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Discovery in federal court

FEDERAL PRACTICE PROMOTES A SPIRIT OF DISCOVERY AT THE INCEPTION OF THE CASE. EMBRACE IT

As with all things in life, practice creates confidence, which in turn creates mastery. Once you've mastered federal discovery, the rest will take care of itself. How do I know this, you ask. Well, sometime long ago in a galaxy far, *far* away, I was a baby lawyer at a public-entity defense firm where my training ground was the United States District Court, Central District of California. That's how federal practice became my jam.

My goal here is to walk you through the overarching discovery fundamentals in federal practice to ensure that the next time you find yourself in a federal venue, you know exactly how to navigate the discovery landmines which often entrap the unwary plaintiff's lawyer.

We will begin with the Federal Rules of Civil Procedure ("FRCP"), and more specifically with Rule 26. Rule 26 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. Your number one goal is to master Rule 26.

Required disclosures

Federal practice promotes a spirit of discovery at the inception of the case. Unless otherwise specified, each party must serve their respective initial disclosures within 14 days after the early meeting of counsel. (Fed. R. Civ. P. 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 whether or not insurance coverage is available. 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. (Fed. R. Civ. P. 26(a)(1)(A)(i)).)

Keep in mind that you are not required to disclose witnesses or

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documents used solely for impeachment. (*Ibid*.; see Adv. Comm. Notes to 2000 Amendments to Fed. R. Civ. P. 26(a)(1).) As of January 1, 2024, initial disclosures are now required in California state court practice. (Code Civ. Proc., § 2016.090.)

Thereafter, a party is *required* to serve supplemental disclosures upon learning that earlier disclosures are incorrect or incomplete. (Fed. R. Civ. P. 26(e)(1).) This is in contrast to state-court practice where you typically find folks supplementing their discovery responses only after being prompted to do so by opposing counsel.

At my law firm, I have a procedure in place where once a month we review our cases to confirm whether any new witnesses or documents have come to light. If so, we will serve Rule 26 supplemental disclosures. And what do I mean by this? Let's say you take a deposition, and a new witness is identified. I have a standing memo that is immediately updated with this new information so that once the next monthly check-in comes around, I already know that I need to serve supplemental disclosures.

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 a catch-all, and 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 a last and final supplemental disclosure. You do not want to end up in trial having not disclosed a witness or document because the federal district court judge (i.e., trial judge) will very well exclude that witness or document pursuant to FRCP 37.

Now, let's talk about 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 because at the time of expert initial disclosures you must identify your expert and must also provide an expert report to opposing counsel. 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.

Timing of the expert disclosures depends on a couple of things. Typically, at the scheduling conference, the district judge will review the pretrial dates included in the Joint Rule 26(f) Report, which will include your proposed expert disclosure dates. 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. (Fed. R. Civ. P. 26(a)(2).)

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 needed. 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 is needed 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. FRCP wholly 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." (Fed. R. Civ. P. 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. (Fed. R. Civ. P. 26(b)(4)(B).)

The reports I typically disclose in my federal civil-rights cases are anywhere from 40 to 100 pages long. But it's not too bad if you're on it. Meaning, if you are diligent in getting your expert all necessary information and materials 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 in the most advantageous position come trial.

Discovery scope and limits

The spirit of discovery in federal court is very liberal and is meant to encourage discovery, e.g., FRCP 26 initial and supplemental disclosures. Furthermore, district courts have broad discretion to determine relevancy for discovery purposes. (See *Hallett v. Morgan* (9th Cir. 2002) 296 F.3d 732, 751.)

The scope of discovery is governed by Federal Rule of Civil Procedure 26(b)(1). Rule 26 states that the "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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 of expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Notably, the scope of federal discovery was amended recently to include the added requirement that discovery must not only be relevant but must also be "proportional to the needs of the case." Because of this new "proportionality" requirement, federal practitioners often find themselves filing motions to compel where the overarching defense theme they need to argue against is proportionality.

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Protective orders and privilege logs

Unlike state-court practice, stipulated protective orders are very much encouraged in federal practice. Your discovery battles will be won not at the motion stage, but rather, at the inception of the discovery phase. The more carefully crafted, narrowly tailored your stipulated protective order is, the better your odds are at securing the universe of documents. You need to draft the stipulated protective order. Yes, you. Sure, you'll start with the model stipulated protective order which the district judge will either have on her/his webpage or you will find on the district court's webpage, but you need to include the following two sections.

The first section lays out your privilege-log parameters. This is the language I include:

> "If a party withholds information that is responsive to a discovery request by claiming that it is privileged or otherwise protected from discovery, that party shall promptly prepare and provide a privilege log that is sufficiently detailed and informative for the opposing party to assess whether a document's designation as privileged is justified. See Fed.R.Civ.P. 26(b)(5). The privilege log shall set forth the privilege relied upon and specify separately for each document or for each category of similarly situated documents: (a) the title and description of the document, including number of pages or Bates-number range; (b) the subject matter addressed in the document; (c) the identity and position of its author(s); (d) the identity and position of all addressees and recipients; (e) the date the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than its author(s); and (f) the specific basis for the claim that the document is privileged and protected. Communications involving counsel that post-date the filing of the complaint need not be placed on a privilege log."

