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NON-PARTY DISCOVERY IN CALIFORNIA

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March 30, 2015

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Non-party discovery is an effective tool when used properly. Parties often fail to do so, however, and choose instead to serve discovery that is inconsistent with the requirements of California's Civil Discovery Act (the "CDA"), Cal. Civ. Proc. Code §§ 2016.010-2036.050. This is not particularly surprising considering the fact that the rules for parties and non-parties overlap in a number of significant ways, and attorneys are often unfamiliar with the slight, yet important, differences between the two.

Regardless of the reason, the end result is that a great deal of non-party discovery is defective in some way, shape, or form. Among other things, non-party discovery often will be served incorrectly, seek to depose non-resident witnesses, or cite to inapplicable sections of the CDA. And even more so than discovery requests to parties, non-party requests almost universally are substantially overbroad and unduly burdensome. This article attempts to provide an overview of the California's non-party discovery rules and identify how those rules differ from party discovery.

I. Which Discovery Tools Are Available For Non-Parties?

In California, if a witness is a non-party – i.e., not a party to the action or a party-affiliated witness – a deposition subpoena must be served to compel that witness's attendance, testimony, or production of documents and things pursuant to Chapter 6, "Nonparty Discovery," of the CDA, Cal. Civ. Proc. Code §§ 2020.010-2020.510. *See, e.g.*, *California ex rel Lockyer v. Super. Ct.*, 122 Cal. App. 4th 1060, 1076-78 (2004) (finding that service of deposition subpoenas is required to compel the attendance of witnesses and produce documents at deposition who are not parties to a civil action).[1] Thus, in a California proceeding,[2] *a deposition subpoena is the*

[1] The CDA was reorganized in 2004 at the recommendation of the Law Revision Commission. Ten years later, this is noteworthy because a number of important discovery cases were decided prior to the 2004 reorganization and therefore refer to the former CDA sections. Thankfully, the California Law Revision Commission compiled a disposition table showing each former subsection and corresponding current subsection. *See Civil Discovery: Nonsubstantive Reform*, 33 Cal. Revision Comm'n Reports 789, 1073-1087 (2003). This table, for example, can be found at the beginning of the CDA in West's California Civil Practice and Rules.

[2] For discovery to be used *in an out-of-state proceeding*, California has adopted a modified version of the Uniform Interstate Depositions and Discovery Act (2007), which became effective as of January 1, 2010. Under these rules, in order to obtain a subpoena from a California court to compel discovery in California for use in an out-of-state proceeding, the out-of-state party must: (1) submit the original subpoena from the foreign jurisdiction where the case is pending (or a true and correct copy), see Cal. Civ. Proc. Code § 2029.300(a); (2) pay a fee of $20 per subpoena (which is comparable to the fee for issuing a commission to take an out-of-state deposition, *see* Cal. Gov. Code § 70626(b)(5)); and (3) submit an application for a subpoena on the prescribed Judicial Council form, *see* Cal. Civ. Proc. Code §§ 2029.300(b), 2029.390. The application should be submitted to the clerk of the superior court of the county in California where the discovery is to be taken. *See* Cal. Civ. Proc. Code § 2029.300(a). If a party complies with these

only method by which to obtain discovery from a non-party in civil litigation.[3] Cal. Civ. Proc. Code §§ 2020.010, 2020.020; *Naser v. Lakeridge Athletic Club*, 227 Cal. App. 4th 571, 577 (2014) (finding process by which a nonparty is required to provide discovery is a deposition subpoena); *Unzipped Apparel*, 156 Cal. App. 4th at 127 ("In civil litigation, discovery may be obtained from a nonparty only through a 'deposition subpoena.'").

There are four different types of deposition subpoenas that may be served on non-parties:

1. a subpoena for an oral deposition pursuant to CCP §§ 2020.310 and 2025.010;

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requirements, the clerk "shall promptly issue a subpoena" for service that complies with the requirements of California Code of Civil Procedure ("CCP) 2029.300(d). *See* Cal. Civ. Proc. Code § 2029.300(c).

Alternatively, an out-of-state party may retain a licensed California attorney to issue a deposition subpoena for purposes of the out-of-state proceeding so long as the subpoena complies with CCP § 2029.350(b) and the attorney is provided with an original subpoena from the foreign jurisdiction (or a true and correct copy). *See* Cal. Civ. Proc. Code § 2029.350. A party represented by an out-of-state attorney in an out of-state proceeding is not required to retain local counsel in order to depose a California witness. Cal. R. Ct. 9.47(c)(1); *see Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99, 119 (2007).

If a discovery dispute arises regarding discovery conducted in California for use in an out-of-state proceeding, any request for relief should be filed in the superior court of the county in California where the discovery is to be conducted, and an appeal of the superior court's decision may be brought by means of an extraordinary writ in the appropriate court of appeal. *See* Cal. Civ. Proc. Code §§ 2029.600, 2029.650. California law should govern the dispute. *See Unzipped Apparel, LLC v. Bader*, 156 Cal. App. 4th 123, 130 (2007) (finding that although dispute arose from a New York action, California law governed a discovery dispute where a New York party sought discovery from a California non-party through the mechanisms provided by California courts); *cf.* Cal. Civ. Proc. Code § 2029.600, Law Revision Commission Comments (observing that objective "is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of the person located in the state").

[3] In California, a deposition is defined as "a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine." Cal. Civ. Proc. Code § 2004. Moreover, a subpoena is "[t]he process by which the attendance of a witness is required…. It is a writ or order directed to a person requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, or other things under the witness's control which the witness is bound by law to produce in evidence." Cal. Civ. Proc. Code § 1985(a).

2. a subpoena for a business records deposition commanding only the production of business records for copying pursuant to CCP § 2020.410;[4]

3. a subpoena for a business records deposition commanding *both* the production of business records[5] and testimony pursuant to CCP § 2020.510; and

4. a subpoena for a written deposition pursuant to CCP § 2028.010.[6]

See Cal. Civ. Proc. Code §§ 2020.010, 2020.020; *Naser*, 227 Cal. App. 4th at 577 (finding party may obtain discovery from non-party through an oral deposition subpoena, written deposition subpoena, deposition subpoena for production of business records, and deposition subpoena for production of business records and testimony); *Unzipped Apparel*, 156 Cal. App. 4th at 127.

Although entitled "Persons within the state; approved methods," CCP § 2020.010 does not create any new or additional tools of discovery for non-parties in California.[7] Rather, it merely sets forth the mechanisms that may be used to obtain discovery from non-parties and the different procedures, if any, that are involved. *See California Shellfish, Inc. v. United Shellfish Co.*, 56 Cal. App. 4th 16, 21 (1997) (former "Section 2020 merely specifies the methods of discovery that may be used against nonparties, the process to bring nonparties under the court's jurisdiction, and the form of notice and requirements for service of a deposition on a nonparty"). California courts repeatedly have stated that non-parties should not be subjected to a greater burden than parties, and indeed should be somewhat protected. *See, e.g.*, *Catholic Mutual Relief Society v. Super. Ct.*, 42 Cal. 4th 358, 366 n.6 (2007) ("The permissible scope of discovery in general is not as broad with respect to nonparties as it is with respect to parties."); *Unzipped*

[4] This can be thought of as the functional equivalent of an inspection demand made to a party. James E. Hogan & Gregory S. Weber, 1-7 *California Civil Discovery* § 7.1 (2d ed. 2008).

[5] As opposed to a business records only deposition subpoena, here, the term "business records" encompasses not only business records, but the production of documents and tangible things as well. *Compare* Cal. Civ. Proc. Code § 2020.510(a), *with* Cal. Civ. Proc. Code § 2020.410(a). Thus, the discovery that is responsive here is arguably broader than with solely a business records deposition subpoena.

[6] While CCP § 2020.020 does not list written depositions as a form of discovery that a deposition subpoena can command, CCP § 2020.010(a)(2) clearly lists written depositions as a mechanism that can be used to obtain discovery from a non-party. Moreover, CCP § 2028.010 states that "[a]ny party may obtain discovery by taking a deposition by written questions instead of by oral examination…." Cal. Civ. Proc. Code § 2028.010.

[7] It is important not to place undue reliance on the chapter titles for California statutes because the title of a chapter "does not make the law" and does "not alter the explicit scope, meaning, or intent of a statute." *Monarch Healthcare v. Super. Ct.*, 78 Cal. App. 4th 1282, 1288 (2000) (citing *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 602 (1992)); *Unzipped Apparel*, 156 Cal. App. 4th at 134. In other words, the title of this chapter probably should not be a central argument in any opposition to a motion to compel the production of business records located outside of California.

Apparel, 156 Cal. App. 4th at 133 ("'nonparty witness should be somewhat protected from the burdensome demands of litigation'" (citation omitted)). Thus, to the extent a party attempts to impose discovery burdens on a non-party witness equivalent to, if not greater than, what could be imposed on a party, there is ample authority to support the argument that such discovery is improper.

II. Responding To Deposition Subpoenas

A. First Things First: Personal Jurisdiction, California Subpoena Jurisdiction, And Residency

1. Personal Jurisdiction v. Subpoena Jurisdiction

Although very much related, personal jurisdiction and subpoena jurisdiction are not equivalent legal concepts. *See St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese*, 223 Cal. App. 3d 1354, 1365 (1990) (finding the term jurisdiction has different meanings in different situations).[8] Personal jurisdiction is the power to bring a party into a state's court system, render judgment, and then impose liability. *See* Cal. Civ. Proc. § 410.10; *see, e.g.*, *Burns v. Municipal Ct.*, 195 Cal. App. 2d 596, 599 (1961) (jurisdiction "is generally construed to mean the power of a court to hear and determine, or power to act in a certain manner"); *Mueller v. Elba Oil Co.*, 21 Cal. 2d 188, 206 (1942) (finding jurisdiction is the "power to hear and determine"). By comparison, subpoena jurisdiction is the power to compel witnesses to come into court "not as parties … but simply to testify and produce evidence." John Sink, *California Subpoena Handbook* § 3:2 at 66 (Thomson/West 2011-2012).[9]

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[8] "It is now recognized that the term 'jurisdiction' does not have a single, fixed meaning, but has different meanings in different situations." 2 Witkin, Cal. Procedure (5th), Jurisdiction § 1 (2014).

[9] "*Subpoena jurisdiction* may be thought of as a convenient set of loosely related problems the solution of which may variously depend on the identity of the court which issues the subpoena, where it is served, the residence of the person on whom it is served, the nature and location of physical evidence subpoenaed, whether the testimony or physical evidence sought relates to events which previously occurred in California, and whether the subpoena will require any action to be taken outside California or (by requiring actions inside California) will affect the rights of persons residing elsewhere." Sink, *California Subpoena Handbook* § 3:1 at 64; *see Abelleira v. District Ct. of Appeal*, 17 Cal. 2d 280, 291 (1941) ("The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.").

