DISCOVERY ESSENTIALS

John D. Rowell

OVERVIEW

The most recent iteration of the California Discovery Act provides essentially three methods to obtain testimony and evidence before trial. Each will be discussed at length below.

First, oral testimony may be obtained by way of deposition. (C.C.P. §§2025.010 - 2025.340 [oral deposition in California]; 2026.010 - 2027.010 [oral deposition outside of California], 2035.010 - 203 6.0 50 [perpetuation of testimony or preservation of evidence before filing action and pending appeal].)

Second, written testimony may be secured by way of interrogatories (C.C.P. §§2030.010 - 2030.090[special interrogatories]; 2033.710-2033.740[form interrogatories]) or by deposition by written questions (C.C.P. §§2028.010 - 2028.080).

Third, documentary evidence may be obtained by request for production of documents (C.C.P. §§2031.010 - 2031.320), a description of documents to be produced attached to notice of deposition of a party (C.C.P. §2025.220(a)(4), 2025.280(a)), by a description of documents to be produced attached to a deposition subpoena (C.C.P. §§2020.020, 2020.510), or by a subpoena duces tecum (C.C.P. §§ 2020.410 - 2020.440). In addition to the request for documents, the same procedure can be used for production and inspection of land or other items of physical evidence. (C.C.P. §§2031.010 -2031.320 [parry] 2025.510 [non-party].)

The California Discovery Act provides the option of serving requests for admission to narrow both legal and factual issues. (C.C.P. §§2033.010 - 2033.420.) The Act also allows the compulsory physical or mental examination of a party or one who is under the control of a party. (C.C.P. §§2032.010 - 2032.650.) I have never heard of a plaintiff invoking the physical examination procedures to compel a defendant to submit to a mental or physical examination, but can conceive of some cases where, by way of cross-claim or by the nature of the defense, a physical or mental examination would be appropriate.

The Federal Rules of Civil Procedure, on which the California Discovery Act of 1964 was originally based, provides similar procedures. Oral testimony by way of deposition (FRCP 27 [depositions before action or pending appeal], 28 [person before whom deposition may be taken], 30 [oral depositions], 31 [depositions upon written questions], 33 [interrogatories], 34 [production of documents and things and entry upon land], 35 [physical and mental examination of persons], 36 [requests for admissions], 45 [subpoenas].)

However, unlike California, since 1993, the parties in federal cases are initially obligated to produce all materials which may be used to support their claims, identify all known witnesses that may be used to support their claims, provide a calculation of damages, and provide a copy of any insurance policy which may be applicable. (FRCP 16 and 26(a)(l) - (3).) Moreover, the obligation to produce documents and

evidence under the Federal Rules continues throughout the case both as to the initial disclosure and the specific discovery requests. (FRCP 26(e).)

Expert witness discovery is provided by C.C.P. §2034.010 - 2034.730 and FRCP 26(a)(2) and (b)(4).

TIMING OF DISCOVERY

A. State

Generally, a party is entitled as a matter of right to conduct discovery such that discovery proceedings will be complete on or before the 30th day before the date initially set for trial. (C.C.P. §2024.020(a).) A continuance or postponement of the trial does not operate to reopen discovery proceedings. (C.C.P. §2024.020(b).) However, on motion, the court has discretion to extend the discovery cut-off dates generally or for a specific means of discovery or witness. (C.C.P. §20204.050.) The parties "affected by it" may also stipulate to extend the time for discovery or to reopen discovery after a new trial date is set. (C.C.P. §2024.060.) The agreement must be in writing and must specify the extended date. However, no such agreement shall require the court to continue or postpone the trial of the action. (C.C.P. §2024.060.)

Expert witnesses are governed by a separate time limits. Generally, expert witness discovery is allowed up to 15 days before the initial trial date. (C.C.P. §2024.030.)

