Discovery and deposition practice in federal court

Key differences between federal practice and California practice

By Brian J. Malloy

Federal law governs "procedural" matters for cases that are in federal court, whether based on state or federal substantive law. (See *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64.) This article will highlight significant differences between discovery and depositions in federal practice as compared to California state practice.

The Federal Rules of Civil Procedure ("Rules") govern civil pretrial and trial practice in the federal courts. However, these Rules are not the only source; each federal district has civil local rules that may govern certain procedures. In addition, many federal district judges have standing orders specific to civil cases which govern discovery and, while beyond the scope of this article, law and motion and trial practice.

The local rules and standing orders are usually available on the district court's Web site. While you should always be familiar with your district's civil local rules and your assigned judge's standing orders, this article will highlight when special attention should be paid to them.

As a threshold matter, the federal Rules provide that the scope of discovery, unless otherwise limited by the court, is the following: "Parties may obtain discovery regarding any *nonprivileged matter that is relevant to any party's claim or defense* – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter" and that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." (Rule 26(b)(1) (emphasis supplied).) For "good cause," the district court may permit discovery "of any matter relevant to the subject matter involved in the action." (Rule 26(b)(1).)

Initial disclosures

Unless there is a stipulation, court order, or the case falls within a limited exception, the federal Rules do not permit discovery from parties or nonparties "before the parties have conferred as required by Rule 26(f) . . . ." (Rule 26(d)(1).) This Rule 26(f) conference must occur 21 days prior to the district court's scheduling conference (case management conference). (Rule 26(f)(1).) At the Rule 26(f) conference, a number of items must be discussed by the parties, including "the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery

plan." (Rule 26(f)(2).) The parties generally must prepare a joint case management report prior to the scheduling conference. The district judge will enter a Scheduling Order pursuant to Rule 16 following this conference, which will usually set a trial date, a variety of pretrial deadlines (i.e., close of fact and expert discovery), and other case management issues.

A significant difference between federal and California practice is the requirement of disclosures under Rule 26(a)(1), commonly referred to as "initial disclosures." The initial disclosures are to be exchanged "at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan." (Rule 26(a)(1)(C).) Thus, in practice, these disclosures will be made near the time of the Rule 26(f) conference and the district court's scheduling conference.

It is important to understand what is required to be disclosed and the consequences for failing to disclose. Rule 26(a)(1)(A) requires the disclosure of the following information concerning witnesses, documents, damage computations and insurance agreement information:

> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party *may use to support its claims or defenses*, unless the use would be solely for impeachment;
> (ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and *may use to support its claims or defenses*, unless the use would be solely for impeachment;
> (iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(Emphasis added).

These disclosures must be made "based on the information then reasonably available" to the party. (Rule 26(a)(1)(E).)

At the Rule 26(f) conference with opposing counsel, you may find it beneficial to attempt to reach an agreement to produce the initial disclosure documents (as opposed to simply "describing" them) without the need for a formal discovery request. This will save time and also provide you with the opposing party's documents sooner. Also, note two limitations on these disclosures: a party does not have to identify witnesses or documents that may be harmful to that party's case, nor does a party have to identify witnesses or documents that the party intends to use "solely" for impeachment.

A party is also under a continuing duty to supplement its initial disclosures (as well as all other discovery responses) "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ." (Rule 26(e)(1)(A).)

Written discovery

Interrogatories are governed by Rule 33. There are no Form Interrogatories (or Special Interrogatories) in federal court; they are simply called Interrogatories. The Rule limits a party to serving no more than 25 interrogatories "including all discrete subparts" on any other party. (Rule 33(a)(1).) Unlike state practice, however, you cannot sign a declaration to propound more than 25; instead, you either have to stipulate with opposing counsel to exceed that limit or seek leave of court. (Rule 33(a)(1).)

Therefore, if you anticipate needing more than 25 interrogatories in a particular case, you should bring this up in your Rule 26(f) conference with opposing counsel before the scheduling conference and propose an increase in your joint case management statement. This will enable the judge to enter that increase as part of the Scheduling Order. This will save time and hassle later on if you find yourself needing to exceed this number.

The party served with the Interrogatories has 30 days to respond and any grounds for objection must be stated or they are waived unless the court for good cause excuses the failure. (Rule 30(b)(2), (4).)[1]

While an "interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact," Rule 33 permits the court to "order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." (Rule 33(a)(2).) In other words, if defendants propound contention interrogatories right at the start of the case, case law based on this section, particularly in the Northern District, holds that such contention interrogatories are premature and the responses should be deferred. (See, *e.g., In re Convergent Technologies Securities Litigation* (N.D. Cal. 1985) 108 F.R.D. 328, 336; *see also B. Braun Medical Inc. v. Abbott Laboratories* (E.D.Pa. 1994) 155 F.R.D. 525, 527; *Storie v. U.S.* (E.D. Mo. 1991) 142 F.R.D. 317, 319); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.* (D.N.J.1990) 135 F.R.D. 101, 111.)