Thus, a court's subpoena jurisdiction should be more narrowly construed than its personal jurisdiction because a subpoenaed, non-party witness has no stake in the litigation or any control over it. *See Syngenta Crop Protection, Inc. v. Monsanto Co.*, 908 So. 2d 121, 127 (Miss. 2005) ("the basic concepts of personal jurisdiction and subpoena power are vastly different").[10] As such, only California residents are subject to the subpoena jurisdiction of California courts, and a non-resident witness cannot be compelled to appear in California or produce documents. *See* Cal. Civ. Proc. Code § 1989 ("A witness … is not obligated to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service.").[11] Although perhaps slight, the distinction between the two – personal and subpoena jurisdiction – can be important. Accordingly, after receiving a deposition subpoena, one of the first steps should be to determine whether the witness is indeed a resident of California.[12]

[10] *Cf. In re Nat'l Contract Poultry Growers' Ass'n*, 771 So.2d 466, 469 (Ala. 2000) ("The fact that NCPGA may have sufficient contacts with the State of Alabama to subject it to the jurisdiction of the Alabama courts under the Alabama long-arm personal-jurisdiction provisions is irrelevant to the question presented in this case. However, a finding that NCPGA is subject to the personal jurisdiction of Alabama courts would not necessarily mean that it was obligated to respond to a subpoena by having to appear and produce documents in an Alabama court in a lawsuit to which it is not a party. *The underlying concepts of personal jurisdiction and subpoena power are entirely different.* Personal jurisdiction is based on conduct that subjects the nonresident to the power of the Alabama courts to adjudicate its rights and obligations in a legal dispute. For example, a foreign corporation that qualifies to do business in Alabama subjects itself to the jurisdiction of an Alabama court, even if it is not a party to a lawsuit. By contrast, the subpoena power of an Alabama court over an individual or a corporation that is not a party to a lawsuit is based on the power and authority of the court to compel the attendance of a person at a deposition or the production of documents by a person or entity." (citations omitted)); *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So. 2d 1186, 1187-88 (La. 1994) (same).

[11] While CCP § 1989 prevents a *non-resident* witness from being compelled to appear for deposition in California, this section has no effect where a business records deposition subpoena is served upon a custodian of records and *only* requires the production of business records for copying—not the custodian's personal attendance and testimony. *See* Cal. Civ. Proc. Code § 1987.3.

[12] When responding to a deposition subpoena, it also should be determined whether the court actually possesses subject matter jurisdiction because a court's subpoena jurisdiction cannot be greater than its subject matter jurisdiction. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-78 (1988) ("[T]he subpoena power of a court cannot be more extensive than its [subject matter] jurisdiction. It follows that if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void…."); *Adams v. Johnson & Johnson Co.*, 2010 U.S. Dist. LEXIS 35000, at *4, 2010 WL 1462947 (D.N.J. Apr. 9, 2010) (finding a district court's subpoena power cannot be more extensive than its jurisdiction).

Ultimately, if a witness is not a California resident, the procedure to obtain discovery in a California action follows a different set of rules.[13] *See* Cal. Civ. Proc. Code § 2026.010. For a non-party, non-resident witness, parties must "use any process and procedures required and available under the laws of the state … where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document or tangible thing for inspection, copying, and any related activity." Cal. Civ. Proc. Code § 2026.010(c).[14]

2. Residency Of Natural Persons

For purposes of subpoena jurisdiction, the issue of residency in California is by no means clear-cut. *See In re Morelli*, 11 Cal. App. 3d 819, 830-31 (1970) ("We find no California decisions construing residency for purposes of subpoena power."). In *Morelli*, for example, the court of appeal discussed at length the meaning of residency for purposes of the CDA in general, as well as subpoena powers under CCP § 1989 in particular. *Id*. at 830-32. The court of appeal began by noting that "residence" is "'a most elusive and indefinite term,'" possessing various meanings depending on the statute and the legal concept involved. *Id.* at 830. The court of appeal then expressly observed that "residence" can be different from "domicile" and stated that it was unable to find any "California decisions construing residency for the purposes of subpoena power." *Id*. at 831. Ultimately, the court of appeal determined that under CCP § 1989, residence "is residence in fact and not domicile." *Id*.; *National Auto. & Cas. Ins. Co. v. Underwood*, 9 Cal. App. 4th 31, 39 (1992) ("cases recognize that a person may have several residences at the same time and for different purposes").[15]

For purposes of subpoena jurisdiction, the *Morelli* court concluded that residency "envisages nothing more than an abode, possibly with a professional base of operations, which gives the 'resident' a sojourning connection with the area of a type and duration related to the status of a witness and which makes it not a hardship for him to attend the legal proceedings at which he is commanded to appear." *Morelli*, at 831. Based on this approach to residency, the court of appeal found that a subpoenaed witness was indeed a resident where the witness: (1) had a California post office address and local phone number; (2) carried the title of "Dr." and was "available" at the California Institute of Technology; and (3) when served, demanded and received witness fees. *Id*. at 832. By describing the witness – a non-party expert – as

[13] *See* Part XI *infra*.

[14] If required by the foreign jurisdiction, the clerk of the court may issue a commission authorizing the deposition in another state. *See* Cal. Civ. Proc. Code § 2026.010(f); Judicial Council Official For DISC-030 (Commission to Take Deposition Outside California). If, however, a court order is required, "an order for a commission may be obtained by ex parte application." Cal. Civ. Proc. Code § 2026.010(d).

[15] A person may have several residences at one time for personal jurisdiction purposes but only one domicile, which consists of both a presence at a location and an intent to remain there indefinitely. *See In re Marriage of Tucker*, 226 Cal. App. 3d 1249, 1258-59 (1991). The party asserting residence has the burden of establishing it. *See In re Marriage of Dick*, 15 Cal. App. 4th 144, 153 (1993).

"available," the court of appeal apparently was making reference to the witness's employment at the California Institute of Technology. *See id*. at 830.

Although somewhat unclear, to determine whether a natural person is a resident of California for purposes of subpoena jurisdiction when California is not their domicile, courts may consider whether the person: (1) spends time working in California; (2) spends time living in California; (3) has a California mailing address or phone number; and (4) demands witness fees. *See Morelli*, at 831-32. The answer to the question of residency therefore appears to involve a kind of minimum contacts analysis. *See* Sink, *California Subpoena Handbook* § 3:2 at 67-69 ("[W]hen a California court asserts long-range subpoena jurisdiction … the result tends increasingly to be influenced by the minimum contacts rule.");[16] Hogan & Weber, 1-2 *California Civil Discovery* § 2.9 (regarding whether a California court possesses the power "subpoena a nonparty foreign corporation or other organizational entity that has not qualified to do business in California. Case law is scant, but what there is suggests that the organization's contacts with California must at least be sufficient to make it subject" to personal jurisdiction). And this is consistent with how California courts analyze personal jurisdiction questions. *See Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 (1996) ("A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate "'traditional notions of fair play and substantial justice.'"") (citing *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).[17]

3. Residency Of Organizations

It is similarly unclear when an organization[18] should be considered a resident of California for purposes of subpoena jurisdiction. *See* Sink, *California Subpoena Handbook* § 3:9

[16] California possesses the broadest "long arm" statute possible to assert personal jurisdiction through minimum contacts. California courts are authorized to exercise jurisdiction over parties "on any basis not inconsistent with the Constitution of this state or the United States." Cal. Civ. Proc. Code § 410.10.

[17] *See also In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100, 122 (2005) ("When determining whether California courts have specific jurisdiction over a nonresident defendant, the question of whether the defendant purposefully availed itself of the benefits of conducting activities in this state focuses on that defendant's intent. A plaintiff may establish purposeful availment based on the effects of the defendant's out-of-state conduct in this state.").

[18] "Organization" probably should be viewed as any legal entity, other than a natural person, that can be sued. *See* Sink, *California Subpoena Handbook* § 1:8 at 21-22. For example, the CDA describes organization as including "a public or private corporation, a partnership, an association." Cal. Civ. Proc. Code § 2025.010. Moreover, CCP § 2020.310 provides that an "organization" is an entity that can be compelled to designate an employee or agent to testify on its behalf. Thus, this term includes corporations as well as businesses, which is defined as "every kind of business, governmental activity, profession, occupation, calling, or operation of

at 104-06. While doing business in California, by itself, does not automatically subject an organization to California's subpoena jurisdiction, it generally will make an organization subject to a court's personal jurisdiction. *Id*. § 3:9 at 109. As discussed above, subpoena jurisdiction is narrower than personal jurisdiction, and factors that a California court might consider include: (1) whether the organization conducts intrastate business in California; (2) whether the organization conducts inter-state business that involves California; (3) whether the organization has registered with the California Secretary of State;[19] (4) the organization's state of incorporation; (5) the location of the organization's principal place of business; and (6) whether the organization maintains an office in California. Again, the answer to this question appears to involve a sort of minimum contacts analysis. *See* Hogan & Weber, 1-2 *California Civil Discovery* § 2.9 (observing that although case law is scant, subpoena jurisdiction likely occurs where an organization's minimum contacts would be sufficient to make it subject to suit in California were it named as a defendant).

4. Whose Residency Controls When A Business Records Deposition Subpoena Seeks Testimony From An Organization? The Organization Or Its Designated Witness?

If the deponent is an organization, it also is unclear whose residency determines subpoena jurisdiction: (1) the organization; or (2) the employee designated to testify on the organization's behalf. For example, it could be argued that where an organization is a non-party and its designated witness – as a non-resident of California – can only be forced to testify via a deposition subpoena directed to the organization, the jurisdictional bar of CCP § 1989[20] should apply and the non-resident designee cannot be required to testify in California. *See* Sink, *California Subpoena Handbook* § 3:8 at 95-96 (concluding that to allow substitution of business entity's residency for residency of witness would subvert CCP § 1989). This position makes sense because an organization can only testify through a natural person – its employees or agents – and the jurisdictional bar of CCP § 1989 applies to natural persons.

In interpreting the analogous provision of the Federal Rules of Civil Procedure, the Fifth Circuit has observed that a non-officer employee designated by an organizational deponent "could not be required to travel outside the limits" that would apply if that person was personally

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institutions, whether carried on for profit or not." Cal. Evid. Code § 1270; *see* Sink, *California Subpoena Handbook* § 1:8 at 21.

[19] "A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification." Cal. Corp. Code § 2105. In and of itself, registration with the Secretary of State is likely not overly significant. *See* Sink, *California Subpoena Handbook*, § 3:9 at 105-06 (concluding that since secretary of state's office "does not consider subpoenas to be the kind of process which it is required to accept on behalf of a certified entity" the factor of registration probably does not carry as much weight in determining subpoena jurisdiction as it might first appear).

[20] "A witness … is not obligated to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service." Cal. Civ. Proc. Code § 1989.

served with a subpoena. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (interpreting Federal Rules of Civil Procedure 30(b)(6) and 45 and the limits of federal subpoena jurisdiction of non-parties);[21] *see also Wultz v. Bank of China Ltd.*, 293 F.R.D. 677, 679 (S.D.N.Y. 2013) (finding under Rule 45(c)(3)(A)(ii), "a court must quash or modify a subpoena that 'requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person'" because rule's purpose is to protect non-party witnesses from being subjected to excessive discovery burdens).

On the other hand, the argument could be made that it really is the organization's residency that matters – not that of its employees or agents – because it is the organization that is named as the deponent in the subpoena. To date, there does not appear to be any cases on point regarding this issue as to non-parties.

There is, however, conflicting case law involving parties to an action and whether a natural person (even if not a resident of California) may be compelled to attend an oral deposition in California because that person is an officer or employee of a corporate party doing business in California. *See* Sink, *California Subpoena Handbook* § 3:4 at 75-79 (stating that California courts are divided over the applicability of CCP § 1989 "to the production of persons residing … outside California"). *Compare Boal v. Price Waterhouse & Co.*, 165 Cal. App. 3d 806, 810-11 (1985) (finding that subpoena duces tecum served on a party's Los Angeles office to obtain records from custodian located in New York required their production regardless of location), and *Glass v. Super. Ct.*, 204 Cal. App. 3d 1048, 1052-53 (1988) (holding that a foreign corporation may not file suit in California and then contend that its management team may not be required to attend depositions in California pursuant to CCP § 1989 because they were not residents of California), *with Amoco Chem. Co. v. Certain Underwriters at Lloyd's of London*, 34 Cal. App. 4th 554, 559-62 (1995) (holding that a witness who resides outside California cannot be compelled to testify in California, even when the witness is a party to the action, unless the witness is a resident of California at the time of service because of CCP § 1989), *Toyota Motor Corp. v. Super. Ct.*, 197 Cal. App. 4th 1107, 1114 (2011), as modified, (July 28, 2011) (finding that CCP § 1989 prohibits the trial court from compelling a foreign resident to attend a deposition in California), and *Lund v. Olson*, G046537, 2013 Cal. App. Unpub. LEXIS 1323, at *1, 2013 WL 648628, at*4 (Cal. Ct. App. Feb. 22, 2013) (finding non-Californian residents cannot be compelled to testify as witnesses or provide deposition testimony in California in context of evaluating proper forum for trial).

