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So, you want to be a federal practitioner?

LEARNING HOW TO NAVIGATE THE FEDERAL DISCOVERY PROCESS IS THE SINGLE MOST IMPORTANT PART OF HANDLING A FEDERAL CASE

Navigating federal discovery landmines

For whatever reason, you find yourself in federal court. No need to panic. This is a good thing. In fact, many attorneys, including myself, prefer a federal venue over a state venue.

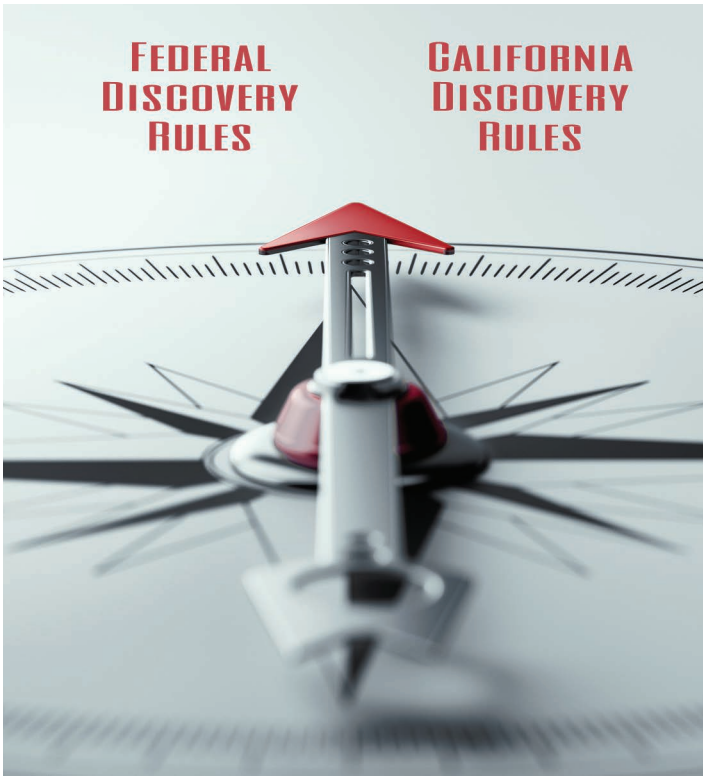
To start, you are likely to experience far fewer games and other associated "b.s." from opposing counsel in federal court. District judges are infamous for keeping attorneys in check. There is zero tolerance for gamesmanship. The proverbial federal short leash often works to a plaintiff's favor. Scheduling orders are strictly followed with continuances seldom granted. The discovery phase is also a smoother and more transparent ride. Document withholding is mitigated by procedural mechanisms and rules favoring disclosure; these include less arbitrary and stringent discovery objections, strict adherence to privilege logs, protective orders promoting a safe space for disclosure of information and documents, and the expeditious handling of informal discovery conferences by the assigned magistrate judge.

The upshot is a greater likelihood that the universe of documents will be known to the plaintiff in a federal civil action. But if an attorney has a limited understanding of the federal discovery process, particularly during the first six months of litigation, these supposed favorable procedural mechanisms and rules will become impediments to the plaintiff.

Rules governing discovery

Generally speaking, the federal discovery process is governed by the Federal Rules of Civil Procedure ("FRCP"), the general orders and local rules specific to the district court where a case is venued, and the standing order specific to the assigned district judge and, if applicable, the magistrate judge assigned to handle all discovery matters. There's no magic to the FRCP. The trick is locating the controlling local rules, general orders, and standing orders, then assiduously following them.

Before we discuss how to locate the local rules specific to your case, here's a quick overview of the federal-court system. The United States District Courts are the federal trial courts. In California, which is part of the Ninth Circuit, there are four districts: Northern, Southern, Eastern and Central. The Central District covers Los Angeles (Western Division), Santa Ana (Southern Division), and Riverside (Eastern Division). The western coastal area, including Ventura, Santa Barbara, and San Luis Obispo counties, are all also in the Central District. The Central Valley, from Sacramento to Bakersfield, is in the Eastern District. Northern California, including the San Francisco Bay Area, is in the Northern District. San Diego is in the Southern District.



A quick Google search will take you to the Local Rules for the Central District of California: https://www.cacd.uscourts.gov/sites/default/files/documents/LocalRules_Chap1.pdf. Local rules typically expound on the FRCP but will never be in conflict with the FRCP. The numbering of the local rules will typically follow the FRCP (e.g., FRCP 56 and L.R. 56-1 are the procedural rules pertaining to summary judgment).

Some district courts have general orders regarding procedures and practice particular to that district. Typically, these general orders will regard broader litigation matters such as ADR programs available in that district. If you're looking for rules specific to discovery, summary judgment or ex partes, you're not going to find them in the general orders but rather in the standing orders.

