Federal court discovery and deposition practice

An overview and update of the most important Federal Rules, in particular the changes effective December 1, 2015, and important differences with California practice

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The Federal Rules of Civil Procedure ("Rules") govern civil pretrial and trial practice in the federal courts. Each federal district also has its own civil local rules that may govern certain procedures and most federal district judges have standing orders specific to civil cases. This article will provide a general overview of federal discovery and deposition procedure, with particular attention to important changes made to the Rules effective December 1, 2015, and important differences with California practice.

Scope of discovery

Effective December 1, 2015, Rule 26(b) was amended to read that the scope of discovery had two requirements. A "relevancy" requirement for "any nonprivileged matter that is relevant to any party's claim or defense" and a "proportionality" requirement that the discovery be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits." (Fed. Rules Civ. Proc., rule 26(b)(1).)

In other words, in order for evidence to be discoverable, it must not only be non-privileged and relevant to the claims or defenses, but also must be proportional to the needs of the case.

First, the discovery must be relevant to the claims or defenses. The 2015 Amendments deleted the phrase "appears reasonably calculated to lead to the discovery of admissible evidence" from the scope of discovery. However, this Rule explicitly states that matter does not have to be admissible to be discoverable.

Second, the 2015 Amendments require that a number of "proportionality" factors must also be considered. But this is not a burden that solely falls on the party seeking the discovery. The Advisory Committee states:

> A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

(See Advisory Comm. Notes, 2015 Amends.)

The Advisory Committee Notes state that a party may not "refuse discovery simply by making a boilerplate objection that it is not proportional." Moreover, the fact that discovery oftentimes flows mostly in one direction does not mean that it is disproportional — that is not one of the factors to be considered. However, it is important to be prepared to address these proportionality factors when you draft discovery and especially if you need to compel responses.

Initial disclosures

Unless there is a stipulation, court order, or the case falls within a limited exception, the 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. The Rules direct a number of items be discussed at this conference. (Rule 26(f)(2).) 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.

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 and electronically stored information

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.

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 inspect, 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).)

A privilege log is required if the responding party is withholding documents 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.

Documents and ESI requests under Rule 34

The 2015 Amendments make several revisions to Rule 34 requests. First, document requests under Rule 34 can now be served prior to the Rule 26(f) conference, 21 days after the party has been served. (Rule 26(d)(2)(A).) However, the time to respond does not begin until the parties have the Rule 26(f) conference. (Rule 26(d)(2).)

The 2015 Amendments also sought to provide clarity regarding objections to Rule 34 requests and productions. Rule 34(b)(2)(B) was amended to require that objections be stated "with specificity the grounds for objecting to the request, including the reasons." This amendment ties to a revision of Rule 34(b)(2)(C), which directs that an objection to a request under Rule 34 must state whether anything is being withheld on the basis of that objection. The Advisory Committee Notes state that "[t]his amendment

should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." (Advisory Comm. Notes, 2015 Amends.)

Further, the responding party cannot simply sit on the actual production of documents or take its time with an undefined rolling production: "The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." (Rule 34(b)(2)(B).)

If you are getting boilerplate objections and ambiguous responses, making it unclear whether documents are being withheld, use the newly amended Rule 34 to your advantage. For example, in *Loop AI Labs, Inc. v. Gatti*, No. 15-cv-00798-HSG (DMR), 2016 WL 9132846 (N.D. Cal. May 6, 2016), the court discussed the new amendments to Rule 34 and found that the defendant's responses did not comply with them, ordering further responses and ultimately sanctions.

Rule 34 allows for discovery of electronically stored information ("ESI"). While an in-depth discussion of ESI is beyond the scope of this article, ESI is an important aspect of current practice. ESI must be discussed early in the case and certainly as part of a Rule 26(f) conference. For example, the Northern District of California has an entire section of its website devoted to E-Discovery (ESI) Guidelines, https://www.cand.uscourts.gov/eDiscoveryGuidelines, which includes an ESI Checklist to be used in the Rule 26(f) conference and an ESI Guidelines document, both revised in December 2015.

Requests for Admissions

Requests for Admissions are governed by Rule 36, which operates in a similar manner as Requests for Admissions under state law. 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 a separate interrogatory subject to those limitations. (See, e.g., N.D. Civ. L. Rule 36-2.) 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).)

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. Unlike in 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).) "Reasonable" notice depends on the facts of a particular case and of a particular notice. For example, some courts have interpreted notice periods as short as eight days to be reasonable under the facts of the case, *Jones v. United States,* 720 F.Supp. 355, 366 (S.D.N.Y. 1989), while in more complex cases ten days was held to be unreasonable, *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 327-328 (N.D.Ill. 2005). 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).) As with expanding the number of interrogatories, 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.

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).)

Similar to state practice (Code of 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. Importantly, if the entity produces several individuals to cover various topics, that will only count as one deposition toward the 10 deposition limit.

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;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(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).)

Attorney-expert communications

Under 2010 amendments to the Rules, there is a limited protection for attorney-expert communications which differs from California state practice. Unlike California state practice, drafts of expert reports are shielded from discovery under Rule 26(b)(4)(B): "Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." Additionally, communications between an expert and attorney also receive limited protection. Such communications "between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communication" are generally[1] protected from disclosure except to the extent the communications: "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." (Rule 26(a)(2)(C)(i)-(iii).)

Therefore, email communications between the expert and attorney are no longer discoverable, provided the email communication does not fit within one of the three exceptions (compensation, facts or data considered, or relied-upon assumptions). The Advisory Committee Notes to these amendments state that they were added "to provide work-product protection against discovery regarding draft expert disclosures or reports and – with three specific exceptions – communications between expert witnesses and counsel."

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

The federal rules do not contain any time limit in which a motion to compel discovery must be filed. But you should check your court's local rules and even the judge's standing order. For instance, in the Northern District of California you must move to compel within seven days of the close of discovery. (See N.D. Civ. L. Rule 37-3.)

Rule 37 governs motions to compel and sanctions for all discovery matters. 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.")

Of note, Rule 37(e) was amended to provide clarity on when sanctions should be imposed for the failure of a party to produce ESI.

Oftentimes in federal court you will be assigned to a magistrate judge to deal with discovery disputes. It is very important to know your district judge and magistrate judge's requirements for moving to compel discovery. Many judges have requirements that must be followed before filing 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)), 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.


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Endnote:

[1] The materials are "generally" protected because under Rule 26(b)(3)(A), a party may obtain "documents and tangible things that are prepared in anticipation of litigation or for trial" by another party or party representative if those materials are "otherwise discoverable under Rule 26(b)(1)" *and* "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."