Of course, all of these cases are distinguishable because they involve parties. *Toyota Motor Corp.* discussed the history of the applicable statutes at length and concluded that "[t]he plain language of the statutory scheme and the legislative history of that language fully support

[21] This conclusion is further supported by the most recent amendment to Rule 45 (effective December 1, 2013), which makes clear that a party's officers may not be compelled to travel more than 100 miles or to another state to testify at trial. *See* Fed. R. Civ. P. 45 advisory committee's note, 2013 Amendment ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state.").

the conclusion that a trial court cannot order a non-resident to appear at a California deposition." 197 Cal. App. 4th at 1125 (finding that hat notwithstanding court's authority under CCP § 2025.260 to order a deponent's attendance at a deposition to be taken beyond CCP § 2025.250's mileage limitations, court has no authority to compel the attendance at a deposition of a deponent who was not a California resident at the time of service of the deposition notice or subpoena under CCP § 1989). The court of appeal expressly declined to decide whether its analysis "would or should extent or apply to a court order made pursuant to [CCP] 2025.230 which provides for the circumstances where '[] the deponent named is not a natural person ….'" *Id.*; *see also* Hon. William F., Rylaarsdam, Hon. Lee Smalley Edmon, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 8:628.4 (The Rutter Group 2013) (describing it as "unclear whether a party can rely on CCP § 2025.250(d) to force a non-party corporation that has no officers or employees resident in the state to testify in the county where the action is pending"). More recently, however, in an unpublished decision, a court of appeal affirmed a trial court's determination that it had no power to compel the deposition of a party's non-resident personal most knowledgeable witness or production of a non-resident party's financial records. *See I-Ca Enters. v. Palram Ams.*, 2015 Cal. App. Unpub. LEXIS 1067, at *41 (Feb. 18, 2015).

Thus, it remains unclear whose residency controls with respect to parties. Suffice it to say that in response to any non-party deposition subpoena, the initial position should be that ***no*** deposition of a non-resident, non-party witness shall go forward in California—whether as a designated witness for an organization or as natural person witness. Quite simply, "[CCP § 1989] means what it says - a witness is not obliged to appear in court [or as a witness] in California unless he is a resident of the state at the time of service." *Amoco Chem. Co.*, 34 Cal. App. 4th at 556.[22]

B. Is There A Protective Order In Place And Are Non-Parties Covered?

Before a non-party produces a witness or documents in response to a deposition subpoena, there should be an appropriate protective order entered in the case.[23] While the parties

[22] Interestingly, in *Amoco Chem. Co.*, the court of appeal concluded that it lacked authority to compel the production of documents from a party pursuant to a notice because CCP § 1987(c) makes that right contingent upon the requesting party's right to request the appearance of a party. *Amoco Chem. Co.*, 34 Cal. App. 4th at 560.

[23] The terms "protective order" and "confidentiality agreement" are often used interchangeably, but they are in fact different animals. A protective order is an order obtained from the court after a showing of "good cause" to protect against disclosure of specific information pursuant to CCP §§ 2025.420, 2030.090, 2031.060, or 2033.080. *Cf.* Fed. R. Civ. P. 26(c). While a protective order is backed by the court's authority and the power of contempt, a confidentiality agreement is an agreement by and between the parties regarding the designation and handling of confidential materials that may be enforced solely as a matter of contract law. Like many other courts, the Los Angeles County Superior Court has adopted a form stipulated protective order that is useful for determining whether a draft stipulated protective order is adequate. *See* http://www.lacourt.org/division/civil/pdf/FormProtectiveOrder1Confidential_1.pdf. *Cf.* http://www.cand.uscourts.gov/stipprotectorder. Significantly, the form order does not include a

usually will have a protective order in place by the time they serve non-party discovery, their protective order sometimes only applies to parties.

Therefore, during the first meet and confer with the subpoenaing party, a responding non-party should request a copy of any applicable protective order and determine whether it extends to non-parties. If the protective order does not contemplate non-parties, either the existing protective order should be amended to include non-parties or an additional protective order applicable to non-parties must be negotiated and executed. Even if the existing protective order contemplates non-parties, it may still need to be amended in order to fully protect the non-party's interests.

C. Does A Non-Party Have A Duty To Preserve Documents?

The quick answer is that for non-parties, a duty to preserve generally does not arise until served with a deposition subpoena. A duty to preserve also may arise for a non-party by statute, contract, or a voluntary undertaking to preserve evidence. As always, the long answer is a bit more complicated than that.

While federal law recognizes a party's duty to preserve relevant evidence whenever litigation is pending or probable, California does not have a similar explicit requirement. *Compare Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (finding duty to preserve evidence arises when (a) the party has notice that the evidence is relevant to litigation or (b) should have known that the evidence may be relevant to future litigation), *with New Albertsons Inc. v. Super. Ct.*, 168 Cal. App. 4th 1403, 1430-31 (2008) (rejecting sanctions for the destruction of video recordings where there was no failure to obey an order compelling discovery), and *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley*, 105 Cal. App. 4th 1414, 1419 (2003) (finding CDA does not provide "a mechanism for the preservation of evidence" before a lawsuit is filed or before a discovery request).

The 2009 amendments to the CDA acknowledge that a duty to preserve exists, and the California Supreme Court has stated that (a) a prudent attorney should take affirmative steps to instruct the client "to preserve and maintain any potentially relevant evidence" "because it is right for the client to do so" and (b) the destruction of evidence in anticipation of litigation or after receiving a discovery request is a misuse of discovery. *See* Cal. Civ. Proc. Code § 1985.8(m)(2) ("This subdivision shall not be construed to alter any obligation to preserve discoverable information."); *Cedars-Sinai Medical Center v. Super. Ct.*, 18 Cal. 4th 1, 12-13 (1998) ("Destroying evidence in response to a discovery request after litigation has commenced

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statement of good cause. While such a showing may not be necessary or even practical in the context of a stipulated "blanket" protective order, parties should be aware that some courts – at least at the federal level – will require a particularized statement of "good cause." *Compare Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1176 (9th Cir. 2006) (parties must make a "particularized showing" under Rule 26(c)'s good cause showing for court to enter protective order); *with In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) ("While courts generally make a finding of good cause before issuing a protective order, a court need not do so where (as here) the parties stipulate to such an order.").

would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request."). But neither the CDA nor the California Supreme Court explicitly identify what the duty to preserve is, when it arises, or how far it extends.

Non-parties presumably possess some duty to preserve documents as well, but again, when and in what context this duty arises in California is even murkier than it is with parties. For non-parties, awareness of a lawsuit alone – absent some special duty arising from contract or imposed by statute (i.e., record-retention statutes and regulations) – is probably insufficient to trigger a duty to preserve. *See Temple Cmty. Hosp. v. Super. Ct.*, 20 Cal. 4th 464, 476-77 (1999). Moreover, while a duty of care may not be imposed on non-parties, they nonetheless may elect to assume a duty to preserve and be held accountable if they breach that duty under a theory of promissory estoppel. *See Cooper v. State Farm Mut. Auto. Ins. Co.*, 177 Cal. App. 4th 876, 892 (2009) (finding non-party State Farm owed plaintiff a duty to preserve evidence because it "was independently assumed by State Farm when it made the promise to preserve the tire and plaintiff relied thereon"). Since there do not appear to be any California decisions that address when a duty arises for parties or non-parties, federal case law may be instructive. *See Liberty Mut. Ins. Co. v. Super. Ct.*, 10 Cal. App. 4th 1282, 1288 (1992) ("Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions.").

Several commentators assume that parties in California have a duty to preserve that is comparable to the one described in *Zubulake*: "While a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *See, e.g.*, Matthew Bender Practice Guide: California E-Discovery and Evidence § 5.05[1] (2012) (quoting *Zubulake*, 220 F.R.D. at 217).

For non-parties, it is safe to assume that a duty to preserve arises after receipt of a subpoena.[24] *See In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006) (finding non-party is under duty to preserve upon service of subpoena). Receipt of a written request to preserve also may trigger a duty to preserve because it presumably puts a non-party on notice that: 1) litigation has commenced or will commence; 2) a non-party may have relevant information; and 3) the party issuing the notice anticipates a reasonable likelihood of using that information.[25] This is especially the case where the written request is coupled with a court order

[24] That is, unless the non-party has reason to suspect that it will become a party to the litigation. In that case, the general duty to preserve that exists for parties would apply.

[25] *But see In re Heckmann Corp. Sec. Litig.*, 10-378-LPS-MPT, 2010 U.S. Dist. LEXIS 141663, at *19, 2011 WL 10636718, at *5 (D. Del. Feb. 28, 2011) (under PSLRA, "[s]ending preservation letters … is distinct from serving preservation subpoenas because the latter imposes a legal obligation on third parties to take reasonable steps to preserve relevant documents."); *Koncelik v. Savient Pharm., Inc.*, 08 CIV. 10262 (GEL), 2009 U.S. Dist. LEXIS 73607, at *5, 2009 WL 2448029, at *2 (S.D.N.Y. Aug. 10, 2009) (finding in context of PSLRA that "only

directing counsel for the parties to identify nonparties in possession of possibly relevant materials and provide them with notice of the court order. *See In re Nat'l Sec. Agency Telecommunications Records Litig.*, MDL. 06-1791VRW, 2007 WL 3306579, at *1 (N.D. Cal. Nov. 6, 2007) (finding duty to preserve extends to "any employees, agents, contractors, carriers, bailees or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action" and counsel "are under an obligation to exercise efforts to identify and notify such non-parties, including employees of corporate or institutional parties").

Thus, while a written request to preserve may not technically trigger a duty to preserve for a non-party, attorneys still should consider whether complying with the request makes sense under the circumstances after consultation with a client. Moreover, a non-party affiliated with a party to a lawsuit should evaluate whether it may possess relevant evidence, which the party-affiliate would be obligated to produce, and consider instituting preservation measures to ensure that the party-affiliate is not subject to future spoliation claims or adverse inference instructions.

In terms of liability arising from a failure to preserve, according to the California Supreme Court, unless a special statutory or contractual relationship exists, there can be no violation of a non-party's duty to preserve evidence absent a specific request by a party to preserve made before the evidence's destruction. The California Supreme Court has made it abundantly clear that "no tort cause of action will lie for intentional third party spoliation of evidence." *Temple Cmty. Hosp.*, 20 Cal. 4th at 466; *see also Cedars-Sinai*, 18 Cal. 4th at 17 ("we hold that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action"). Although the California Supreme Court has not addressed the tort of negligent spoliation, a number of court of appeals have found that there is no cause of action for negligent spoliation based on the same policy reasons articulated in *Cedars–Sinai* and *Temple*. *Rosen v. St. Joseph Hosp. of Orange Cnty.*, 193 Cal. App. 4th 453, 460 (2011).

Of course, this does not mean that non-parties face no potential repercussions whatsoever if they fail to preserve possibly relevant evidence. While there may be no cause of action in tort, a non-party still may be sanctioned for suppressing or destroying evidence. *Temple Cmty. Hosp.*, 20 Cal. 4th at 476-77 (finding "monetary and contempt sanctions" may be imposed against non-parties and their attorneys "who flout the discovery process by suppressing or destroying evidence"); Cal. Civ. Proc. Code §§ 2020.240, 2023.030(a), 2025.440(b). Criminal sanctions also are a possibility, and attorneys face possible discipline as well to the extent they may be involved in spoliation. *Temple Cmty. Hosp.*, 20 Cal. 4th at 477; Cal. Penal Code § 135. Parties also may be able to establish a connection between a party and non-party "sufficient to invoke the sanctions applicable to spoliation by a party." *Temple Cmty. Hosp.*, 20 Cal. 4th at 477. Finally, "[t]o the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidated damages, may be available for breach of the contractual duty." *Id.*

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thing that is certain is that without preservation subpoenas, the third party corporations in possession of potentially relevant information are free to destroy that information").

