a brief narrative of the expert's qualifications and expected substance of the expert's testimony, a representation that the expert has agreed to testify at trial, a representation that the expert will be sufficiently familiar with the action to give a meaningful deposition, and a statement

25 Cal. Code Civ. Proc. § 2025.230 (emphasis added).

26 Fed. R. Civ. P. 30(b)(6); *Louisiana Pacific Corp. v. Money Market 1 Inst. Inv. Dealer,* 285 F.R.D. 481, 486 (N.D. Cal. 2012) ("The corporation has a duty to educate its witnesses so they are prepared to fully answer the questions posed at the deposition.") (citation omitted); *see also* 8A Charles Alan Wright et al., Federal Practice and Procedure § 2103 (3d ed. 2013) ("The goal of the Rule 30(b)(6) requirement is to enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.").

27 Cal. Code Civ. Proc. § 2034.210.

28 Cal. Code Civ. Proc. §§ 2034.210 & 2034.220.

29 Cal. Code Civ. Proc. § 2034.230.

30 Fed. R. Civ. P. 26(a)(2)(D) (also allowing for court order or stipulation to modify these deadlines).

31 *See* Fed. R. Civ. P. 26(a)(2)(B) (disclosure required of retained experts).

32 Cal. Code Civ. Proc. § 2034.260(b).

of the expert's compensation.[33] And within twenty days of this exchange, a party may supplement its previous expert disclosure to identify rebuttal expert witnesses.[34] The parties must then, at their discretion, utilize depositions and subpoenas to discover the detailed substance of the expected expert testimony.

As litigants and lawyers are aware, discovery can be a time-intensive and expensive process. Discovery in California is no different; indeed, this article has merely scratched the surface of California's discovery procedures and their use in litigation. But for those engaged in litigation in California, understanding and employing these procedures is a prerequisite to success.

33 Cal. Code Civ. Proc. § 2034.260(c).

34 Cal. Code Civ. Proc. § 2034.280(a); *see also id.* at (b) (noting the rebuttal disclosure must contain the information required by § 2034.260(c)).

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