If one party requests it in writing within 10 days after the initial trial date is set or 70 or more days before the trial date, whichever is closer to the trial date, simultaneous written disclosure of expert witnesses is required. (C.C.P. §2034.220.) If no demand is timely made, no expert witness discovery is required. The expert witness disclosure, including disclosure of all discoverable reports and writings of the expert if requested, takes place 50 days before the initial trial date or 20 days after service of the demand to exchange, whichever is closer to the trial date. (C.C.P. §2034.230(b).)

Any party who exchanged is allowed to file a supplemental list of experts up to 20 days after the initial disclosure. (C.C.P. §2034.280.) However, the supplemental list is limited to an expert who will express an opinion on a subject to be covered by an expert designated by an adverse party and supplementation is only allowed if the party submitting the supplemental list has not already retained an expert to testify on that subject. (C.C.P. §2034.280(b).) The expert must be made available for deposition "immediately." (C.C.P. §2034.280(c).)

For purposes of these limits discovery is considered complete on the day a response is due or on the day a deposition begins. (C.C.P. §2024.010.)

As to non-expert discovery, motions can be set for hearing up to 15 days before the initial trial date. (C.C.P. §2024.020(a).) As to expert discovery, the deadline is 10 days before the initial trial date. (C.C.P. §2024.030.)

B. Federal

In Federal Court, the parties will receive a notice of a scheduling conference or direction to prepare a scheduling order per FRCP 16(b). FRCP 26(f) provides that at leas! 21 days prior to either the scheduling conference or the date the proposed scheduling order is due, the parties must meet and confer. FRCP 26(a) provides that the initial disclosure is to be made either at this meeting or within 14 days after the initial FRCP 26(f) meeting. No **discovery is allowed prior to the initial FRCP 26(f) meeting.**

Discovery cut-off dates are normally set by the trial court in the scheduling order. (FRCP 16(b)(3).) The scheduling order is to issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. The scheduling order cannot be modified except on a showing of good cause. (FRCP 26(f).)

The trial court will also set disclosure times for expert witnesses. (FRCP 26(a)(2)(C).) **Be aware that the disclosure requirements for expert witnesses in federal court are substantially different than those in state court.** Experts are identified as those persons who are expected to testify under Federal Rules of Evidence 702 (testimony by experts), 703 (bases of opinions by experts) or 705 (disclosure of facts or data underlying expert opinion). (FRCP 26(a)(2).) The disclosure must be accompanied by a written report signed by the expert. This report in turn must include: (1) a complete statement of all opinions to be expressed and the basis and reasons for the opinions; (2) the data or other information considered by the witness in forming the opinions; (3) any exhibits to be used as a summary of or support for the opinions; (4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; (5) the compensation to be paid to the witness; (6) a listing of all other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years. (FRCP 26(a)(2)(B).) Not a small task.

Generally, the expert disclosures will not be simultaneous in federal court.

Discovery is almost always cut-off before the Final Pre-Trial Conference.

ORAL DEPOSITIONS

A. State

1. Time

The defendant may serve notice of an oral deposition any time after the defendant has answered or has otherwise appeared in the action. (C.C.P. §2025.210(a).) The plaintiff may serve a deposition notice on any date that is 20 days after service of the summons on or appearance by the defendant. (C.C.P. §2025.210(b).) Both these time limits can be changed by the court.

An oral deposition must be scheduled for a date at least 10 days after service of a deposition notice. (C.C.P. §2025.270(a).) If personal records of a consumer are being sought, the deposition time must be at least 20 days after issuance of the subpoena. *(Id.)*

2. Location

Unless otherwise ordered by the court, the deposition of a natural person is to be taken at a place that is within 75 miles of the deponent's residence or within the county where the case is pending and within 150 miles of the deponent's residence. (C.C.P. §2025.250(a).)

Any party, except the deponent, may appear at a deposition by telephone or other electronic means. (C.C.P. §2025.310(a).) The court may also order that the deponent may appear by telephone or other electronic means. (C.C.P. §2025.310(b).)