D. Special Requirements For Consumer Records

The CDA contains specialized procedures for obtaining consumer records from a non-party witness. *See* Cal. Civ. Proc. § 2020.410(d). In this context, "personal records" are "the original, any copy of books, documents, other writings, or electronically stored information pertaining to a consumer and which are maintained by any 'witness.'" Cal. Civ. Proc. Code § 1985.3(a)(1). A "witness" is defined as most health care providers, professionals, financial institutions, and schools. *Id*. In turn, "consumer" is defined as "any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent of fiduciary." Cal. Civ. Proc. Code § 1985.3(a)(2). Before producing consumer records, a non-party must ensure that the subpoenaing party has included either (a) written authorization from the consumer or (b) a proof of service showing that notice was given to the consumer. *See* Cal. Civ. Proc. Code § 2020.410(d); Cal. Civ. Proc. Code § 1985.3(b) (10 days prior to date of production, "plus the additional time provided by Section 1013 if service is by mail," and 5 days prior to service upon custodian of records, "plus the additional time provided by Section 1013 if service is by mail," subpoenaing party must serve consumer with a copy of the subpoena and notice). A non-party "may decline to produce the requested documents if the statutory procedure has not been followed." *Foothill Fed. Credit Union v. Super. Ct.*, 155 Cal. App. 4th 632, 639 (2007); Cal. Civ. Proc. Code § 1985.3(k) ("Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the personal records sought by a subpoena duces tecum."). A non-party, however, does not face liability for failure to comply with the statute, though it still may face sanctions. *Foothill*, 155 Cal. App. 4th at 642 ("Not permitting subsequent suits based on a custodian's overbroad response to a subpoena or response to a subpoena that was deficient because of insufficient notice to the affected consumers does not eviscerate the statute's function or its purpose.").

Significantly, "[w]hen a subpoena is served seeking the personal records of a nonparty consumer under section 1985.3, the party seeking discovery is not required to obtain the consumer's affirmative consent to the release of those records. If the nonparty consumer wishes to object to the release of the records, he or she must 'serve on the subpoenaing party, the witness, and the deposition officer, a written objection that cites the specific grounds on which production of the personal records should be prohibited.'" *Puerto v. Super. Ct.*, 158 Cal. App. 4th 1242, 1257 (2008) (quoting Cal. Civ. Proc. Code § 1985.3(g)).

E. Special Requirements For Employee Records

The CDA also contains specialized procedures for obtaining employment records from a non-party witness. *See* Cal. Civ. Proc. § 2020.410(d). In this context, "employee" is defined as "any individual who is or has been employed by a witness subject to a subpoena duces tecum" or "any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum." Cal. Civ. Proc. Code § 1985.6(a)(2). In turn, "employment records" consist of "the original or any copy of books, documents, other writings, or electronically stored information pertaining to the employment of any employee maintained by the current or former

employer of the employee, or by any labor organization that has represented or currently represents the employee." *See* Cal. Civ. Proc. Code § 1985.6(a)(3).

Before producing employment records, a non-party must ensure that the subpoenaing party has included either (a) written authorization from the consumer or (b) a proof of service showing that notice was given to the consumer. *See* Cal. Civ. Proc. Code § 2020.410(d); Cal. Civ. Proc. Code § 1985.6(b) (10 days prior to date of production, "plus the additional time provided by Section 1013 if service is by mail," and 5 days prior to service upon custodian of records, "plus the additional time provided by Section 1013 if service is by mail," subpoenaing party must serve consumer with a copy of the subpoena and notice). A non-party "may decline to produce the requested documents if the statutory procedure has not been followed." *Foothill*, 155 Cal. App. 4th at 639; Cal. Civ. Proc. Code § 1985.6(j) ("Failure to comply with this section shall be sufficient basis for the witness to refuse to produce the employment records sought by a subpoena duces tecum."). A non-party, however, does not face liability for failure to comply with the statute, though it still may face sanctions. *Foothill*, 155 Cal. App. 4th at 642 ("Not permitting subsequent suits based on a custodian's overbroad response to a subpoena or response to a subpoena that was deficient because of insufficient notice to the affected consumers does not eviscerate the statute's function or its purpose.").

As with consumer records, "when a subpoena is served that seeks the production of a nonparty employee's employment records, a nonparty employee contesting the release of those records must serve a specific, written objection on the subpoenaing party, the deposition officer, and the witness that articulates the grounds on which the nonparty employee contends production of the employment records should be prohibited." *Puerto*, 158 Cal. App. 4th at 1257 (citing Cal. Civ. Proc. Code § 1985.6(f)(2)).

III. Methods Of Responding To Deposition Subpoenas

A non-party served with a deposition subpoena may choose to substantively respond, as well as any one of the following options: (1) serve only objections; (2) move for a protective order; or (3) move to quash. *See Monarch Healthcare*, 78 Cal. App. 4th at 1284, 1290 (holding that a non-party may simply object to a business records only deposition subpoena where the request sought privileged information);[26] Cal. Civ. Proc. Code § 2025.410. While objecting has the advantage of putting the burden on the subpoenaing party to bring a motion to compel, it also has the disadvantage of allowing the subpoenaing party to frame the issue. At the same time, filing a motion to compel in California is an arduous and expensive process that most parties

[26] "The discovery rules do not discriminate against nonparty deponents. They need not scramble to retain a lawyer to file a motion to quash in order to challenge 'records only' discovery requests that seek privileged information. *It is sufficient to simply object*." *Monarch Healthcare*, 78 Cal. App. 4th at 1284 (emphasis added). In *Monarch Healthcare*, the non-party produced some of the requested documents but objected to producing the rest. The plaintiff moved to compel on the basis that any objections had been waived because the non-party did not move to quash or obtain a protective order. The court denied the motion, holding that while a non-party may seek relief from the trial court before production, a non-party is not required to do so. *Id.*, 78 Cal. App. 4th at 1288-90.

would rather avoid. *See, e.g.*, Cal. R. Ct. 3.1345-3.1346. Thus, it makes sense at the beginning of the process to ask the subpoenaing party: "What is it that you really want?"

A. Serve Only Objections

Written objections may be served in response to all discovery mechanisms suitable for non-parties at least three calendar days before the date of the oral deposition or the production is due. *See Monarch Healthcare*, 78 Cal. App. 4th at 1289 (holding that provisions for oral depositions apply to deposition subpoenas for business records as well); Cal. Civ. Proc. Code § 2025.410(a) (objections to defective notice are waived if not timely raised). However, if the respondent waits to serve written objections until exactly three calendar days before the applicable response date, then the objections must be personally served on the party who gave notice of the deposition pursuant to CCP § 1011. Cal. Civ. Proc. Code § 2025.410(b).

Prior to January 1, 2013, parties and non-parties alike were not required to serve a "privilege log" or provide sufficient information to support the claim of privilege at the time they served their objections. *See Best Products, Inc. v. Super. Ct.*, 119 Cal. App. 4th 1181, 1188 (2004) (finding there is absolutely no requirement that a privilege log be served at the time responses asserting boilerplate privilege and work product objections are served); *Hernandez v. Super. Ct.*, 112 Cal. App. 4th 285, 891 (2003) (waiver is not an appropriate sanction for a late privilege log so long as the privilege itself is invoked in a timely manner).

CCP § 2031.240 was amended to include the following additional language as of January 1, 2013:

> (c)(1) If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log.
>
> (2) It is the intent of the Legislature to codify the concept of a privilege log as that term is used in California case law. Nothing in this subdivision shall be construed to constitute a substantive change in case law.

This amendment has altered the timing involved with providing a privilege log and requires that a responding party provide information supporting the asserted privilege at the time the objection is made. *See* Assembly Committee On Judiciary, AB 1354 Assembly Bill Analysis, Summary (amendment "expressly require[s] a responding party, when that party objects to a discovery demand on the basis of a claim of privilege or work product, to provide sufficient factual information in its response for other parties to evaluate the merits of that claim, including, if necessary, a privilege log"). As indicated in the amended language, the responding party's substantive obligation remains unaltered. *See* Cal. Civ. Proc. Code § 2031.240(c)(2) ("Nothing in this subdivision shall be construed to constitute a substantive change in case law."); *Hernandez v. Super. Ct.*, 112 Cal. App. 4th 285, 292 (2003) (purpose of a privilege log is to provide a specific factual description of documents in aid of substantiating a claim of privilege in connection with a request for document production); *Blue Ridge Ins. Co. v. Super. Ct.*, 202 Cal.

App. 3d 339, 346 (1988) (purpose of providing a specific factual description of documents is to permit a judicial evaluation of the claim of privilege).

In the only case to date that has discussed this amendment, the court of appeal recognized that prior to the amendment becoming effective on January 1, 2013, "the Code of Civil Procedure did not require preparation of a privilege log to preserve objections based on privilege or attorney work product," as well as that the amendment only applies to inspection demands. *Bank of Am., N.A. v. Super. Ct. of Orange Cnty.*, 212 Cal. App. 4th 1076, 1098 (2013).

B. Move For Protective Order

Alternatively, a non-party may file a motion for a protective order. *See* Cal. Civ. Proc. Code §§ 2017.020(a), 2019.020(b), 2019.030, 2025.420(a), (b) (providing non-exhaustive list of 16 different types of appropriate protective orders).[27] This motion must be accompanied by a meet and confer declaration pursuant to CCP § 2016.040 showing that the parties engaged in a reasonable and good faith attempt at informally resolving each issue presented by the motion. Cal. Civ. Proc. Code § 2025.420(a). The motion may be made before, during, or after a deposition. Cal. Civ. Proc. Code § 2025.420. To defeat a motion for protective order, the subpoenaing party must show good cause for having sought the production. *Cf. Calcor Space Facility, Inc. v. Thiem Industries, Inc.*, 53 Cal. App. 4th 216, 223-24 (1997) (observing that the requesting party on a motion to compel must demonstrate good cause for the discovery sought).

C. Move To Quash

A non-party also may move for an order that stays the taking of an oral deposition and quashes the notice. Cal. Civ. Proc. Code § 2025.410(c); *see* Cal. Civ. Proc. Code § 1987.1 ("the court, upon motion reasonably made by … the witness … may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective order"). As with a motion for protective order, any such motion must be accompanied by a meet and confer declaration pursuant to CCP § 2016.040. Cal. Civ. Proc. Code § 2025.410(c). To successfully oppose a motion to quash, the subpoenaing party must show good cause for having sought the production in the first place. *Cf. Calcor*, 53 Cal. App. 4th at 223-24.

D. Who Can Challenge A Non-Party Deposition Subpoena?

While there do not appear to be any California decisions on point, parties have the ability to challenge subpoenas directed at non-parties. *See* Civ. Proc. Code §§ 1987.1(b) (in addition to a witness, consumer, or employee, a party to the litigation may seek to quash a subpoena), 2017.020(a) (motion for protective order may be filed "by a party or other affected person"); *see also Johnson v. Super. Ct.*, 80 Cal. App. 4th 1050, 1062 (2000) (finding CCP 2017.020 "is equally applicable to discovery of information from a nonparty as it is to parties in the pending

[27] Indeed, "any party, any deponent, or any other affected natural person or organization" may move for a protective order in response to an oral deposition subpoena. Cal. Civ. Proc. Code § 2025.420(a).

suit"). Moreover, consumers or employees also possess the right to challenge subpoenas directed at non-parties seeking their consumer or employee records. Cal. Civ. Proc. Code §§ 1985.3(g), 1985.6(f).