Standing orders are referred to as the "local, local rules" and serve to provide additional procedural rules or clarifying points on certain practices. Like the local rules, standing orders will not conflict with the FRCP. The standing order for your

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assigned district judge or, if applicable, the assigned discovery magistrate judge is easily located by going to the judge's web page of the United States District Court website. There, you will find the judge's standing order, as well as other helpful orders and templates, including scheduling conference order, pretrial conference order, model protective order, and witness/exhibit list templates.

The famous Rule 26

Rule 26 is where it's at! FRCP 26 is your go-to discovery rule. It comprehensively covers a variety of general provisions governing discovery, including disclosures, discovery scope and limits, protective orders, timing and sequence of discovery, and conference of parties. If you're able to master Rule 26, the rest will be a piece of cake.

Early meeting of counsel

Rule 26(f) makes it mandatory for the attorneys to meet and confer before discovery and disclosures. This mandatory conference is often referred to as the "early meeting of counsel" and provides a space where counsel can openly discuss case management and the discovery process. This is one of the greatest distinctions between federal and state practice.

The district judge will normally set a scheduling conference either 90 days after the defendant appears or 120 days after service of the complaint and summons. Rule 26(f) requires counsel to meet and confer at least 21 days before the scheduling conference. There is no requirement to meet and confer in person. Attorneys typically meet and confer over a telephonic conference. Believe it or not, these conferences are often quite pleasant. You're still in the honeymoon phase, after all.

While FRCP provides general guidelines as to timing and conferring topics, the district judge's standing order will provide a detailed outline listing each and every topic she/he expects the attorneys to discuss during the conference. Some judges will have a separate order solely dedicated to the scheduling conference and the early meeting of counsel, with date calculation worksheets and all. Use the outline to guide your discussions. I also use the outline as a skeleton draft for the Joint Rule 26(f) Report.

Joint Rule 26(f) Report

All discussions had during the early meeting of counsel will be memorialized in a report. This report is commonly referred to as the "Joint Rule 26(f) Report" and is typically filed 14 days before the scheduling conference. A word to the wise – always take lead in drafting the joint report. This report will not only lay out the agreed-to discovery plan, but it will also serve to memorialize important agreements amongst counsel pertaining to discovery limitations, amendments to the operative complaint, special procedural handling of electronically stored information, and the pretrial and trial calendar. Although a topic for another day, I also take lead in drafting the protective order.

Initial and supplemental disclosures

Federal practice promotes a spirit of discovery that is unparalleled. The disclosures procedure is just another example of this. Unless otherwise specified, each party must serve their respective initial disclosures within 14 days after the early meeting of counsel. (FRCP, rule 26(a)(1)(C).) This is not too arduous of a task. For one, you are simply identifying relevant witnesses and documents, providing a computation of damages, and disclosing insurance coverage. Further, the disclosures are based on information "reasonably available" to the disclosing party at the time of the initial disclosures, meaning you are not required to expend energy and resources to list every possible witness who is "likely to have discoverable information" or list every possible document that *may* be used to support a claim or defense. (FRCP, rule 26(a)(1)(A)(i).) Keep in mind that you are not required to disclose witnesses or documents used solely for impeachment. (*Ibid*.; see Adv. Comm. Notes to 2000 Amendments to FRCP rule 26(a)(1).)

Upon learning that earlier disclosures are incorrect or incomplete, a party is *required* to serve supplemental disclosures. (FRCP, rule 26(e)(1).) This is another key distinction between federal and state practice. A good rule of thumb is to supplement your disclosures when a new witness or document is identified. For example, if a new witness is identified during a deposition, a supplement disclosure should be served that day. Or, let's say your office is in receipt of documents in response to a subpoena or FOIA request, you should serve a supplemental disclosure identifying those documents. As the trial date nears, I will comb through depositions, written discovery, disclosures, medical records, and client documents to make sure all witnesses and documents are included in the final "catch all" supplemental disclosure. You do not want to end up in trial having not disclosed a witness or document.

Expert disclosures

There are differing views on whether the federal expert rules are a good thing or a bad thing for a plaintiff. Some say that the federal expert disclosures practice makes litigation costly and adds unnecessary work. Others believe that expert disclosures provide a means for each party to lay their cards on the table to get the most out of the mediation process, rather than mediation being a perfunctory step in the litigation ladder. If you are diligent in getting your experts all of the information and materials necessary for her/his evaluation, the expert disclosures will be the most powerful tool available to you to either settle your case at value or be the party in the more advantageous position come trial.

At the scheduling conference, the district judge will review the pretrial dates included in the Joint Rule 26(f) Report. If all seems reasonable, the district judge will rubber-stamp the parties' agreed-to dates. Although uncommon, if an expert disclosure date is not previously agreed to, then expert disclosures must be served at least 90 days before trial. (FRCP, rule 26(a)(2).)