3. Notice

The notice must contain the name and address of each deponent, if known, the address where the deposition will be taken, the date of the deposition and a general description of any documents to be produced by the deponent. (C.C.P. §2025.220.) If the deposition is to be recorded by audio or video, notice of the intent to do so must be included. *(Id.)* While the deposition officer cannot be a relative or employee of any parts or attorney (C.C.P. §2025.320(a)), the video operator may be an employee (C.C.P. §2025.340(b)). However, if the video tape is to be offered as evidence at trial, the operator must be capable of administering oaths and not be an employee or relative of an> party or attorney. (C.C.P. §2025.340(c) and §2025.620.)

If the deponent is not a natural person the deposition notice must describe with reasonable particularity the matters on which examination is requested. The deponent is then required to identify and produce those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent. (C.C.P. §2025.230.) Such a deposition notice is sometimes referred to a **Person Most Qualified** or **Person Most Knowledgeable** deposition. The use of this procedure coupled with a description of documents to be produced is highly recommended and generally extremely effective. When coupling the document request with a PMQ deposition notice, it is a good idea to identify the categories of the documents themselves as individual items of examination.

4. Re-examination of Deponent

Once a party has taken the deposition of a natural person, neither the party who gave notice, nor any other party may re-examine the deponent in another deposition in the case. (C.C.P. §2025.610(a).) The court may, for good cause shown, order another deposition and the parties, with the consent of the witness, may stipulate to another deposition. (C.C.P. §2025.610(b).)

There is a very important exception to this rule. If the previous deposition was taken pursuant to a PMQ notice, the natural person deponent cannot use the prior deposition as a means of avoiding a second deposition. (C.C.P. §2025.610(c).)

5. Out of State Depositions

If a deposition is sought of an out of state party, the timely service of a deposition notice is sufficient to compel attendance. (C.C.P. §2026.010(b) and §2027.010(b).)

Generally, California procedures will apply. (C.C.P. §2026.010(a) and §2027.010(a).) However, anyone who is authorized under the laws of United States or the place where the deposition is being taken may serve as deposition officer.(C.C.P. §2026.010(d) and §2027.010(d).) Alternatively, the court may appoint someone. *(Id.)*

The parties are authorized to use local process to secure attendance of non-party witnesses and the Discovery Act authorizes the California court to issue commissions, letters rogatory, or letters of request to effect attendance by a non-party witness. (C.C.P. §2026.010(f) and §2027.010(f).)

Based upon past experience in air crash disaster litigation and products liability litigation, I have found it easier in most non-United States jurisdictions to bring along my own court reporter. This is usually not much more expensive and provides a measure of security.

B. Federal

1. Timing and Notice

Depositions may not be taken prior to the initial Rule 26(f) meeting of counsel. *(Id)*

As in state court, the party desiring to take the deposition must give notice. However, in federal practice, the notice must only be reasonable and there is no set time period. This has given rise to disputes as to what reasonable notice is. In *United States v. Phillip Morris, Inc. (D.* DC 2004) 312 F.Supp.2d 27, 36-37, the District Court held that three days was not reasonable notice. In that case, the court noted that the time was unreasonable, "especially to busy litigators who need to prepare to testify about events occurring six to nine years previously." (See also *In re Sulphuric Acid Antitrust Litigation* (N.D. 111. 2005) 231 F.R.D. 320, 327.) Ten days notice is normally reasonable, but it depends on the circumstances of the case. (See discussion in *In re Sulphuric Acid Antitrust Litigation, supra,* 231 F.R.D. at 327.) Some courts have local rules requiring counsel to consult with opposing counsel about convenience for deposition dates. For example, Northern District of California Rule 30-1 requires such contact.