In federal courts, however, "[t]he law is clear, absent a claim of privilege, a party has no standing to challenge a subpoena to a nonparty. The party to whom the subpoena is directed is the only party with standing to oppose it." *Novovic v. Greyhound Lines, Inc.*, 2:09–CV–00753, 2012 U.S. Dist. LEXIS 9203, at *23, 2012 WL 252124, at *8 (S.D. Ohio Jan. 26, 2012) (quoting *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) (internal citations omitted); *see also Waite, Schneider, Bayless & Chesley Co. L.P.A. v. Davis*, No. 1:11–cv–0851, 2013 U.S. Dist. LEXIS 5253, at *14, 2013 WL 146362 (S.D. Ohio Jan. 14, 2013) ("The only basis upon which a party could have standing to quash a non-party subpoena would be a claim or personal right or privilege."); *Green v. Baca*, CV 02-204744MMMMANX, 2005 WL 283361, at *1 (C.D. Cal. Jan. 31, 2005) (finding defendant does not have standing to quash because parties ordinarily lack standing to quash a subpoena directed at a non-party unless the party is seeking to protect a personal privilege or right); *Clayton Brokerage Co., Inc. v. Clement*, 87 F.R.D. 569, 571 (D.Md. 1980) (a party typically has no standing to challenge a subpoena issued to his or her bank seeking discovery of financial records because bank records are the business records of the bank, in which the party has no personal right); 9A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2459 (1995) (noting that "ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought").

IV. The Subpoenaing Party's Response: Move To Compel

If the subpoenaing party is dissatisfied with the non-party's response, it has only one option: the motion to compel. A subpoenaing party has 60 days after "the completion of the record of the deposition" to file a motion to compel.[28] Cal. Civ. Proc. Code § 2025.480(b). For non-parties, however, objections to a subpoena constitute a "record of deposition" for purposes of CCP § 2025.480(b). *Unzipped Apparel*, 156 Cal. App. 4th at 127 (holding "that the 60-day limit applies because a response to a business records subpoena, namely, objections, is a 'record of the deposition.'"). Thus, once the subpoenaing party is served with a non-party's objections, the record is complete, and the 60-day period within which to file a motion to compel begins.[29] *See Unzipped Apparel*, 156 Cal. App. 4th at 127.

[28] By way of comparison, parties have 45 days from the deadline to respond and/or produce to bring a motion to compel. *See* Cal. Civ. Proc. Code § 2031.310(c). A motion to enforce a subpoena for production of a consumer's personal records or employment records must be brought within 20 days of service of written objections. *See* Cal. Cal. Civ. Proc. Coe §§ 1985.3(g), 1985.6(f)(4).

[29] Any motion to compel must be personally served on the non-party deponent unless the non-party agrees to accept service by mail. Cal. R. Ct. 3.31346.

If the subpoenaing party chooses to proceed with a motion to compel, the motion must be accompanied by a meet and confer declaration pursuant to CCP § 2016.040. *See* Cal. Civ. Proc. Code § 2025.480(b). Notice of the motion must be given to all parties either orally at the deposition[30] or by "subsequent service in writing." Cal. Civ. Proc. Code § 2025.480(c). In addition, "[a] written notice and all moving papers supporting a motion to compel an answer to a deposition question or to compel production of a document or tangible thing from a nonparty deponent must be personally served on the nonparty deponent unless the nonparty deponent agrees to accept service by mail at an address specified on the deposition record." Cal. R. Ct. 3.1346.

Although the CDA does not explicitly provide for this option, a non-party may oppose a motion to compel by seeking protective relief just like in federal court. *See* Fed. R. Civ. P. 37(a)(5)(B) ("If the motion [to compel discovery] is denied, the court may issue any protective order authorized under Rule 26(c)."). Some judges will entertain a non-party's request for a protective order by way of an opposition to a motion to compel. While the safest course by far remains to move for a protective order, it also is more expensive and could lead to motion practice where the subpoenaing party otherwise may not have moved to compel.

V. General Non-Party Deposition Subpoena Provisions

The answers to the following questions and their corresponding California Code provisions *are applicable to all deposition subpoenas served on non-parties*:[31]

A. Who may issue a deposition subpoena, and does it have to be sealed?

- The subpoena may be issued by: (1) the clerk of the court where the action is pending, Cal. Civ. Proc. Code § 2020.210(a), or (2) the attorney of record for any party, Cal. Civ. Proc. Code § 2020.210(b).
- If the clerk of the court issues the subpoena, the subpoena should be signed and sealed. Cal. Civ. Proc. Code § 2020.210(a).
- If the attorney of record issues the subpoena, the subpoena does not have to be sealed. Civ. Proc. Code § 2020.210(b).

[30] If notice is given orally, the deposition officer must tell the non-party deponent to appear in court on the date and time set forth in the notice. Cal. Civ. Proc. Code § 2025.480(c).

[31] *Except as modified by the rules and procedures applicable to non-parties*, the CDA's provisions regarding subpoenas in general (CCP § 1985 *et seq*.) and the California Evidence Code's provisions regarding the production of business records (Cal. Evid. Code § 1560 *et seq*.) remain applicable to non-party deposition subpoenas. Cal. Civ. Proc. Code § 2020.030. Usually, to the extent either the CCP or the Evidence Code is applicable, non-party discovery rules explicitly reference them. Nevertheless, this "exception" must be considered whenever dealing with non-party discovery to see how other code provisions might apply.

- Regardless of who issues the subpoena (the clerk or attorney of record), a form subpoena must be used. *See* Cal. R. Ct. 1.31(b). Judicial Council forms that are mandatory are listed in Appendix A to the California Rules of Court and are identified by an "*".[32] *See* Cal. R. Ct. 1.31(b).

B. Who may serve a deposition subpoena?

- "Any person" may serve a deposition subpoena. Cal. Civ. Proc. Code § 2020.220(b).[33]

C. What method of service is required?

- If the deponent is a natural person, service is effective if the subpoena is personally delivered to that person. Cal. Civ. Proc. Code § 2020.220(b)(1).

- If the deponent is an organization, service is effective if the subpoena is personally delivered to "any officer, director, custodian of records, or to any agent or employee authorized by the organization to accept service of a subpoena." Cal. Civ. Proc. Code § 2020.220(b)(2).[34]

D. When may a deposition subpoena first be issued?

- As with all forms of discovery in California, a plaintiff must wait until at least 20 days after the defendant is served with the summons or has entered an appearance before issuing deposition subpoenas to non-parties—the so-called deposition hold rule. *See* Cal. Civ. Proc. Code § 2025.210(b); *California Shellfish*, 56 Cal. App. 4th at 24-25 (finding the deposition hold rule applies to non-parties).

- By token of the same reasoning, a defendant therefore may serve a deposition subpoena at any time after being served or after first appearing

[32] This list is available on the California Judicial Branch's website at: http://www.courts.ca.gov/forms.htm.

[33] While the CCP does not explicitly preclude parties from serving a deposition subpoena, it probably is best not to use a party because if a dispute over validity of service, it may be difficult arises for a party to convince a court that the party is unbiased and that service was in fact made. *Cf*. Cal. Civ. Proc. Code § 414.10 ("A summons may be served by any person who is at least 18 years of age and not a party to the action.").

[34] A foreign organization that conducts business in California must designate "an agent upon whom process directed to the corporation may be served within this state." Cal. Corp. Code § 2105(a)(4). If, however, an organization does not have a designated agent, the court may order substitute service of process. Hogan & Weber, 1-2 *California Civil Discovery* § 2.9.

in the action. *See* Cal. Civ. Proc. Code § 2025.220(a); *California Shellfish*, 56 Cal. App. 4th at 24-25.

E. When must a non-party respond to the deposition subpoena?

- The deposition subpoena must allow sufficient time for the deponent to have a reasonably opportunity to locate and produce any designated business records, documents, or tangible things and a reasonable time to travel to the deposition location. Cal. Civ. Proc. Code § 2020.220(a).

- With oral depositions, the date for the deposition must be set at least 10 days after service of the deposition notice. Cal. Civ. Proc. Code § 2025.270(a).

- With business records depositions, a subpoena may command production either (a) 20 days after issuance of the subpoena or (b) 15 days after service of the subpoena, whichever is later. Cal. Civ. Proc. Code § 2020.410(c).

F. When must objections be served?

- Written objections to a deposition subpoena must be served at least three calendar days before the date of the oral deposition or the production is due. Cal. Civ. Proc. Code § 2025.410(a); *Monarch Healthcare*, 78 Cal. App. 4th at 1289 (finding written objections may be served in response to all discovery mechanisms suitable for non-parties).

- If a non-party respondent waits to serve written objections until exactly three calendar days before the applicable response date, then the objections must be personally served on the party who gave notice of the deposition pursuant to CCP § 1011. Cal. Civ. Proc. Code § 2025.410(b).

G. When are parties required to complete discovery?

- The discovery cutoff is 30 days before the date initially set for the trial of an action. *See* Cal. Civ. Proc. Code. § 2024.020(a).

- A continuance or postponement of the trial date will not reopen discovery. *See* Cal. Civ. Proc. Code. § 2024.020(b). The only exception to this rule is where a party successfully moves to reopen discovery or complete discovery closer to the initial trial date. *See* Cal. Civ. Proc. Code § 2024.050.

H. Does the deposition subpoena have to be filed with the court?

- No. The original deposition subpoena and proof of service are not filed with the court, but are retained by the subpoenaing party. Cal. R. Ct. 3.250(a)(1); Cal. Civ. Proc. Code § 2020.210(b).

VI. Oral Deposition Subpoenas

An oral deposition subpoena may be used to take the oral deposition of any non-party witness (natural person, organization, or governmental agency). Cal. Civ. Proc. Code §§ 2020.310, 2025.010. Practitioners must utilize Judicial Council Official Form SUBP-015 (Deposition Subpoena For Personal Appearance).[35] Sections 2025 and 2028 of the CCP "are the general sections governing the procedures for oral and written depositions, and are applicable to depositions of party deponents and nonparty witnesses alike." *California Shellfish*, 56 Cal. App. 4th at 23.

A. Notice Provisions For Oral Deposition Subpoenas

1. What information is an oral deposition subpoena required to contain?

- The subpoena must specify the time and location of the deposition. Cal. Civ. Proc. Code § 2020.310(a).

- The subpoena must describe: (1) the nature of the deposition; (2) the rights and duties of the deponent; and (3) the penalties for any failure to comply with the subpoena. Cal. Civ. Proc. Code § 2020.310(b).

- If, in addition to the stenographic recording of the deposition, the subpoenaing party wants to record the deposition with audio or video, the subpoena must state that the deposition will be recorded in that manner. Cal. Civ. Proc. Code § 2020.310(c).

- If the deposition is going to be conducted using instant visual display, the subpoena must state that as well. Cal. Civ. Proc. Code § 2020.310(d).

- If the deponent is an organization, the subpoena must: (1) describe with reasonable particularity the matters upon which the organization will be examined; and (2) advise the organization of its duty to designate an employee who is the most qualified to attend the deposition and testify on its behalf respecting any information known or reasonably available to the deponent.[36] Cal. Civ. Proc. Code § 2020.310(e).

[35] http://www.courts.ca.gov/13889.htm.

[36] For designating a witness as the responding party, see the discussion below at Part VI.D.

