



Do's and Don'ts about a Nonparty's Response to Federal and State Court Deposition Subpoenas Involving Civil Litigation

by John E. Bowerbank

A strange person is at your doorstep or company reception stating that you have just been served with a deposition subpoena for testimony and production of voluminous documents at an attorney's office in an unknown city on a specified date and time. After celebrating that you have not been served with a summons and complaint for a lawsuit, you agonize over the fact that you have just been roped into dealing with a lawsuit in which you are not a party and which you could not care less about. To compound the situation, the subpoena demands that you give testimony and produce sensitive records pertaining to your number one customer who is responsible for 25% of your gross revenues last year. Congratulations! You are now a nonparty subpoena recipient who has been compelled to testify and/or produce documents while at the same time protecting your rights and interests and those of your customer.

What do you do? Who do you talk to first to deal with this headache? How do you challenge this intrusion that may compromise your most significant business or personal relationship? The first thing to do is examine the subpoena to see exactly what it seeks. There are three types of deposition subpoenas on nonparties: (1) deposition subpoenas for "testimony"; (2) deposition subpoenas for "testimony and records"; and (3) deposition subpoenas for "records only."

Subpoena Compliance — It May Be a Nonparty's Best Option

When a nonparty is served with a subpoena, the subpoena is usually rooted in someone else's fight. The least expensive path — especially if you are not a litigation target — is to com-

ply in a timely and proper manner. If a nonparty is going to comply — by giving testimony, documents or both — it should try to wait until the date specified in the subpoena. This will allow parties other than the subpoenaing party to oppose the subpoena in accordance with their rights to the extent warranted. If confidential and proprietary documents are sought, the nonparty should inquire as to whether a protective order is already in place covering nonparties. If a protective order is not in place, the nonparty (or one of the litigants) may need to bring a motion for a protective order.

How much time does the subpoena give the nonparty to comply? Just because the subpoena specifies a certain date and time does not mean the date is proper or that the nonparty is precluded from stipulating with the subpoenaing party to comply on a different date. In federal court, there is no fixed time for service of a deposition subpoena for “testimony,” “testimony and records,” or “records only.” However, a subpoena in federal court must allow a “reasonable” amount of time for compliance after service. Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 11:2276 (The Rutter Group 2006).

Unlike federal court, the timing of compliance with a California state court subpoena differs depending on the type of subpoena and documents sought. In state court, the same “reasonable” time standard applies for “testimony” or “testimony and records,” but not subpoenas seeking “records only,” “consumer records” and “employment records.” A “records only,” subpoena in state court must command compliance on a specified date, no sooner than 20 days after issuance, or 15 days after service, whichever is later. *Cal. Code Civ. Proc.* § 2020.410(c); Weil & Brown, *Cal. Prac. Guide: Cal. Civ. Pro. Before Trial*, 8:545 (The Rutter Group 2006). A subpoena for “testimony and records” or “records only” that seeks personal records of a “consumer” or employment records of an “employee” must be served at least 20 days prior to the date of production. *Cal. Code Civ. Proc.* §§ 1985.3, 1985.6, 2020.410(d), 2020.510(c).

Prior to complying with any subpoena, a nonparty should analyze whether it is a potential litigation target. Typically, a subpoena is used by a litigant to obtain evidence from a nonparty that will be used against another litigant during pending litigation. However, in some cases, a litigant who serves a subpoena for testimony

and/or documents may view the nonparty as a potential defendant or cross-defendant. If a nonparty served with a subpoena suspects it may be a potential litigation target, the nonparty’s counsel should take immediate steps to investigate and insulate the nonparty from exposure. It may be a good idea for the nonparty’s counsel to contact the counsel of a party (other than the subpoenaing party) to gain an understanding of the case and to request a copy of the complaint and any cross-complaints filed in the action. A nonparty’s counsel may also want to contact the subpoenaing party’s counsel to see if he or she will give any indication as to why the subpoena was served.

Additionally, a nonparty who suspects it might be a litigation target should have an attorney review the documents being produced prior to production. Similarly, if a subpoena seeks testimony, a nonparty should be adequately prepared by its counsel to avoid saying something foolish during deposition that may get the nonparty sued. When a nonparty produces documents in response to a subpoena, the nonparty should take steps to provide copies to the other litigants to avoid responding to duplicative subpoenas from other litigants.

Challenging the Subpoena

Finding Defects in the Subpoena

Whether a discovery subpoena is proper often depends on what it seeks and whether it is issued in a federal or state court action. An attorney representing the nonparty subpoena respondent should immediately examine the subpoena to determine if it is procedurally “void.” Subpoenaing attorneys practicing in unfamiliar jurisdictions may fall prey to procedural blunders.