A deponent who claims lack of sufficient notice may seek a protective order to enlarge the time for taking the deposition. (FRCP 26(c), 30(b)(3).) It is important to remember that merely filing a motion for a protective order does not stop a deposition or excuse the deponent from attending. (See FRCP 30(d)(l), Advisory Committee Notes to 1993 Amendments to FRCP 30(b)(3).) However, if the moving party received less than eleven days notice of the deposition and its motion for protective order was pending at the time of the deposition, the deposition cannot be used against that party at trial. (FRCP 32(a)(3).)

The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify the person or particular class or group to which the person belongs. (FRCP 30(b)(l).) In federal practice, depositions may be recorded by sound, sound and visual, or stenographic means. The party taking the deposition must advise in the notice the method by which the testimony is to be recorded. Any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition

with prior notice. (FRCP 30(b)(2) and (3).)

2. Limitations and Objections

Federal Rule of Civil Procedure 30 limits the number of depositions a party may take without either a written stipulation or leave of court to ten depositions. (FRCP 30(a)(2)(A).) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. (FRCP 30(d)(2).) Any objection interposed during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct the deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion for protective order under FRCP 30(d)(4).

Under federal practice, failure to object to a particular question results in a waiver as to the following: The manner of taking the deposition; the form of the questions or answers; the oath or affirmation; the conduct of the parties; or any other kind of error that might have been corrected at the time the objection had been made. (FRCP 32(b)(3)(B).) This includes objections on the grounds of privilege or work product. *(Marx v. Kelly, Hart & Hallman, P.C.* (1st Cir. 1991) 929 F.2d 8, 10-11.) On the other hand, objections to competence of a witness or relevance or materiality of the testimony are not waived by failure to object unless the defect could have been cured if the objection had been raised. (FRCP 32(d)(3)(A).)

It is not enough to preserve the grounds for objection simply by stating "objection". Counsel must also state the grounds for the objection. (See Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Chapter 8J.)

3. Place of Deposition

A non-party witness may be served at any place within the district of the court by which the subpoena is issued or at any place outside a district that is within 100 miles of the place of the deposition or inspection. (FRCP 40(b)(2).) However, on a timely motion, the court shall quash or modify the subpoena if it requires a non-party to appear for a deposition more than 100 miles from his or her residence or regular place of business or employment. (FRCP 45(c)(3)(A)(ii).)

The place of deposition of a party or its officers, employees, etc. may be noticed wherever the deposing party designates, subject to the court's power to grant a protective order. Normally, a party's deposition is taken in the district in which he or she resides or is employed or has a place of business. *(Philadelphia Indemnity Ins. Co. v. Federal Insurance Co.* (E.D. Pa. 2003} 215 F.R.D. 492. 495.)

Where a corporate party designates an officer, director or employee to testify on its behalf pursuant to FRCP 30(b)(6), the deposition should ordinarily be taken at the corporation's principal place of business. *(Moore v. Pyrotech Corp.* (D. Kansas 1991) 137 F.R.D. 356,357; *Dwelfy v. Yamaha Motor Corp.* (D. Min. 2003) 214 F.R.D. 537, 541.)

4. Document Production

The notice of deposition to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the deposition. The procedure of Rule 34 applies to such a request. (FRCP 30(b)(5).) Thus, a notice seeking attendance of a party and production of documents must provide at least 30 days notice. (FRCP34) Under FRCP 45 a subpoena may include a request for production of documents. The 30 day time period of FRCP34 does not apply to a FRCP 45 notice.

INTERROGATORIES

A. State

As the result of what was then perceived as an abuse of pattern interrogatories[1], the Legislature limited the number and form of interrogatories. Interrogatories developed and approved by the Judicial Council (C.C.P. §2033.710), aka form interrogatories, may be served as well as 35 special(non-form) interrogatories. (C.C.P. 2030.030(1).)