Requests for Production of Documents are governed by Rule 34. Rule 34 allows a party to request from another party:

> (1) to produce and permit the requesting party or its representative to in-

spect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(Rule 34(a).)

When preparing document requests, you should define the term "document" as a writing, recording or photograph as defined in Rule 1001 of the Federal Rules of Evidence, including the original or a copy of any handwritten, typewritten, printed, photostatic, photographic, computer, magnetic impulse, mechanical or electronically recorded, or any other form of data compilation. While beyond the scope of this article, discovery of electronically stored information ("ESI") is a key area that needs to be addressed early in a case. The party served with a document production request has 30 days to respond. (Rule 34(b)(2)(A).) A privilege log is required if documents are being withheld based on privilege. (Rule 26(b)(5)(A).) Unlike responses to interrogatories and unlike state practice, the responses to document requests do not have to be verified.

Requests for Admissions are governed by Rule 36, which operates in a similar manner as Requests for Admissions under state law. The party served with the request has 30 days to respond (Rule 36(a)(3)) and there are no limits under the Rules on the number of requests that can be propounded. However, be aware of a potential trap. Unlike Form Interrogatory 17.1, which requests information supporting a denial of a request to admit, there is no corresponding interrogatory in federal court. If you send similar discovery in federal court, you have to be mindful of the number of interrogatories that you may send. While the Rules do not address this, many federal districts' local rules state that asking for the information that is contained in Form Interrogatory No. 17.1 will be treated as a separate interrogatory subject to those limitations. (See, *e.g.*, N.D. Civ. L. Rule 36-2 ("A demand that a party set forth the basis for a denial of a requested admission will be treated as a separate discovery request (an interrogatory) and is allowable only to the extent that a party is entitled to propound additional interrogatories.").)

Similar to responses to Requests for Production, responses to Requests for Admissions do not have to be verified. It is critical to respond to Requests for Admissions because failure to respond results in the requests being deemed admitted without the need for a motion to have the responses established as admitted. (Rule 36(a)(3).) Cost of proof sanctions are available against a party who denies a Request for Admission and the matter is proven at trial. (Rule 37(c)(2).)

Finally, Rule 35 governs physical and mental examinations. The Rule states that "[t]he court where the action is pending may order a party whose mental or physical condition – including blood group – *is in controversy* to submit to a physical or mental examination by a suitably licensed or certified examiner." (emphasis supplied). (Rule 35(a)(1).) This order "(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it." (Rule 35(a)(2).)

A party may request a copy of the examiner's report, "together with like reports of all earlier examinations of the same condition." (Rule 35(b)(1).) The report "must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests." (Rule 35(b)(2).) The party who sought the examination, after delivering the report, may request and receive from the other party "like reports of all earlier or later examinations of the same condition." (Rule 35(b)(3).)

Subpoenas to nonparties

Rule 45 governs subpoenas. Subpoenas may issue for deposition testimony and/or document production. There is no specific time limitation for deposition testimony or, unlike Rule 34, document requests. Instead, the time to comply must be reasonable. (Rule 45(c)(3)(i).)

Depositions

Rule 30 governs depositions in federal court.[2]

Unlike state court where the Code of Civil Procedure provides timing requirements, a deposition notice in federal court need only give "reasonable written notice." (Rule 30(b)(1).) While "reasonable" generally depends on the facts of a particular case and a particular notice, some courts have interpreted periods as short as eight days notice to be reasonable. (See, *e.g.*, *Jones v. United States* (*S.D.N.Y. 1989*) 720 F.Supp. 355, 366.) However, time limits apply if you want the party deponent to bring documents to the deposition, which are governed by Rule 34's limitations. (Rule 30(b)(2).) In other words, if you wish to compel the party deponent to bring documents, the deposition cannot be noticed to occur for at least 30 days.

The Northern District local rules require conferring with opposing counsel before sending out a notice of a party. (N.D. Civ. L. Rule 30-1.) Regarding a non-party witness, "[a] party noticing a deposition of a witness who is not a party or affiliated with a party must also meet and confer about scheduling, but may do so after serving the nonparty witness with a subpoena." (*Ibid.*) The local rules also

require parties to confer regarding the sequencing of deposition exhibits. (N.D. Civ. L. Rule 30-2.)

Rule 30(a)(2)(A)(i) limits the number of depositions to 10 "by the plaintiffs, or by the defendants, or by the third-party defendants." In other words, the limit is 10 depositions per each side. The parties can stipulate to exceed this limitation or a party can seek leave of court. (See Rule 30(a)(2)(A).)