An attorney charged with handling the response to a subpoena should examine the subpoena to verify that the correct form was used and that the proper boxes were checked. In state court, a subpoena can be either “issued” by the clerk of the court in which the action is pending or by any party’s attorney of record. *Cal. Code Civ. Proc.* § 2020.210. However, in federal court, a subpoena shall “issue” from the court for the district in which the deposition is to be taken, or in which the records are to be produced or the inspection is to be made. Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 11:2262 (Rutter Group 2006); *Fed. R. Civ. P.*

45(a)(2). If a subpoena is “issued” from the wrong court, grounds exist for a court to find the subpoena invalid.

Was the subpoena personally served? Unlike a summons and complaint, there is no substitute service of a subpoena. In both federal and state court, the subpoena must be personally served on the nonparty. *Cal. Code Civ. Proc.* § 2020.220; *Fed. R. Civ. P.* 45(b)(1); Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 11:2273 (Rutter Group 2006).

If the subpoena requires testimony, how far must the nonparty deponent travel? In federal court, if the deponent must travel more than 100 miles from his or her residence, place of employment, or place where he or she regularly transacts business (except the subpoena may require travel anywhere in the state), then the nonparty may have grounds to quash or modify the subpoena. Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 11:2301 (Rutter Group 2006); *Fed. Civ. P.* 45(c)(3)(A)(ii). In California state court, the place of the deposition must be 75 miles from the deponent’s residence, or in the county where the action is pending at a place within 150 miles of the deponent’s residence. *Cal. Code Civ. Proc.* § 2025.250(a). Weil & Brown, *Cal. Prac. Guide: Cal. Civ. Pro. Before Trial*, 8:621 (The Rutter Group 2006).

Does the subpoena seek documents located in a state other than where the action is pending? If it is a state court action in California, does the subpoena seek to obtain testimony or documents from a witness who resides in another state? If this is the case, the state where the witness resides may require the filing of a proceeding in that state, thereby making the California subpoena invalid. Weil & Brown, *Cal. Prac. Guide: Cal. Civ. Pro. Before Trial*, 8:536; 8:636 (The Rutter Group 2006). In federal court, the service range of a subpoena is very broad. A federal subpoena may be served at any place within the district of the court issuing the subpoena, at any place outside that district which is within 100 miles of the place of the deposition or inspection specified in the subpoena, anywhere in the state where a state statute or court rule permits service of a subpoena issued by a state court sitting in the place of the deposition, or anywhere else authorized by federal law. Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 11:2270 (Rutter Group 2006); *Fed. R. Civ. P.* 45(b)(2).

Did the subpoenaing party tender witness and mileage fees? Unlike state court subpoenas, where

witness fees may be paid at the time of service or at the deposition, federal court subpoenas require a party to tender the fees for one day's attendance and the mileage allowed by law at the time of service of the subpoena; otherwise service is invalid. Cal. Code Civ. Proc. § 2020.230; Fed. R. Civ. P. 45(b)(1). Notably, if the subpoena is for "records only," the custodian of the subpoenaed documents is not required to travel to the place of production and thus no witness mileage and travel fees are required. However, a custodian is entitled to reasonable costs for compliance, such as retrieval and copying.

Does the subpoena seek documents of a "consumer" or "employee"? The answer to this question does not make a difference in federal court, but does make a difference in state court. In state court, additional procedures and timelines must be followed where a subpoena seeks the personal records of a "consumer" (Cal. Code Civ. Proc. § 1985.3) or employment records of an "employee" (Cal. Code Civ. Proc. § 1985.6). If "consumer" and "employment" records are sought from a nonparty in a state court action, the nonparty should look for a written release from the consumer or employee or proof that a "notice of privacy rights" was timely served on the consumer and employee at least five days prior to service of the subpoena on the nonparty.

One of the most controversial issues involving a subpoena is whether it seeks disclosure of the trade secrets or confidential information of the nonparty or one of the other litigants. If this is the case, disclosure may be prohibited or a protective order may be warranted.

Other questions for a nonparty include whether a subpoena seeking testimony requires excessive travel? If the subpoena seeks documents, are the requests reasonably particularized? Does the subpoena seek production of irrelevant documents? Is the subpoenaing party using the subpoena to harass the nonparty? Will searching for the documents impose an undue expense on the nonparty? Was the subpoena served on all parties to the litigation? Does the subpoena seek documents that violate the nonparty's (or another's) right to privacy? Does the subpoena seek documents that are protected by the attorney-client privilege, attorney work product doctrine, spousal privilege, doctor-patient privilege or any other privilege? Are the records sought outside the permissible scope of discovery? Are the documents located in another

state or out of the deponent's control? If the deponent is an entity, does the subpoena describe the examination matters with reasonable particularity?