In order to make the numerical limitation on interrogatories meaningful, the legislature prohibited the use of subparts or any compound, conjunctive or disjunctive questions. (C.C.P. §2030.060(f). Again, in order to make the numerical limitation meaningful, each interrogatory is required to be full and complete in and of itself. No preface or instructions may be included except those approved by the Judicial Council. Any term specially defined must be capitalized. (C.C.P. §2030.060 (d) and (e).)

The narrow limit on the number of interrogatories is mitigated by C.C.P. §2030.040(a) and §2030.050. These two statutes allow propounding parties to send as many interrogatories as they wish so long as the form declaration is attached. C.C.P. §2030.040 does state that, if the responding party moves for a protective order the propounding party has the burden of showing justification.

Allowed responses are also detailed. The response must consist of an answer containing the information sought, an exercise of the party's option to produce writings under C.C.P. §2030.230, and/or an objection to the particular interrogatory. Each answer must bear the number of the question asked. (C.C.P. §2030.230(c).) Each answer must be as complete and straightforward as the information reasonably available to the responding party permits (C.C.P. §2030.220(a).)

---

[1] At one point in a gas tank design case I received a set of 2,135 interrogatories. Fortunately, my motion for a protective order was granted and the defendant was ordered to limit the number to 200.

If the interrogatory cannot be answered completely, it must be answered to the extent possible. (C.C.P. §2030.220(b).)

> "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." (C.C.P. §2030.220(c).)

28 years ago these provisions were anticipated by the Second District in its oft-cited *Deyo* v. *Kilbourne* (1978) 84 Cal.App.3d 771, 782-785, opinion.

Where an answer to an interrogatory would necessitate the preparation or making of a compilation, abstract, audit or summary of or from the responding party's documents, the response can merely refer to C.C.P. §2030.230 and specify the writings from which the answer may be derived. If this option is used, the responder must then give the propounding party the opportunity to examine and copy the documents. *(Id.)*

If only part of the interrogatory is objectionable, the remainder of the interrogatory must be answered. (C.C.P. §2030.240.) If an objection is made to all or part of an interrogatory, the specific ground for the objection must be stated, any privilege invoked must be specifically identified as must any claim of work product. The response must be signed by the party under oath, unless it contains only objections. (C.C.P. §2030.250.) If the responding party is an entity, the response must be signed by an officer or agent of the party under oath. If the officer or agent is a lawyer, the attorney client privilege as to that lawyer is waived. (C.C.P. §2030.250(b).) The attorney must also sign any response which contains an objection. (C.C.P. §2030.250(c).)

The time to respond is 30 days and the time may be extended by stipulation, but the stipulation must be confirmed in writing and contain the date to which the extension is granted. Unless expressly stated otherwise, any stipulated extension also extends the time within which to object. (C.C.P. §2030.270(c).) The code also provides that the propounding party is to keep both the original interrogatories and the original responses. (C.C.P. §2030..280.)

The failure to timely serve responses carries some significant penalties. The right to produce documents under C.C.P. §2030.230 is waived. (C.C.P. §2030.290(a).) All claims of privilege are waived. *(Id.)* Additionally, all claims of work product are waived. *(Id.)* However, the court may relieve a party from such waiver if the party has served a proper response and the failure to serve a timely response was due to mistake, inadvertence, or excusable neglect.

The propounding party has 45 days from the date of service of the responses to move to compel. (C.C.P. §2030.300(b).) The parties may, in writing, agree to extend this period. *(Id.)* Before a motion to compel is filed, the parties must have met and conferred and a declaration to that effect must be filed with the motion. (C.C.P. §2030.300(b).)

Amended answers to interrogatories may be served if it contains information

subsequently discovered, inadvertently omitted, or mistakenly stated in the interrogatory. (C.C.P. §2030.310(a). However, interrogatories are not and cannot be made continuing. (C.C.P. §2030.060(g).) In place of a continuing obligation, the code allows each party to serve up to two supplemental interrogatories before the initial trial date. (C.C.P. §2030.070.)

