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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

Seven ways to quash a subpoena

A DEPOSITION SUBPOENA FOR THE PRODUCTION OF BUSINESS RECORDS IS A USEFUL TOOL IN GATHERING EVIDENCE

A Deposition Subpoena for the Production of Business Records is a useful discovery tool in gathering evidence. It is empowered by California Code of Civil Procedure § 2020 et seq. and can be served on any natural person or an agent authorized by an organization to accept service of a subpoena. The Subpoena for the Production of Business Records is often used to obtain documents from third parties and help uncover evidence that will support or devaluate a claim. The Deposition Subpoena for the Production of Business Records is served to the witness who will provide the documents. If necessary, a notice to consumer or employee and objection must also be served to the consumer or employee to allow them time to object to the subpoena. Then, the deposition officer, or the photocopying agent, will be responsible to obtain copies of the records from the witness. This is often done either by appearing in person and photocopying the documents on the production date or obtaining certified copies of all the records via mail. The deposition officer will then provide copies of the records to the requesting party once they receive them. If there are no records, the deposition officer will obtain an affidavit of no records from the custodian of records of the witness.

The seven ways to challenge a subpoena

Attachment 3 of the subpoena lays out a detailed description of the documents requested by the requesting party. Opposing counsel will often use the same

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boilerplate language in an attempt to gather as many documents as they can. Or, they feel that most attorneys will not challenge the subpoena, and they may get their hands on additional documents that are detrimental to Plaintiff's claim. The language is often overbroad, not reasonably calculated to lead to admissible evidence, and violates Plaintiff's privacy rights. Do not let opposing counsel get these records.

Overbroad medical records

Plaintiff has a statutory physician-patient privilege as to their medical records. (See Evid. Code §§ 990 & 1014.) Plaintiff also has an "inalienable right of privacy" provided by the California Constitution, Article 1 § 1. In every personal injury case, opposing counsel will try to obtain all of plaintiff's medical records. Often, the requests are overbroad and request records from more than ten years prior to the incident. The request will also refer to all body parts and will not be limited to the body parts that are at issue in the personal injury action. The language in these subpoenas improperly invades plaintiff's constitutional right of privacy. Opposing counsel is not entitled to these records and more likely than not, those records will give opposing counsel something to blame plaintiff's alleged injuries on.

The language in the subpoena must be limited to ten years prior to the incident and must not include any medical records referring to any body parts not claimed in the lawsuit. As confirmed in *Hale v. Superior Court* (1994) 28 Cal.App.4th 1421, 1424, even if part of a medical condition is at issue, it does not follow that the plaintiff waived the privilege as to otherwise protected aspects of their medical history during their lifetime, or some condition that they may have suffered from at the time of the incident which is clearly unrelated to the incident.

Unrelated psych medical records

When a plaintiff files a lawsuit for personal injuries, the physician-patient relationship and privilege is waived for those body parts that are alleged. However, plaintiff still has a right of privacy as to the *physical and mental conditions* that are unrelated to the claim or injury. Specifically, in *Britt v. Sup. Ct* (1978) 20 Cal.3d 844, 863-64, the court explained:

> … [P]laintiffs are not 'obligated to sacrifice all privacy to seek redress for a specific [physical], mental or emotional injury'; while they may not withhold information which relates to any physical or mental condition which they have put in issue by bringing this lawsuit, they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past.

Just because a plaintiff claims "pain and suffering and emotional distress" as part of their mental distress claim in a personal injury action does not put the plaintiff's mental condition at issue or waive plaintiff's privacy rights. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1116-17.) The burden is on the party seeking the constitutionally protected information to establish direct relevance. Mere speculation that portions of the medical records might be relevant to some substantive issue is not enough. Unless plaintiff is alleging an emotional injury that is graver than the *normal* emotional distress associated with a personal injury action, then psychiatric medical records are protected by plaintiff's right to privacy and are not reasonably calculated to lead to discovery of admissible evidence.