Remember, you don't know what you don't know. How are you going to be able to argue to the judge that defense counsel is "hiding" documents from you if you don't know the universe of documents. You need to be able to point to her or his honor exactly *which* document defense counsel is improperly withholding and *why* the privilege defense counsel is relying on does not apply (hence, why title, author, and recipient categories are vital).

The second section is a provision that lays out the rules to challenge confidentiality designations, placing the onus on defense counsel to file the motion for protective order. This is the language I include:

> "The Challenging Party shall initiate the dispute resolution process under Local Rule 37.1 *et seq*. Failing informal resolution between parties, the Designating Party may file and serve a Motion for a Protective Order with the Court strictly pursuant to Local Rule 37, including the Joint Stipulation Procedure. The parties agree that if the Motion for Protective Order is filed within 21 days of the written challenge (subject to extension upon agreement of the Parties), the Material will retain its original designation until the Court rules on the Motion for a Protective Order. If the Designating Party does not file a motion within the 21-day period following a challenge, the material is no longer designated as CONFIDENTIAL INFORMATION for purposes of this Stipulation, but that change in designation does not bar the Producing Party from subsequently filing a motion for a protective order."

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." (Fed. R. Civ. P. 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.)

You must review the privilege log with a critical eye. If a dispute arises, 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 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. (*In re Grand Jury Investigation* (9th Cir. 1992) 974 F2d 1068, 1074-1075.) This is distinguishable from state practice. (*Regents of the University of California v. WCAB* (2014) 226 Cal.App.4th 1530; *see also* Cal. Evid. Code § 915(a).)

Timing and sequence of discovery

In federal practice, there are no "form" interrogatories nor "special" interrogatories. There's just "interrogatories." Unlike state practice where you get 35 interrogatories, in federal you only get 25. (Fed. R. Civ. P (a)(1).) There is no 35-limit on a request for admission set. (Fed. R. Civ. P. 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. This is called an Early FRCP 34 Request for Production of Documents. 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 interrogatories are served. (Fed. R. Civ. P.

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6(d).) This is different from state practice as you get an additional five days for service by mail. (Code Civ. Proc., § 1013, subd. (a).)

Now, let's talk about depositions. This is where you take the good with the bad. In federal practice, there is a presumptive limit of 10 depositions for each side. (Fed. R. Civ. P. 30(a)(2)(A)(i).) Again, there are differing views on this. I'm sure you've had a state case where dozens of depositions have been taken for whatever 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, contentious discovery disputes. The federal discovery limit may help attorneys narrow in on key witnesses and may do away with the ol' churning of a file.

But some cases, such as excessive-force cases or in-custody death cases, may involve multiple eyewitnesses, multiple facilities, and multiple personnel (both custody staff and medical staff, especially in jail cases). These cases require more than 10 depositions. A request to modify the 10-depositon limit must be made in the Joint Rule 26(f) Report and should also be broached during 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 get a total of seven hours. (Fed. R. Civ. P. 30(d)(1); Cal. Code Civ. Proc. §§ 2025.610, 2025.290.)

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

Another difference between state and federal discovery practice is the rule pertaining to "independent" medical exams. Only on motion for good cause, a court may order a party whose mental or physical condition is in controversy to submit to a physical or mental examination. (Fed. R. Civ. P. 35(a).) Unlike state practice, leave of court based on a showing of good cause is necessary for an IME.

Discovery-plan conference

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 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 skeletal draft for the Joint Rule 26(f) Report.

Additional rules governing federal discovery practice

Generally speaking, the federal discovery process is governed by the 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 local rules, and standing orders, then assiduously following them.

Here's how to locate the local rules specific to your case. But first, a quick overview of the federal court system. The United States District Courts are the federal trial courts. This is akin to the Los Angeles County Superior Court and the Stanley Mosk Courthouse. In California, there are four districts: Northern, Southern, Eastern and Central. Los Angeles practitioners will often find themselves in the United States District Court for the Central District of California. The Central District covers Los Angeles (Western Division), Santa Ana (Southern Division), and Riverside (Eastern Division). A quick Google search will take you to the local rules for the Central District Court: https://www.cacd.uscourts.gov/sites/default/files/documents/2023%20June%20LRs%20Chap%201.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.

The standing order for your assigned district judge and, 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. Standing orders are referred to as the "local, local rules" and serve to provide additional procedural rules or

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clarifying points on certain procedural practices. Like the local rules, standing orders will not conflict with the FRCP. Each district judge and magistrate judge has her/his own web page. 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.

Denisse is a civil rights attorney, who focuses her practice on police shootings and in-custody death cases, representing plaintiffs in state and federal courts throughout California. In 2022, Denisse was a recipient of the CAOC Street Fighter of the Year Award for her role on the litigation team behind the Alarcio v. County of Los Angeles federal civil rights action, which resulted in the largest jail-death related settlement against the Los Angeles County Sheriff's Department. Denisse sits on the Board of Directors for CAALA, CAOC, NPAP, ACLU SoCal and LACBA.