I am not a big fan of interrogatories. I tend to serve the form rogs and a few special questions and rely upon depositions and document productions. I do however make one very important exception. The use of **requests for admissions in conjunction with Form Interrogatory 17.1** can be very effective. Requests for admission, while part of the discovery act, are more in the nature of fact and issue limiting devices. However, when a detailed set of requests for admission is served with a Form Interrogatory 17.1, a great deal of information must be provided unless the request is admitted. I tend to serve requests on both sides of each issue. For example, I will ask the opposing party to admit the driver's side seat-belt was in use and the next request will seek an admission that the driver's side seat belt was not in use. This way, I can obtain the 17.1 information regardless of which way the opponent answers.

B. Federal

Unless leave of court is obtained, FRCP 33 allows only 25 interrogatories per opposing party, including discrete subparts. (FRCP 33(a).) Disputes commonly arise as to what constitutes a subpart properly included in the interrogatory or one which is actually another question in disguise. (Compare, *Safeco of America v. Rawstrom* (C.D.Cal. 1998) 181 FRD 441, 445, *with Kendall v. GES Exposition Services, Inc.* (D.Nev.1997) 174FRD 684, 686.)

As with State practice, a 30 day period is provided for response, the answers must be complete, a party must answer that which he can, objections must be specifically stated and the failure to timely object constitutes a waiver. (FRCP 33(b).) The responding party also has the option of producing business records. (FRCP 33(d).) However, the records production option in FRCP 33(d) is not as broad as that in C.C.P. §2030.230 ["business records" vs. "documents of a party"]. There is no proscription of compound, conjunctive or disjunctive questions and no prohibition of definitions, instructions or prefaces. Unlike State practice, there is no self executing means of serving more than 25 interrogatories, the propounding party must secure permission from the district court.

The answer must include a verbatim copy of each question followed by the answer,

PRODUCTION OF DOCUMENTS

A. State

Any party may obtain discovery of documents and things in the possession, custody or control of another party by serving a request for production of documents. This includes production of documentary materials for copying and photographing, to

enter and inspect land possessed or under the control of another, and to inspect and photograph, "test" or "sample" any tangible things in the possession of another. (C.C.P. §2031.010.)

Any party may subpoena non-parties to compel attendance and production of documents. (C.C.P. §§1985, 2064.) A subpoena may require the witness to bring any books, documents or other things under the witnesses control to a deposition. (C.C.P. §1985.) If documents are requested, the subpoena must be accompanied by an affidavit showing good cause for the production of the matters and things described in the subpoena. (C.C.P. §§1985(b), 1987.5.) Blank subpoena and subpoena duces tecum forms are issued by the courts and are available through the numerous computer programs which contain court forms. Either a judge or an attorney of record of any party may sign the blank subpoena. (C.C.P. §1985(c).) If the person served with a subpoena agrees to a change in the time and/or place, the agreement is enforceable, even if not confirmed in writing. (C.C.P. §1985.1.)

1. Timing

Until the discovery cut-off date, a request for inspection or production propounded to a party may be served at any time by a defendant and at any time that is 10 days after service of a summons and complaint on a defendant. (C.C.P. §2031.020.)

The request must set forth a reasonable time and place for the inspection which must be at least 30 days from the date of the demand. (C.C.P. §2031.030(c)(2) and (3).) If any testing or other activity is to be done, such must be specified in the demand. (C.C.P, §2031.030(c)(4).) The response must be served within 30 days after the demand is served. (C.C.P. §2031.260.) The parties may informally stipulate to extend the time, but the agreement must be confirmed in writing which must state the date for response based upon the extension. *(Id.)* The propounding party must move to compel further responses within 45 days of service of the written response, or any supplemental response. (C.C.P. §2031.310.) If he does not, he waives the right to compel. *(Id)*

Similar to Supplemental Interrogatories, C.C.P. §2031.050 provides that a party may serve two times before the discovery cut-off date.