Pre-mature expert reports

Public policy encourages the facilitation of making offers of settlement that may lead to settlement, absent the court's intervention. (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1475.) Frequently, an expert's draft report is sent with the demand letter to opposing counsel. The expert's report itself is protected because it was provided during the course of settlement negotiations. (Evid.Code § 1154.) However, since the name is not, opposing counsel may subpoena the expert for a copy of the report, or other communications, along with a signed declaration by the custodian of records. This can lead to the discovery of privileged communications between you and your expert, including attorney impressions, case strategy, etc. if the subpoena is not objected to.

The identity and preliminary observations of the expert is still confidential and protected by the attorney work product doctrine, regardless of whether the expert has been designated or not. (See also Evid.Code § 1152.) Furthermore, section 2034.210 of the Code of Civil Procedure specifies the timing and procedure for simultaneous exchange of expert information, timing of such demand, discoverable reports and writings, persons authorized to issue such a demand, the time to make such a demand, the language necessary in the demand, etc. Any attempt to obtain an expert's report earlier than the Code allows would violate the statutory procedures.

W2s and other tax documents

Once the plaintiff is making a claim for lost wages, opposing counsel will request the plaintiff's employment records. Payroll records or attendance records are discoverable when the plaintiff is asserting a lost wages or a loss of earning capacity claim. Nevertheless, documents prepared for tax purposes, such as tax returns, W-2s, W-4s, partnership tax documents, employment tax documents, or corporate tax documents are privileged. The court in *Brown v. Superior Court* (1977) 71 Cal.App.3d 141, 143-44, stated that W-2 forms, which are required to be attached to a taxpayer's state and federal income tax returns, constitute an integral part of the tax return and qualify as information contained in the returns and are therefore protected. The taxpayer privilege was created to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in their return, without fear that their statements will be revealed or used against them for other purposes. (*Webb v. Standard Oil* (1957) 49 Cal.2d 509, 513.) Opposing counsel can verify plaintiff's lost wages or loss of earning capacity through payroll or check stubs. Alternatively, if there is no other way to support the plaintiff's claim, consider a stipulation requiring the destruction of the documents at the conclusion of the lawsuit.

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Personnel records

Personnel records are the documents referring to an employee's eligibility for employment, promotion, termination, disciplinary actions, evaluations, reports about the employee's character, etc. The broad request for *personnel records* contains documents that are not relative to the plaintiff's claim and violates Plaintiff's privacy rights. Personnel documents and information, communicated to an employer in confidence are covered by the employee's constitutional right of privacy. (*Board of Trustees v. Superior Court,* 119 Cal.App.3d 516, 174 Cal.Rptr. 160 (1981).) "The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code of Civ. Proc. § 2017.020(a).) There are far less intrusive means for opposing counsel to obtain the necessary information and is often obtained during the plaintiff's deposition. Opposing counsel must not be allowed to run roughshod over the privacy rights of the plaintiff and third parties simply because opposing counsel wishes to inquire into plaintiff's entire employment history.

Prior insurance records

The California legislature has enacted the Insurance Information and Privacy Protection Act, Insurance Code §§ 791 et seq., which applies to, and restricts, information-gathering practices and disclosures of information by insurers. Specifically, Insurance Code § 791.13(a) prohibits an insurance company or its agents from disclosing any personal or privileged information received in connection with an insurance transaction, unless the insured authorizes such disclosure. (*Mead Reinsurance Company v. Superior Court* (1986) 188 Cal.App.3d 313, 322.)

Subpoenas requesting entire insurance files may also call for attorney-client privileged information and attorney work product. The request may call for recorded statements, interviews, and investigation done in anticipation of litigation which is protected. The insurance company also has a duty and obligation to assert the appropriate privilege upon receipt of the subpoena. (*Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 272-83.) Make sure the subpoena is objected to and a copy is sent to the insurance company reminding them of their duty to protect their insured's privacy interest.