2. What information it a notice of oral deposition subpoena required to contain?[37]

- The notice must list all of the parties that were served. Cal. Civ. Proc. Code § 2025.240(a). This list may appear in either the body of the notice or the accompanying proof of service. *Id*.
- The notice must identify the deponent, including address and telephone number (if known). Cal. Civ. Proc. Code § 2025.220(a)(3).
- The notice must specify the time and location of the deposition. Cal. Civ. Proc. Code § 2025.220(a)(1), (2).
- If the subpoenaing party wants to record the deposition with audio or video,[38] then the notice must state that the deposition will be recorded in that manner. Cal. Civ. Proc. Code § 2025.220(a)(5).
- If the deponent is an organization, the notice must describe with reasonable particularity the matters upon which it will be examined. Cal. Civ. Proc. Code § 2025.230.

3. Who must be served with notice of oral deposition subpoena?

- All parties who have appeared in the action must be provided with notice by the subpoenaing party. Cal. Civ. Proc. Code § 2025.240(a).

4. What documents must be with the oral deposition notice?

- An identical copy of the deposition subpoena must be served with the deposition notice. Cal. Civ. Proc. Code § 2025.240(c).

5. When may an oral deposition be scheduled?

- A reasonable amount of time must be allowed for the deponent "to travel to the place of deposition," Cal. Civ. Proc. Code § 2020.220(a), and the deposition date must be scheduled at least 10

[37] The required contents of a deposition notice and oral deposition subpoena are substantially similar. *Compare* Cal. Civ. Proc. Code §§ 2025.220-2025.240, *with* Cal. Civ. Proc. Code § 2020.310.

[38] Unless otherwise agreed to by the parties or ordered by the court, all depositions must be recorded by a stenographer who is "a person certified pursuant to Article 3 (commencing with Section 8020) of Chapter 13 of Division 3 of the Business and Professions Code." Cal. Civ. Proc. Code § 2020.330(b).

days after service of the deposition notice, Cal. Civ. Proc. Code § 2025.270.

6. Does the deponent have to appear at the oral deposition in person?

- No. A non-party deponent may appear telephonically or by videoconference with the court's approval after demonstrating good cause and no prejudice to any party. Cal. Civ. Proc. Code § 2025.310(b); Cal. R. Ct. 3.1010(d).

7. Who is authorized to conduct an oral deposition?

- An oral deposition must be conducted and supervised by an officer "authorized to administer an oath." Cal. Civ. Proc. Code § 2025.320.

- The officer cannot have a financial interest in the action and cannot be a relative or an employee of any of the parties or their attorneys. Cal. Civ. Proc. Code § 2025.320(a).

- Any objections to the deposition officer's qualifications must be made before the deposition begins or as soon after that as the basis for the objection becomes known or could have reasonably become known. Cal. Civ. Proc. Code § 2025.320(e).

8. Must a deposition subpoena be accompanied by a good cause affidavit?

- No. There is no requirement that a good cause affidavit be served with an oral deposition subpoena. *See* Cal. Civ. Proc. Code § 2020.310; *Terry v. SLICO*, 175 Cal. App. 4th 352, 357 (2009).

9. What happens if a non-party fails to comply with an oral deposition subpoena?

- A non-party who fails to comply with an oral deposition subpoena exposes itself to contempt sanctions "without the necessity of a prior order of court directing compliance by the witness." Cal. Civ. Proc. Code § 2020.240; *see also* Cal. Civ. Proc. Code § 2023.010; *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 311 (1989) ("Deliberate refusal to obey a lawfully issued subpoena to attend a deposition is punishable as a contempt without the necessity of a prior order directing compliance.").

- A non-party also must pay $500 to the party noticing the deposition and may be liable for any other damages the noticing party may have incurred. *See* Cal. Civ. Proc. Code § 2020.240.

B. The Location Of The Oral Deposition

The location of the deposition depends on whether the deponent is a natural person or an organization.[39]

1. Deponent As Natural Person

Depositions of a natural person may be taken either: (1) within 75 miles of the deponent's residence; or (2) within the county where the action is pending, if the deposition location is within 150 miles of the deponent's residence. Cal. Civ. Proc. Code § 2025.250(a). The party seeking the deposition may choose between either of these two options. *Id*. A non-party deponent may seek a court order, based on a "finding of good cause and no prejudice to any party," to appear by telephone, videoconference or other remote electronic means. Cal. Civ. Proc. Code § 2025.310; Cal. R. Ct. 3.1010(d). Significantly, regardless of what the parties may stipulate or what a court may order, nothing can extend these geographical limits for a non-party witness. Rylaarsdam & Edmon, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 8:626.[40]

2. Deponent As Organization

Where an organization has designated a principal executive or business office in California, its deposition must be taken within 75 miles of the designated office—unless it consents to a more distant place. Cal. Civ. Proc. Code § 2025.250(c). If, however, the organization has not made a designation, the party seeking the deposition may take the deposition either: (1) "within the county where the action is pending;" or (2) "within 75 miles of any executive or business office" the organization might have in California. Cal. Civ. Proc. Code § 2025.250(d). The subpoenaing party may choose either option. *Id*.

C. Witness Fees For Oral Depositions

Any witness required by a subpoena to attend a deposition is entitled to witness fees from the subpoenaing party.[41] Cal. Civ. Proc. Code §§ 1986.5, 2020.230(a). Regardless of whether the witness makes a demand for payment, the subpoenaing party must pay the witness fees either when the deposition subpoena is served or at the beginning of the deposition. Cal. Civ. Proc. Code § 2020.230(a). Witness fees are calculated by statute and are currently set at $.20 per mile actually and reasonably traveled and $35 per day of testimony. Cal. Gov. Code § 68093. To ensure that a deposition is not disrupted by this issue, best practices require that the subpoenaing party have check in hand at the beginning of the deposition if witness fees were not paid at the time of service.

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[39] This issue is also addressed in a chart attached hereto as Appendix A.

[40] Courts, however, may order *a party or a party-affiliated witness* (officer, director, managing agent or employee of a party) to appear for deposition at a location beyond the limits set forth in the CDA. Cal. Civ. Proc. Code § 2025.260(a).

[41] These witness fees therefore apply to both oral depositions and business record depositions that require testimony.

D. The Non-Party Organization's Duty To Designate A Witness

When an organization is required to designate a person most qualified to testify pursuant to CCP § 2025.230, that witness "must familiarize themselves with any documents they are instructed to produce and be able to testify about information that is readily available to one in the position they hold within the organization." Hogan & Weber, 1-2 *California Civil Discovery* § 2.14 (citing *Maldonado v. Super. Ct.*, 94 Cal. App. 4th 1390, 1396 (2002)); *see* Sink, *California Subpoena Handbook* § 2.3 at 53 n.1 (citing *Maldonado*, 94 Cal. App. 4th at 1398). A corporation's duty "is limited … to producing the most knowledgeable person currently in its employ and making sure that person has access to information and documents reasonably available within the corporation." *Maldonado*, 94 Cal. App. 4th at 1398 (finding that organization was not required to produce former employees for deposition even if former employees were more knowledgeable than any current ones). *Maldonado* makes it clear that a witness should have some familiarity with the documents produced at the deposition. *Id*. at 1396 (disapproving of "the cavalier attitude displayed at the depositions concerning information that should have been readily available to the witnesses"). Moreover, when a request for documents is made, the witness "is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." *Id.* at 1396-97 (witnesses ordered to return "with the documents requested and with proof that the witnesses had undertaken some effort to familiarize themselves with the areas of their supposed 'knowledge'").[42]

[42] Some federal district courts have found that the federal rules regarding PMK depositions of organizations are even more demanding. For example, regardless of whom the organization designates, the organization must fully educate the witness to testify to the best of the organization's ability about what is known or reasonably available to the organization, including all available documents responsive to the subpoena. *See* Fed. R. Civ. P. 30(b)(6); *see, e.g.*, *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387, 389 (D. Mass. 2007) (finding corporation had obligation to prepare designees so that they may give knowledgeable and binding answers for the corporation); *Calazturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 36-37 (D. Mass. 2001) (holding that organization's designee has an affirmative duty to educate himself or herself about the designated topics). A designee should therefore be prepared to testify about the organization's subjective belief, opinion, and interpretation of documents, events, and prior testimony. *See Icon Enters. Int'l, Inc. v. Am. Prods. Co.*, No. CV 04-1240 SVW (PLAx), 2004 U.S. Dist. LEXIS 31080, at *16-17, 2004 WL 5644805, at *6 (C.D. Cal. Oct. 7, 2004) (finding federal rules obligate a corporate party to prepare its designee to be able to give binding answers on its behalf); *U.S. v. Taylor*, 166 F.R.D. 356, 359-63 (M.D.N.C. 1996) (holding that corporation is obligated to produce a witness that can testify to the best of the corporation's ability based on the knowledge it still retains even if corporation no longer employs an individual independently knowledgeable of that issue).

As the designee, the deponent is testifying as to the organization's knowledge and not his own, and an organization cannot fail to designate anyone on the basis that all potential designees are outside of the organization's control. *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146-47 (10th Cir. 2007). In other words, at the very least, an organization must

It should be remembered that a "person most qualified" deponent is the "voice" of the organization, and his or her testimony is binding on the organization and may be read at any time at trial for any reason pursuant to California Evidence Code section 1220. Moreover, the failure to designate, prepare, and produce an appropriate witness to testify on behalf of an organization may result in sanctions, including "payment of costs, sanctions barring the introduction of certain evidence, sanctions deeming that certain issues are determined against the offending party, and sanctions terminating an action in favor of the aggrieved party." *See Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1209, 1214-18 (2006) (citing Cal. Civ. Proc. Code §§ 2023.020, 2023.030).

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designate someone without personal knowledge and then attempt to educate that person as best as it can—i.e., create a witness from the organization's responsive knowledge. *But see Wultz v. Bank of China Ltd.*, 293 F.R.D. at 680-81 (finding non-party would be unduly burdened if required to educate employee regarding topics where they have "no knowledge about them whatsoever"). If no one exists and there is no way in which to educate the remaining members of the organization, then the organization should timely inform the subpoenaing party that such is the case. *Calazturficio S.C.A.R.P.A. S.P.A.*, 201 F.R.D. at 38.

VII. Business Records Deposition Subpoenas For Production Of Business Records For Copying

Non-parties also may be served with a business records deposition for copying business records. Cal. Civ. Proc. Code §§ 2020.010(a)(3), 2020.410; *California Shellfish*, 56 Cal. App. 4th at 21 ("A deposition subpoena which seeks only business records simply allows a party to obtain these records without the formality of requiring the testimony of the custodian."). The CDA does not define "business records," but the term includes: (1) every kind of record, (2) maintained by every kind of business, governmental activity, profession, or occupation, (3) whether carried on for profit or not. *See* Cal. Evid. Code §§ 1270,[43] 1560(a);[44] *Cooley v. Super. Ct.*, 140 Cal. App. 4th 1039, 1044 (2006). Accordingly, as used in CCP § 2020.410, "business records" likely encompasses documents such as journals, account books, reports, and other similar items; i.e., "an item, collection or grouping of information about a business entity." *Urban Pac. Equities Corp. v. Super. Ct.*, 59 Cal. App. 4th 688, 692-93 (1997) (holding that a business records deposition subpoena cannot be used to subpoena a deposition transcript from a court reporter because it was not a business record but rather a product of business).

A. How Must A Non-Party Respond To A Deposition Subpoena For Production Of Business Records For Copying?

There are three ways in which a business record deposition subpoena for production of business records for copying may direct a non-party's custodian to respond: (1) prepare a copy of the requested records for delivery to the deposition officer, Cal. Civ. Proc. Code § 2020.430(a); (2) make the requested records available for inspection and copying by the deposition officer[45] at the organization's place of business, Cal. Civ. Proc. Code § 2020.430(c); or (3) make the requested records available for inspection and copying by a representative of the subpoenaing attorney at the organization's place of business, Cal. Evid. Code § 1560(e); Cal. Civ. Proc. Code § 2020.430(e). *See also Unzipped Apparel*, 156 Cal. App. 4th at 127 (observing that a business records deposition subpoena may direct a non-party's custodian of records to either make the requested business records available for copying or deliver a copy to a deposition

[43] "'[A] business' includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." Cal. Evid. Code § 1270.