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The federal rules require experts to submit written reports. This is different from state practice where an expert witness declaration drafted and submitted by the attorney is all that is required. While you must identify all experts, written and signed reports are only required from experts who are retained to provide expert testimony at trial. An example of an expert who must be identified with no written report required is where a medical expert reaches opinion during treatment.

The written report must include the expert's opinions, the bases for those opinions, and supporting reports and documentation. The FRCP controls the contents of an expert's written report. Each 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." (FRCP, rule 26(a)(2)(B).) Work closely with your expert during the crafting of the written report. Unlike state practice, draft reports are protected as attorney work product. (FRCP, rule 26(b)(4)(B).)

State and federal discovery procedure nuances

There are certain discovery-related idiosyncrasies sprinkled throughout the FRCP. My goal here is to familiarize you with these distinctions to ensure that you are practicing in accordance with the federal rules but, more importantly, to make sure you don't appear like a novice.

The sets: Interrogatories, requests for production, requests for admissions

In federal practice, there are no "form" interrogatories nor "special" interrogatories. There are just "interrogatories." Unlike state practice where you get 35 interrogatories, in federal court you only get 25. (FRCP, rule 33 (a)(1).) There is no 35-limit on a request for admission set. (FRCP, rule 36).

Again, federal practice encourages the parties to get the discovery ball rolling. In this spirit, a party can deliver a request for production after 21 days of service of the complaint and summons. The caveat is that the date of service is not until the scheduling conference. I typically show up to a scheduling conference with a manila envelope in hand with, you guessed it, an RFP set enclosed.

If a discovery set is served by mail, a response is due within 30 days after the discovery set is served with an additional three days to account for the service by mail. (FRCP, rule 6(d).) This is different from state practice where you get an additional five days for service by mail. (Cal. Code Civ. Proc., § 1013, subd. (a).)

Depositions

In federal practice, there is a presumptive limit of 10 depositions for each side. (FRCP, rule 30(a)(2)(A)(i).) Again, there are differing views on this. You have to take the good with the bad. I'm sure you've had a state case where more than 20 depositions have been taken for no discernable reason. Obviously, not only do litigation costs go up, but depositions, in general, take a lot out of you, whether it be prep time, travel time, or contentious meeting and conferring. The federal discovery limit may help attorneys narrow in on key witnesses. The limit may also discourage attorneys from churning a file. There are some cases, however, such as excessive-force and employment cases, where multiple eyewitnesses and involved personnel must be deposed. These cases require more than 10 depositions. A request to modify the 10-deposition limit must be made in the Joint Rule 26(f) Report and should also be broached orally at the scheduling conference.

Another limitation pertains to the time an attorney is allotted to conduct a deposition. In federal practice a deposition is limited to *one* day of seven hours whereas in state practice you are given a *total* of seven hours. (FRCP, rule 30(d)(1); Cal. Code Civ. Proc., §§ 2025.610, 2025.290).

Expert deposition fees are also different. In federal practice, the deposing party must pay "reasonable fees" which include travel time and even prep time, whereas in state practice you are only required to pay experts for the time they spend testifying during the deposition. (FRCP, rule 26(b)(4)(E); Cal. Code Civ. Proc., §§ 2034.440, 2034.450.)

Physical or mental exam

Only by way of a motion for good cause can a federal judge order a party to submit to a physical or mental examination. (FRCP, rule 35(a).) Unlike state practice, leave of court based on a showing of good cause is necessary for an IME.

Privilege log and in camera review

In federal practice, a privilege log is required. Parties withholding documents under a claim of privilege should identify and describe the documents in sufficient detail to "enable other parties to assess the claim." (FRCP, rule 26(b)(5)(A)(ii).) "The requisite detail for inclusion in a privilege log consist of [1] a description of responsive material withheld, [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 material's present location, [6] and specific reasons for its being withheld, including the privilege invoked and the grounds thereof." (*Friends of Hope Valley v. Frederick Co.* (E.D.Cal. 2010) 268 F.R.D. 643, 650-651.)

Reviewing the privilege log with a critical eye is key. If a dispute arises as to a particular privilege, you have options short of a motion to compel. Typically, a privilege dispute can be resolved during an informal discovery conference with a magistrate judge. A request for in camera review is also an option. It is in the federal judge's discretion to conduct an in camera inspection if a party is able

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to make a factual showing sufficient to support a reasonable, good faith belief that the inspection may reveal evidence that information in the materials is not privileged. (See *In re Grand Jury Investigation* (9th Cir. 1992) 974 F2d 1068, 1074-1075). This is distinguishable from state practice. (See *Regents of the University of California v. WCAB* (2014) 226 Cal.App.4th 1530; see also Cal. Evid. Code, § 915, subd. (a)).

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