2. Form of Party's Written Response

The responding party must respond separately to each item or category of item requested. The response must be either (1) a statement that the party will comply with the request, (2) a representation that the party lacks the ability to comply with the inspection demand, and/or (3) an objection. (C.C.P. §2031.210.) The statement of compliance must state whether the production, inspection and related activity demanded will be allowed either in whole or in part and that all documents or things in the demanded category that are in the possession, custody or control of that party and to which no objection is being made will be included. (C.C.P. §2031.220.)

Any representation of inability to comply will affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. (C.C.P.

§2031.230.) The responding party must also state whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. *(Id)* Additionally, the response must set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item. *(Id.)*

If objections are interposed and only part of an item or category of item in an inspection demand is objected to, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category. (C.C.P. §2031.240(a).) If an objection is interposed, the written response must (1) identify with particularity any document, tangible thing, or land falling within any category of item in the demand to which an objection is being made, and (2) set forth clearly the extent of, and the specific ground for, the objection. (C.C.P. §2031.240(b).) II privilege is a ground for objection, the specific privilege must be stated. If work product is a ground for objection that must also be specifically stated. *(Id.)*

The party responding to the request must sign the response under penalty of perjury unless it contains only objections. (C.C.P. §2031.250(a).) An entity must sign under oath through an officer or agent. If the signing officer or agent is an attorney, the attorney-client privilege and work product protection is waived during any subsequent discovery from that attorney concerning the identity of sources of information contained in the response. (C.C.P. §2031.250(b).) If objections are interposed, the party's attorney must sign the response as well. (C.C.P. §2031.250(c).)

3. Motion for Order Compelling Further Response

Unlike a motion to compel further answers to interrogatories or to compel a witness to answer questions posed at a deposition, a party moving to compel production "shall set forth [in the motion] specific facts showing good cause justifying the discovery sought by the inspection demand." (C.C.P. §2031.310(b)(l).) This "good cause" requirement was derived from the following sentence of former C.C.P. §2034(a): "Upon the refusal or failure of a party . . . to permit inspection or entry after having been served with a request under Section 2031, the other party serving the request may ... *upon a showing of good cause* make application for an order to compel compliance with this request."

Thus, good cause does not exist for production of documents which are presumably in the possession of the propounding party. *(Associated Brewers Distrib. Co. v. Sup. Ct.* (1967) 65 Cal.2d 583, 588.) A showing of "specific facts" rather than mere conclusions is required. *(Fireman's Fund Ins. Co. v. Sup. Ct.* (1991)233 Cal.App.3d 1138, 1141.)

Before such a motion can be granted, the moving party is also required to show that the parties have met and conferred regarding the discovery dispute. (C.C.P. §2031.

4. SDT for Personal and Employment Records

Special procedures and limitations apply when an attempt is made to subpoena "personal records" (C.C.P. §§1985.3, 1985.4) and "employment records" (C.C.P. § 1985.6.) C.C.P. 1985.3(a)(l) defines "personal records"as:

> "the original, any copy of books, documents, other writings, or electronic data pertaining to a consumer and which are maintained by any 'witness' which is a physician, a dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code."

"Consumer" includes individuals, partnerships of five or fewer persons, association, or trust which has transacted business with, or has used the services of the witness or for whom the witness acted as agent or fiduciary. (C.C.P. §1985.3(a)(2).

If personal records of a consumer are being sought, at least 10 days prior to the date set for production (15 if service is by mail) and at least 5 days prior to serving the witness, the party seeking the records must serve on the consumer (including a party) a copy of the SDT and any affidavit supporting the issuance of the subpoena. (C.C.P. §1985.3(b).) The party seeking the records must also either serve the witness with a prooJ of service showing the proper notice under 1985.3(b) has been given the consumer or serve the witness with an authorization signed by the consumer or the consumer's lawyer. (C.C.P. §1985.3(c).) An SDT for records maintained by a telephone corporation that is a public utility shall not be complied with unless a consent to release, signed by the consumer is served with the request. (C.C.P. §1985(f).)