Steps for Resistance

The vehicles for challenging a deposition subpoena include written objections, a motion to quash the subpoena, a motion to modify the subpoena, and a motion for a protective order. The appropriate method of resistance depends on the subpoena, the documents sought, and the court.

A common misconception about nonparty deposition subpoenas is that a responding nonparty (or party other than the subpoenaing party) can always file written objections to any subpoena to shift the burden to the demanding party to move to compel compliance with the subpoena. Beware: simply serving written objections is insufficient in certain cases.

Whether a nonparty can merely serve written objections depends on the type of subpoena. In federal court, a nonparty (or litigant) challenging a subpoena for "testimony only" must bring a motion to quash, motion to modify the subpoena, or motion for a protective order prior to the date of production. However, a nonparty responding to subpoenas involving the production of documents can merely serve written objections to shift the burden to compel production to the subpoenaing party. Fed. R. Civ. P. 45(c)(2)(B).

The rules are somewhat similar in state court with respect to the use of written objections to shift the burden to the subpoenaing party to bring a motion to compel. Unlike a litigant, who always needs to file a motion that challenges the subpoena, a nonparty who wants to challenge a subpoena seeking either "records only" or "records and testimony" may simply serve written objections to the subpoena. *Monarch Healthcare v. Superior Court* (2000) 78 Cal. App. 4th 1282, 1284. Additionally, a nonparty in state court who is a "consumer" or "employee" who is requested to produce his or her employment or consumer records can merely serve written objections stating why disclosure should be prohibited. Cal. Code Civ. Proc. §§ 1985.3(g), 1985.6(f); Weil & Brown, Cal. Prac. Guide: Cal. Civ. Pro. Before Trial, 8:601 (The Rutter Group 2006).

If the subpoenaing party moves to com-

pel compliance with a "testimony and records" or "records only" subpoena, the nonparty will have an opportunity to explain the improprieties of the subpoena in its opposition to motion to compel compliance with the subpoena.

From a cost standpoint, it may be less expensive for a nonparty to serve written objections to a "records only" or "testimony and records" subpoena as opposed to incurring the costs to prepare a motion to quash, motion to modify the subpoena, or motion for protective order. Thereafter, the dispute may be resolved through the meet and confer process or the subpoenaing party may even decide it does not want to move to compel compliance.

If written objections are insufficient, a nonparty (or litigant) will need to bring a motion for a protective order, motion to quash, or motion to modify the subpoena. Prior to bringing a motion to challenge a subpoena, a nonparty or litigant must make an attempt to informally resolve the dispute to avoid sanctions or denial of the motion. If a nonparty disobeys a subpoena, brings a motion to challenge the subpoena, or opposes a motion to compel compliance by the subpoenaing party without proper grounds, it may be sanctioned by the court. Additionally, a nonparty who disobeys a subpoena may be held in contempt of court.

If a nonparty elects to challenge a subpoena, it needs to act promptly and make sure it has sufficient grounds to do so. A nonparty should also check the local rules of the applicable court. To reduce the nonparty's fees and costs, a nonparty may want to have its attorney contact the counsel of a litigant (other than the one who served the subpoena) to see if the litigant will "fight the good fight" against the litigant who served the subpoena. Why fight a battle if someone else will fight the same battle for you?

Conclusion

When a nonparty is served with a deposition subpoena, it should analyze the situation to see if the nonparty may be a potential litigation target. If the nonparty suspects it may be a target, the nonparty's counsel should investigate and insulate the nonparty's liability. Prior to any production and/or testimony, the nonparty should be adequately prepared by his or her attorney to avoid foolish mistakes.

To the extent possible, a nonparty should avoid fighting a costly battle over evidence in a pending lawsuit. A nonparty may be best served by limiting expense and complying with the subpoena if it is not a litigation target, has no direct (or indirect interest) in the litigation, or is not being asked to disclose confidential information. However, a nonparty may need to challenge the subpoena through written objections, a motion to quash, motion to modify the subpoena, or motion for protective order. If a nonparty elects to challenge the subpoena, the nonparty's counsel should promptly contact the counsel of another litigant (other than the party who served the subpoena) to see if the other litigant will incur the cost of bringing the motion to challenge the subpoena. If possible, the nonparty should avoid spending money and stay out of the fight.



John Bowerbank is an associate at Sheppard, Mullin, Richter & Hampton, LLP. He can be reached at jbowerbank@sheppardmullin.com or 714.513.5130. The opinions expressed herein are not necessarily those of the Orange County Lawyer magazine or of the Orange County Bar Association. In publishing this article, the OCBA is not providing legal advice.