[44] A "'record' includes every kind of record maintained by a business" as described in California Code of Evidence § 1270. Cal. Evid. Code § 1560(a)(2). This would not include, for example, documents generated by the business—such as deposition transcript generated by a transcription service.

[45] A deposition officer is a professional photocopier "registered under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code, or a person exempted from the registration requirements of that chapter under Section 22451 of the Business and Professions Code." Cal. Civ. Proc. Code § 2020.420. Significantly, these exemptions include "[a] member of the State Bar or his or her employees, agents," Cal. Bus. Prof. Code § 22451(b), but do not include "a relative or employee of any attorney of the parties." Cal. Civ. Proc. Code § 2020.420.

officer). It is mandatory that practitioners use Judicial Council Official Form SUBP-010 (Deposition Subpoena for Production of Business Records).[46]

B. Provisions Applicable To <u>All</u> Business Records Deposition Subpoenas For Production Of Business Records For Copying

1. How must the deposition subpoena describe the business records?

- The subpoena must designate the records to be produced "by specifically describing each individual item or by reasonably particularizing each category of item." Cal. Civ. Proc. Code § 2020.410(a).[47]

- Moreover, the categories of documents must be reasonably particularized *from the standpoint of the non-party to whom the demand is made*.[48]

- Although the requests have to be reasonably particularized, they are not required to include "specific information identifiable only to the deponent's records system, like a policy number or the date

[46] http://www.courts.ca.gov/forms.htm.

[47] This is not an empty requirement for non-party discovery. Courts retain broad discretion to protect parties from the burden and expense of overreaching discovery demands. *See* Cal. Civ. Proc. Code §§ 2017.020, 2019.030, 2023.030. And since "[d]iscovery procedures are generally less onerous for strangers to the litigation," *Monarch Healthcare*, 78 Cal. App. 4th at 1289-90, these protections apply with even greater force to non-parties. California courts have consistently emphasized that "particularly when dealing with an entity which is not even a party to the litigation, the court should attempt to structure discovery in a manner which is least burdensome to such an entity," *Calcor*, 53 Cal. App. 4th at 222 (holding that discovery demand was unduly burdensome because it was so broad that it in effect asked for everything in the custodian's possession relating to the subject of litigation); *see Monarch*, 78 Cal. App. 4th at 1289-90 (observing that while "parties should be subject to the full panoply of discovery devices … nonparty witnesses should be somewhat protected from the burdensome demands of litigation"). Thus, "the concerns for avoiding undue burdens on the 'adversary' in the litigation … apply with even more weight to a nonparty." *Calcor*, 53 Cal. App. 4th at 225 (acknowledging "the tremendous burdens promiscuous discovery has placed on litigants and nonparties alike"); *see Obregon v. Super. Ct.*, 67 Cal. App. 4th 424, 431 (1998) ("When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden.").

[48] "The 'reasonably' in the statute implies a requirement such categories be reasonably particularized from the standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made." *Calcor*, 53 Cal. App. 4th at 222.

when a consumer interacted with the witness…." Cal. Civ. Proc. Code § 2020.410(b).

2. To whom must the business records deposition subpoena be directed?

- The subpoena must be directed to (a) the custodian of records or (b) another person qualified to certify the records. Cal. Civ. Proc. Code § 2020.410(c); Cal. Evid. Code § 1561(a).[49] Significantly, certification is "more than a clerical task." *Cooley*, 140 Cal. App. 4th at 1044. In other words, it is not enough for the records to be in the witness's possession; the witness must be capable of certification. *See Cooley*, 140 Cal. App. 4th at 1045 (Santa Monica District Attorney could not be required to produce records in its possession generated by other law enforcement agencies because they could not be certified pursuant to California Evidence Code § 1561).

- If the subpoena is directed to a "witness" as defined by CCP § 1985.3[50] and seeks consumer or employment records, then service of the deposition subpoena must be accompanied by either: (1) a copy of the proof of service to the consumer as described in CCP § 1985.3(e) or CCP § 1985.6(b) as appropriate; or (2) the consumer's written authorization of release as described in CCP § 1985.3(c)(2). Cal. Civ. Proc. Code § 2020.410(d).

3. Does the business records deposition subpoena have to be accompanied by an affidavit showing good cause?

- A deposition subpoena does *not* have to be accompanied by a declaration or affidavit showing good cause for the production of documents and things designated as generally required by CCP § 1985(b). Cal. Civ. Proc. Code §§ 2020.410(c), 2020.510(b); *Terry*, 175 Cal. App. 4th at 357 (finding CCP sections 1985 and 1987.5 are superseded by CCP § 2020.510).

4. Is a deposition notice required for deposition subpoenas for copying business records?

[49] In order to be certified, an affidavit must describe how the records were prepared and affirm: (1) the affiant is the custodian of the records and has the authority to certify them; (2) the records delivered or made available are a true copy of those described in the subpoena; (3) the records were prepared in the ordinary course of business; and (4) the identity of the records. Cal. Evid. Code § 1561(a).

[50] CCP § 1985.3 provides an extensive definition of "witness" that includes most health care providers, professionals, financial institutions, and schools. Cal. Civ. Proc. Code § 1985.3(a)(1).

- Technically, a deposition notice is not required. Unlike a deposition subpoena that requires testimony, a deposition subpoena that only seeks business records does not require a deposition notice. Cal. Civ. Proc. Code § 2025.220(b).

- In lieu of a notice, however, the subpoenaing party is required to serve a copy of the business records deposition subpoena on every party who has appeared in the action. Cal. Civ. Proc. Code §§ 2025.220(b), 2025.240(a).

5. How soon must a non-party produce documents in response to a deposition subpoena for production and copying of business records?

- Documents are to be produced no earlier than 20 days after issuance of the subpoena or 15 days after service of the subpoena, whichever is later. Cal. Civ. Proc. Code § 2020.410(c).[51] This date is extended 5 calendar days if the subpoena is served by U.S. mail and 2 court days if served by express mail. *See* Cal. Civ. Proc. Code § 1013(a), (b).

6. Does the non-party's production have to be accompanied by an affidavit?

- Yes. The production must be accompanied by an affidavit from the custodian (or other qualified witness) that complies with California Evidence Code § 1561(a). Cal. Civ. Proc. Code § 2020.430(a)(2). Essentially, this affidavit describes the mode of preparation for the production and affirms: (1) the affiant is the custodian of the records and has the authority to certify them; (2) the records delivered or made available are a true copy of those described in the subpoena; (3) the records were prepared in the ordinary course of business; and (4) the identity of the records. Cal. Evid. Code § 1561(a).

- In addition to the custodian's affidavit, if the records were delivered at the custodian's or the witness's place of business for copying to (a) the attorney, (b) the attorney's representative, or (c) a deposition officer, then (i) the attorney, (ii) the attorney's representative, or (iii) a deposition officer also must provide an affidavit stating that the copy is indeed a true copy of the records delivered to them. Cal. Evid. Code § 1561(c).

[51] The subpoenaing party and the custodian may agree on a different date for production. Cal. Evid. Code § 1560(b)(3).

7. What if the non-party does not possess any responsive business records?

- If a non-party is served with a business records deposition subpoena and does not possess any responsive records, the non-party must provide an affidavit stating that fact. *See* Cal. Evid. Code § 1561(b); *Unzipped Apparel*, 156 Cal. App. 4th at 131. A non-party may not simply ignore the deposition subpoena.

C. Provisions Applicable Only To Business Records Delivered To A Deposition Officer For Copying

1. What additional notice is required?

- A special notice must be affixed to the deposition subpoena warning against early delivery of the business records.[52] Cal. Civ. Proc. Code § 2020.430(d). This notice is required to give parties time to move for a protective order. Unless stipulated by the parties (and the consumer/employee if consumer/employee records as defined by CCP §§ 1985.3 or 1985.6 are involved), the custodian may not deliver the records before the time specified in the subpoena. Cal. Civ. Proc. Code § 2020.430(d).

2. What documents must be delivered to the deposition officer?

- The production must consist of a true, legible, and durable copy of the requested records. Cal. Civ. Proc. Code § 2020.430(a)(1).

3. When does the production to a deposition officer have to be sealed?

- The business records must be "enclosed, sealed, and directed" as described in California Evidence Code § 1560(c) if they are delivered to the office of the deposition officer. Cal. Civ. Proc. Code § 2020.430(b).

4. What provisions for copying have to be made for the deposition officer?

- If business records are delivered to a deposition officer at the office of the business producing the records, then the custodian must either: (1) permit the deposition officer to make a copy of the

[52] The following legend must appear in boldface immediately following the date and time specified for production: "**Do not release the requested records to the deposition officer prior to the date and time stated above.**" Cal. Civ. Proc. Code § 2020.430(d).

originals during normal business hours;[53] or (2) deliver to the deposition officer a true, legible, and durable copy of the records upon receipt of payment for the reasonable costs of production. Cal. Civ. Proc. Code § 2020.430(c).

D. Provisions Applicable Only To Business Records Made Available For Inspection And Copying By The Subpoenaing Attorney Or The Subpoenaing Attorney's Representative

1. When is CCP § 2020.430 ("Delivery for copying; requirements; time to deliver; application of Evidence Code concerning inspection of records") inapplicable to a business deposition subpoena?

- CCP § 2020.430 does not apply if the documents are made available for copying at the witness organization's address pursuant to California Rule of Evidence 1560(e). Cal. Civ. Proc. Code § 2020.430(e).

2. When and where do the business records have to be made available for copying?

- The organization must permit the attorney's representative to make a copy of the originals during normal business hours at its business address. Cal. Evid. Code § 1560(e).

- If the custodian is provided with at least five business days' advance notice, the custodian shall designate a time period of not less than six continuous hours on a date certain for copying. Cal. Evid. Code § 1560(e).

E. E-Discovery Procedures Applicable To Business Records Deposition Subpoenas

Effective as of June 29, 2009, California amended the CCP to specifically address the unique issues presented by electronically stored information ("ESI").[54] The amendments expressly permit parties to use subpoenas in order to obtain ESI from both parties and non-parties. *See* Cal. Civ. Proc. Code § 1985.8(a)(1) ("A subpoena in a civil proceeding may require that [ESI] … be produced and that the party serving the subpoena … be permitted to inspect,

[53] If the custodian is provided with at least five business days' advance notice, the custodian shall designate a time period of not less than six continuous hours on a date certain for copying. Cal. Evid. Code § 1560(e).

[54] ESI "mean information that is stored in an electronic medium." Cal. Civ. Proc. Code § 2016.020(e). "'Electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Cal. Civ. Proc. Code § 2016.020(d). By comparison, the FRCP does not have a specific definition of ESI.

copy, test, or sample the information."). Similar in many ways to Federal Rule of Civil Procedure 45, California's ESI amendments: (1) allow the subpoenaing party to specify the production format, Cal. Civ. Proc. Code § 1985.8(b); (2) place the burden of proving that the ESI is inaccessible on the responding party,[55] Cal. Civ. Proc. Code § 1985.8(e); (3) provide the court with authority to shift production expenses to the subpoenaing party, Cal. Civ. Proc. Code § 1985.8(g); and (4) recognize the court's authority to place limitations on ESI discovery—even if accessible, *see* Cal. Civ. Proc. Code. § 1985.8(i).

1. Do the ESI provisions applicable to subpoeanas in general also apply to business records deposition subpoenas?

- Yes. To the extent a business records deposition subpoena seeks ESI, it must comply with the general requirements for subpoenas seeking ESI. *See* Cal. Civ. Proc. Code § 1985.8(a)(2) ("[a]ny subpoena seeking [ESI] shall comply with the requirements of this chapter").