There are also specific duration limits on depositions in federal court: "Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." (Rule 30(d)(1).) Again, if you believe you will need more than 10 depositions, this should be addressed at the Rule 26(f) conference and with the district judge at the initial scheduling conference.

Similar to state practice (Code Civ. Proc., § 2025.230), you may direct a notice or subpoena at an organization:

> *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe *with reasonable particularity the matters for examination*. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons *who consent to testify on its behalf*; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. *The persons designated must testify about information known or reasonably available to the organization*. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Rule 30(b)(6) (emphasis supplied).

Although Rule 30(b)(6) does not use the term "most qualified," the Rule 30(b)(6) witness must be knowledgeable of the "matters for examination" and the testimony binds the organization.

When objecting at a deposition, Rule 30 states that a "person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." (Rule 30(c)(2).) Rule 30(d)(3), in turn, allows a party or the deponent to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." (Rule 30(d)(3)(A).) This provision has a venue rule, allowing the motion to be filed either "in the court where the action is pending or the deposition is being taken." (*Ibid.*)

Rule 32 discusses the requirements for using a transcript of a deposition at a court proceeding and sets forth which objections must be made on the record at the deposition (Rule 32(d)) including objections to "the form of a question or answer" (Rule 32(d)(3)(B)(i).)

Expert disclosures

Rule 26(a)(2) governs the disclosure of expert identities and opinions. All witnesses who will be providing expert testimony must be identified in the disclosure. (Rule 26(a)(2)(A).) A key difference from state practice is the requirement of a written expert report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." (Rule 26(a)(2)(B).) The written report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> (ii) the facts or data considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
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> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

(Rule 26(a)(2)(B)(i)-(vi).)

In 2010, this Rule was amended to provide that drafts of expert reports are protected attorney-client work product. (See Rule 26(b)(4)(B).) As to experts who do not have to provide a written report, you still must disclose their subject matter of testimony and a summary of facts and opinions to which the witness is expected to testify. (Rule 26(a)(2)(C).)

The expert disclosure deadline is usually set in the Scheduling Order but if not, 90 days before the trial date. (Rule 26(a)(2)(D)(i).) Rebuttal disclosures are due 30 days after the other party's disclosure. (Rule 26(a)(2)(D)(ii).) Note that "staggered" disclosures (where the plaintiff discloses first, then the defendant discloses sometime thereafter) are not required by the federal Rules.

Compelling discovery

Rule 37 governs motions to compel and sanctions for all discovery matters. Unlike state court requirements which have time limits in which a motion to compel must be filed, the federal Rules do not specify a deadline. The Rules do require the party moving for an order compelling disclosures or discovery under Rule 37(a) to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." (Rule 37(a)(1).) District courts also have local rules requiring a good faith meet and confer effort prior to filing any motion. (See, *e.g.*, N.D. Civ. L. Rule 37-1 ("Procedures for Resolving Disputes").)

In addition, district judges generally have requirements in their standing orders setting forth processes that must be followed concerning discovery disputes before entertaining a motion to compel.

For example, some judges require that the meet and confer sessions be transcribed or recorded. Other judges require a short letter brief to be submitted followed by a conference call with the court prior to any motions to compel being permitted. Therefore, because of these particular requirements that are judge-specific, it is important to become familiar with your assigned judge's requirements on compelling discovery.

A federal court has authority under Rule 37 to impose sanctions for a variety of discovery abuses (Rule 37(b)),[3] including failing to provide or supplement initial disclosures (Rule 37(c)). Regarding initial disclosures, the rule provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." (Rule 37(c)(1).) Note that these exclusions do not require violation of a court order. The requirement of disclosure and supplementation should therefore especially be taken to heart.

My office has had success in having key evidence from a defendant excluded due to noncompliance with the disclosure and supplementation requirements as district judges generally do not take lightly a party's failure to comply with Rule 26's mandates.

Conclusion

Although this article focused on discovery, there are several other important differences in federal practice from pleadings through trial. For example, the rules require that service of the summons and complaint be made within 120 days (Rule 4(m)), require that an answer in federal court must specifically admit or deny each of the complaint's allegations (Rule 8(b)), has potentially shorter time to respond to dispositive motions based on local civil rules, require specified pretrial disclosures (Rule 26(a)(3)) and require a unanimous verdict in civil cases but only require six jurors (Rule 48). Thus, it is important that these rules, local district civil rules and the district judge's standing orders are kept in mind through all aspects of your case.


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Endnotes

[1] The time limitations in the federal rules discussed in this article do not take into account extensions of time when service is made other than by personal service. Rule 6(d) provides for an additional three days when service is made by mail or other specified means.

[2] Rule 31 applies to written question depositions.

[3] These sanctions include "(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination" as well as reasonable expenses, including attorney fees. (Rule 37(b)(2)(A), (C)); (see also Rule 37(c)(2) (admissions), Rule 37(d) (depositions).)