

California vs. Federal Practice: Document Requests and Depositions

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Many litigation practices, such as motion drafting, deposition questioning and defending, or presenting oral arguments, cross-apply whether in state or federal court. But, while there are many similarities between practicing law in federal court and California state court, there are subtle procedural differences of which to be aware. It is important to recognize when following proven California practices may actually run afoul of the Federal Rules of Civil Procedure.

One area in which we have seen many California litigators stumble in federal court is serving deposition notices.

Differences Between Federal and State Court Deposition Notices

Under the California Code of Civil Procedure, a deposition notice served at least 10 days before the date of the deposition compels the attendance and testimony of any deponent who is a party to the action or affiliated with a party, such as an officer, director, managing agent, or employee. See Cal. Civ. Proc. Code § 2025.280(a).¹ That deposition notice, coupled with a request for production of documents and things that is reasonably particular, compels the deponent to produce books, records, and other materials—including electronically stored information—on the date and at the location of the deposition. *Id.*; see also Cal. Civ. Proc. Code § 2025.220(a)(4). Despite the deposition notice including a request for production of documents and things, a longer notice is not required—the normal 10-day notice suffices to compel production (with any extensions based on the form of service). See Cal. Civ. Proc. Code § 2025.270(a).² The California Code of Civil Procedure thus offers an “end around” Code Section 2031.010 and its 30-day notice period for requests for production of documents and things to parties. California litigators therefore often serve a request for production of documents and things along with the deposition notice when it is less than thirty days before the deposition, or to ensure that the deponent produces all of the documents in his, her, or its possession. Importantly, the request for production of documents attached to a deposition notice is directed to the deponent, not the party.

Many California litigators attempt to import this procedure into federal cases, including federal cases pending in districts outside California. The Federal Rules of Civil Procedure do not, however, permit requests for production of documents and things in the same manner as the California Code of Civil Procedure. Instead, the Federal Rules of Civil Procedure treat requests for production of documents and things attached to a deposition notice as a request under Rule 34.

Accordingly, the recipient of such a deposition notice has a minimum of 30 days to respond and produce documents. See Fed. R. Civ. P. 34. If the serving party wants the documents produced before the deposition, it must serve the deposition notice at least 30 days before the deposition date noticed.

¹ To compel deposition testimony or documents from non-parties or non-party-affiliated individuals, a subpoena is required. See Cal. Civ. Proc. Code § 1985 et seq.

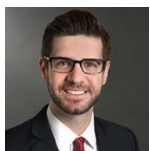
² Where the deposition notice includes a request for documents pertaining to employment records or personal consumer records, 20 days’ notice is required. See Cal. Civ. Proc. Code §§ 1985.6 and 2025.270(c).

The federal rule is even more limiting than that. Because Rule 34 only permits requests for production of documents and things to parties, *see* Fed. R. Civ. P. 34, requests for production of documents and things attached to deposition notices to anyone other than a party, including party-affiliated deponents, are improper (absent compliance with Rule 45). A party may, nevertheless, have to produce its employee's or party-affiliate's documents. Rule 34 requires a responding party to produce documents, electronically stored information, and other tangible things in the "responding party's possession, custody, or control." Fed. R. Civ. P. 34(a). The scope of a party's possession, custody, or control over an employee's or party-affiliate's documents, and thus whether such documents are produced, may hinge upon that party's policies and procedures or other contractual obligations between the party and the employee or affiliate. Various responses to such requests—ranging from objection, refusal to answer, or both, to responding as though the employee or affiliate were properly served with a valid Rule 34 request for production—may be appropriate in the circumstances. To be certain that an employee or party-affiliate produces its documents, the safest course—unless you are certain of winning the custody or control argument—is to secure opposing counsel's agreement as to how the request will be handled, or to serve a subpoena on the employee or party-affiliate requiring it to produce the documents requested.

Implications of the Differences

Thus, to ensure that a non-party brings requested documents to a federal case deposition, the deponent should be served with a subpoena. *See* Fed. R. Civ. P. 45(a)(1)(D). To request documents from an employee's personal email, for example, the requesting party should consider utilizing the subpoena procedures to obtain documents in the employee's possession, custody, or control that may not be in the employer's possession, custody, or control. By only relying on a deposition notice to a party-affiliated witness, the deposing party may miss out on relevant and important documents.

Because the procedures in federal court are distinct from potentially more familiar state court procedures, it is important to refer to the Federal Rules of Civil Procedure for their nuances and not rely on one's instincts, which may be more attuned to state court than federal court.



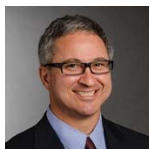
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