Fishing expedition

California Code of Civ. Proc. § 2017 allows a party to obtain discovery regarding any matter not privileged. The code also allows a party to obtain evidence reasonably calculated to lead to the discovery of admissible evidence. However, the statute does not give opposing counsel the go-around with rummaging through different consumers, employees, and other providers in an attempt to obtain evidence. If there are several subpoenas that are not addressed to any medical provider mentioned at plaintiff's deposition or in plaintiff's discovery responses, chances are, that opposing counsel is on a fishing expedition. In *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 384-85, the seminal case in California civil discovery, the court gave examples of *improper fishing expeditions*:

> [T]he method of 'fishing' may be, in a particular case, entirely improper i.e., insufficient identification of the requested information to acquaint the other party with the nature of information desired, attempt to place the burden and cost of supplying information equally available to both solely upon the adversary, placing more burden upon the adversary than the value of the information warrants, etc. Such improper methods of 'fishing' may be controlled by the trial court under the powers granted to it by the statute.

This *fishing expedition* invades the plaintiff's right to privacy. Opposing counsel must not be able to use the subpoena power to unearth and uncover every bit of personal and private detail of plaintiff's life, regardless of whether the private matters have any connection to the issues in plaintiff's lawsuit.

Challenge the subpoena

The truth about when to object

A Motion to Quash a Subpoena for the Production of Documents must be served and noticed on opposing counsel *at least* five days before the date of production of documents. (Code of Civ. Proc., § 1985.3; see also *Slage v. Superior Court.* (1982) 211 Cal.App.3d 1909, 1313 [a court may still grant a motion to quash after the five-day deadline].) But the time to start reviewing subpoenas and sending meet-and-confer letters should not be based on the Motion to Quash date. The earliest time for a witness to provide documents responsive to the subpoena is twenty days after the issuance of the deposition subpoena, or fifteen days after service, whichever date is later.

I have come across dozens of subpoenas that have a production date that is over sixty days out, and opposing counsel pressured the deposition officer to obtain the records at the twentieth day after the subpoena was served. By the time a meet-and-confer letter was sent out, opposing counsel had already obtained the documents well in advance of the production date. After that, filing the Motion to Quash became burdensome and even though opposing counsel could not use the documents, they still had the information. The process of meet-and-conferring must be done and completed no later than twenty days following the issuance of the deposition subpoena. If needed, the Motion to Quash should be filed prior to the production date.

Meet and confer, object, and reserve

The plaintiff should first send a detailed meet-and-confer letter to opposing counsel, listing the subpoenas at issue, and all relevant legal arguments. The deposition officer should also receive a copy of the letter. This will place them on notice and avoid having opposing counsel attempt to obtain documents prior to the production date. An objection on pleading paper should also be mailed to the witness to prevent the witness from providing documents prior to the production date.

After sending a meet-and-confer letter, make sure to have a date in mind to reserve the Motion to Quash hearing. If opposing counsel has not agreed to

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narrow the language, exclude certain documents, withdraw the subpoena, or stipulate to the destruction of certain documents at the conclusion of the lawsuit, continue to meet and confer in writing or over the phone. If the parties reach an impasse, reserve a hearing date and provide opposing counsel with a Notice of Motion to Quash. Meanwhile, contact the witness and request copies of the documents informally. This will allow you to see what documents are included in the request and be better prepared to challenge the subpoena or decide to allow the records to be produced.

Civility

Despite the many tools provided in protecting plaintiff's privacy right and protecting plaintiff's claim, it is important to maintain civility throughout the process. After receiving a subpoena, reach out to opposing counsel, give them a call, and propose coffee or meeting at the court house. Sometimes, it is not necessary to rush into emails and letters when a simple phone call can solve the issue. Do not hesitate to establish a professional relationship with your adversary. It is invaluable.

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