A party/consumer can bring a motion to quash under C.C.P. §1985.1 but must notify the witness and deposition officer at least 5 days prior to production. Any other consumer or nonparty whose records are being sought may, prior to the deposition serve on the subpoenaing party, a written objection that cites specific grounds for objection. No witness or deposition officer shall be required to produce subpoenaed records after receipt of notice of motion to quash or after receipt of a written objection by a nonparty consumer. (C.C.P. §1985.3(g).) The party seeking

the records may bring a motion to compel under §1987.1 within 20 days of service of the written objections. *(Id.)* If the subpoenaing party is the consumer, notice under 1985.3 is not required. (C.C.P. §1985.3(1).)

C.C.P. §1985.6 defines "employment records" as "the original or any copy of books, documents, other writings, or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by any labor organization that has represented or currently represents the employee." The provisions of C.C.P. §1985.6 applicable to SDTs directed at employment records are virtually identical to those applicable to "personal records" under C.C.P. §1985.3.

B. Federal

Federal Rule of Civil Procedure 34 governs production of documents and inspections with respect to parties and Federal Rule of Civil Procedure 45 governs subpoenaed documents from non-parties. Under FRCP 34, the request must set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify reasonable time, place and manner for making the inspection and performing the related acts. A written response is required within 30 days after service of the request. The response must state with respect to each item or category that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated. If an objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

A party who produces documents for inspection must produce them as they are kept in the usual course of business or organize and label them to correspond with the categories in the request. As with the interrogatories, a request for production whether under 34 or as a subpoena duces tecum under 45 may be served only after the early conference of the parties under FRCP 26(f). (FRCP 34(b).) Because the response is not due until 30 days after the request is served, the date chosen for the time and place for inspection should be at least 30 days after the request is served. Again, failure to timely serve a response will result in waiver to all objections including claims of privilege and work product. *(Richmark Corp. v. Timber Falling Consultants* (9th Cir. 1992) 959 F.2d 1468, 1473.) It is important to keep in mind that the extension of time for service by mail is three days in federal court (see FRCP 6) rather than the five days under state practice.

In federal court a privilege log is generally required when objecting to all or a portion of a category on the grounds that the documents are privileged. The log must include the following: (1) the general nature of the document (without disclosing its contents); (2) the identity and position of its author; (3) the date it was written; (4) the identity and position of all addressees and recipients; (5) the document's present location; and (6) the specific reasons it was withheld. *(United States v. Construction Products Research, Inc.* (2nd Cir. 1996) 73 F.3d 464, 473.)

Where creation of a document by document privilege log would be unreasonably burdensome (e.g. voluminous documents claimed are privileged), a description by category may suffice. (See Advisory Committee Notes to 1993 Amendments to FRCP

26(b); see also *In re Imperial Corp. Of America* (S.D. Cal. 1997) 174 F.R.D. 475, 478-479.)

The failure to file a privilege log does not mean that there has been a waiver of the privilege. *(Burlington Northern & Santa Fe Railway Corp. v. United States District Court for District of Montana* (9th Cir. 2005) 408 F.3d 1142, 1148.) However, the court has discretion to reject a claim of privilege where an insufficient privilege log is provided. *(United States v. Construction Products Research, Inc.* (2nd Cir. 1996) 73 F.3d 464, 473.)

The written response **need not be verified under oath** by the party to whom the request is directed and the propounding party must retain possession of the original discovery request and response.

***

John D. Rowell is a partner in the firm Cheong, Denove, Rowell & Bennett. John has been practicing law for almost thirty years and has seven and eight figure verdicts. He has focused much of his time and effort on products liability cases, representing clients who have been catastrophically injured or whose loved ones have been killed as a result of motor vehicle accidents, train accidents, airplane accidents and defective products.

www.CDRB-Law.com