2. In what format must the ESI be produced?

- The subpoenaing party may specify the form or forms in which each type of ESI is to be produced. Cal. Civ. Proc. Code §§ 1985.8(b), 2031.030(a)(2).

- If the subpoenaing party fails to specify the form of production, and unless the subpoenaing party and responding party otherwise agree or the court orders, the responding party may "produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable." Cal. Civ. Proc. Code § 1985.8(d)(1).

- If the responding party objects to the specified form of production, the responding party should identify the format in which it intends to produce ESI. Cal. Civ. Proc. Code §§ 1985.8(c), 2031.280(c) (rules for objecting to requests for production of ESI).

- A responding party is not required to produce the same ESI in more than one format. Cal. Civ. Proc. Code § 1985.8(d)(2).

3. What if ESI is not reasonably accessible?

[55] One difference between the Federal Rules regarding ESI and California's is that the CCP presumes all media to be accessible. *Compare* Cal. Civ. Proc. Code § 1985.8(e), *with* Fed. R. Civ. P. 26(b)(2)(B). As technology advances, however, it will become progressively more difficult in federal court to argue that media is inaccessible.

- If ESI is inaccessible because of undue expense or burden, the burden is on the responding party. Cal. Civ. Proc. Code § 1985.8(e).

- Although unclear for non-parties, a party responding to a request for production of ESI must, in the first instance, either move for a protective order or make specific written objections on the ground that the requested ESI is not reasonably accessible. By doing so, "the responding party preserves any objections it may have" related to ESI. *See* Cal. Civ. Proc. Code § 2031.210(d) ("the responding party shall identify in its response the types of categories of sources of [ESI] that it asserts are not reasonably accessible. By objecting and identifying information of a type or category or source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that [ESI]").

4. What happens if the court determines the ESI is not reasonably accessible?

- Even if the responding party demonstrates that the ESI is not reasonably accessible, a court nonetheless may require production if the subpoenaing party demonstrates good cause—subject to any limitations under CCP § 1985.8(i) that the court may impose. Cal. Civ. Proc. Code § 1985.8(f).

- If a court finds good cause exists that warrants production of inaccessible ESI, the court may set various conditions for the production of the ESI, "*including allocation of the expense of discovery*." Cal. Civ. Proc. Code § 1985.8(g) (emphasis added).

5. How are non-parties protected from often unreasonable demands of non-party ESI discovery?

- The subpoenaing party is required to take "reasonable steps" to avoid imposing an undue expense or burden on the non-party. Cal. Civ. Proc. Code § 1985.8(k).

- Courts are supposed to limit the frequency or extent of discovery of ESI from any source where any of the following conditions exist: (1) there is another more convenient, less burdensome, or less expensive source; (2) the discovery "is unreasonably cumulative or duplicative;" (3) the subpoenaing party has had ample opportunity to obtain the ESI through discovery; and (4) the likely burden or expense of the proposed ESI discovery outweighs the likely benefit—when taking into account the amount in

controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested ESI in resolving the issues. Cal. Civ. Proc. Code § 1985.8(i)(1-4).

- If the court issues an order to compel production of ESI to a non-party under this section, then the court is obligated to protect that non-party "from undue burden or expense resulting from compliance." Cal. Civ. Proc. Code § 1985.8(l).

- If it is necessary to translate a data compilation into a reasonably usable form, then the subpoenaing party shall pay any reasonable expenses incurred by the non-party to accomplish that task. Cal. Civ. Proc. Code § 1985.8(h).

6. Is the clawback provision for ESI applicable to non-parties?

- Yes. As with parties, a non-party may clawback an inadvertently produced ESI document that is subject to a claim of privilege or attorney work product via the process set forth at CCP § 2031.285. Cal. Civ. Proc. Code § 1985.8(j).[56]

- The responding party must notify the subpoenaing party that certain ESI produced is subject to a claim of privilege or of protection as attorney work product. The subpoenaing party must then immediately sequester the information and either return the information or present it to the court under seal for a ruling on the claim of privilege. Cal. Civ. Proc. Code § 2031.285(b). The subpoenaing party may not use the inadvertently produced materials or disclose it until the claim of privilege or protection is resolved by the court. Cal. Civ. Proc. Code § 2031.285(c)(1), (d)(2).

7. Is there a safe harbor provision for non-parties?

- Yes. As with parties, absent extraordinary circumstances, a non-party will not be sanctioned for the failure to provide ESI "that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an" ESI system. Cal. Civ. Proc. Code § 1985.8(m)(1).

F. Consumer/Employee Business Records

[56] The CCP's rules on clawback are similar to those found in Federal Rule of Civil Procedure 26(b)(5)(B).

In order to protect the privacy interests of consumers and workers, CCP § 1985.3 and CCP § 1985.6 establish special notification procedures for consumers and workers where their information could be discovered by a subpoena, which are also discussed in Parts II.D. and II.E above. Cal. Civ. Proc. Code §§ 1985.3, 1985.6, 2025.240(b). The CDA incorporates these provisions for business records deposition subpoenas to non-parties. Cal. Civ. Proc. Code §§ 2020.030, 2020.410(d). For non-parties, however, as set forth above, the process is modified in two ways: (1) an affidavit demonstrating good cause is not required; and (2) production must occur no earlier than either 20 days after issuance of the subpoena or 15 days after service of the subpoena, whichever is later.

Moreover, if the subpoena is directed to a "witness" as defined by CCP § 1985.3 and the records are consumer records, then service of the deposition subpoena must be accompanied by either: (1) a copy of the proof of service to the consumer as described in CCP § 1985.3(e); or (2) the consumer's written authorization of release as described in CCP § 1985.3(c)(2). Cal. Civ. Proc. Code § 2020.510(c).

G. Recoverable Costs Associated With The Production Of Business Records In Response To A Deposition Subpoena

A non-party is entitled to be reimbursed for "all reasonable costs incurred in a civil proceeding … with respect to the production of all or any part of business records" in response to a subpoena. Cal. Evid. Code § 1563(b).

1. What constitutes reasonable costs where the custodian copies and produces the business records?

The California Evidence Code provides a non-exhaustive list of specific recoverable costs and the amount to which a non-party witness is entitled—e.g., "ten cents ($0.10) per page for standard reproduction of documents of a size 8½ by 14 inches or less." *See* Cal. Evid. Code § 1563(b)(1) ("'Reasonable cost,' as used in this section, shall include, *but not be limited to*, the following specific costs…." (emphasis added)). Accordingly, even if an expense associated with responding to a deposition subpoena is not listed, a non-party still may be able to recover for that expense.

2. What constitutes reasonable costs where the custodian delivers the business records for copying?

If the custodian delivers the business records for copying to the deposition officer, the subpoenaing attorney, or the subpoenaing attorney's representative at the custodian's place of business, the custodian must be paid a fee not to exceed $15 "for complying with the subpoena," as well as any fees actually paid by the custodian to an outside vendor for retrieval and return of records held offsite. Cal. Evid. Code § 1563(b)(6). To the extent the records need to be retrieved from microfilm, the "reasonable costs" as set forth in California Code of Evidence § 1563(b)(1) are applicable. Cal. Evid. Code § 1563(b)(6).

3. When do reasonable costs have to be paid?

While the requesting party is not required to pay the reasonable costs before the business records are ready for delivery, a non-party witness is under no obligation to deliver the business records pursuant to the subpoena until these costs are actually paid. Cal. Evid. Code § 1563(b)(2). In order to obtain payment, the non-party witness must submit an itemized statement of the "reasonable costs" to the requesting party. Cal. Evid. Code § 1563(b)(3). Even though the requesting party may challenge the "reasonable costs" listed on the statement by filing a petition with the court, if the court finds that the costs were not excessive, the court is required to order the requesting party to pay the non-party witness's reasonable expenses incurred in defending the challenge, including attorneys' fees. Cal. Evid. Code § 1563(b)(4).

H. Custody Or Control: What Documents Have To Be Produced?

CCP § 1985 allows subpoenas to require that a witness produce all business records under his control.[57] CCP § 2020.030, in turn, makes CCP § 1985 applicable to all deposition subpoenas. Accordingly, a non-party custodian served with a deposition subpoena must produce all business records under his control regardless of their location.

The Rutter Guide takes the position that "[w]hether 'custodian' requires *actual custody* of the records is unclear. If it does, serving an officer or agent in California would not compel production of business records located elsewhere [outside California]." Rylaarsdam & Edmon, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 8:540.4. The Rutter Guide's position appears to be based on the premise that CCP § 1985(a) is only applicable to a records and testimony deposition subpoena. But CCP 2020.030 does not make a distinction between the two types of deposition subpoenas; it makes CCP § 1985 applicable to all deposition subpoenas—both business records only as well as business records and testimony. *Id.* at § 8:540.5.[58]

[57] A subpoena may require "the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, electronically stored information, or other things under the witness's control …." Cal. Civ. Proc. Code § 1985(a). "A copy of an affidavit shall be served with a subpoena duces tecum … showing good cause for the production of the matters and things described in the subpoena … and stating that the witness has the desired matters or things in his or her possession or under his or her control." Cal. Civ. Proc. Code § 1985(b).

[58] By way of comparison, under the Federal Rules of Civil Procedure, it is unnecessary for the documents sought by the subpoena to be in the physical "custody" of the party; rather, "control" is sufficient—legal right, authority, or ability to obtain the documents upon demand. *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (2000) (applying the meaning of "control" under Federal Rule of Civil Procedure 34). "Courts have found control by a parent corporation over documents held by its subsidiary, [] by a subsidiary corporation over documents held by its parent, [] and by one sister corporation over documents held by another sister corporation, []." *Id.* at 472 (citations omitted).

Therefore, contrary to the Rutter Guide's distinction, the better view is that CCP § 1985 requires the production of any documents within the custodian's control and not only documents over which the custodian has actual custody. This approach also would prevent, for example, the possibility of an organization moving documents from its branch in California to a branch in another state in an effort to avoid subpoena jurisdiction. *Cf. In re Jee*, 104 B.R. 289, 294-95 (Bankr. C.D. Cal. 1989) (holding under Federal Rules of Civil Procedure that to the extent there is subpoena jurisdiction over a deponent, the deponent must produce all documents within his control regardless of location unless deponent can prove that production would violate the laws of the state where the documents are located).

I. Opposing The Deposition Subpoena Based On The Location Of The Business Records

A non-party witness may attempt to oppose subpoena jurisdiction based on whether the witness is an organization created under California law and the location of the records.

While CCP § 1989 prevents a non-resident witness from being compelled to appear in California for deposition and produce documents, CCP § 1989 does not apply in cases where a business records deposition subpoena is served upon a custodian and only requests the production of business records for copying—not the custodian's personal attendance and testimony. *See* Cal. Civ. Proc. Code § 1987.3. Accordingly, CCP § 1987.3 "'probably' applies only where the nonresident custodian is employed by a business entity subject to California jurisdiction. Otherwise, there would be no way for the court to enforce compliance with a subpoena served on a nonresident [custodian]." *Amoco Chem. Co.*, 34 Cal. App. 4th at 561 n.9 (citing Wegner, et al., *Cal. Prac. Guide: Civil Trials & Evidence* § 1:58 (The Rutter Group 1994)). Thus, the residency of the custodian may be *immaterial* when dealing with a business records only deposition subpoena.

1. U.S. Organization Created Under California Law

a. Business Records Located In California

If the non-party witness is an organization created under California law and the records are located in California, then the records likely must be produced for copying. Sink, *California Subpoena Handbook* § 3:9 at 106-07. Of all the possible hypothetical situations, California's subpoena jurisdiction most clearly would encompass the records in this scenario.

Nonetheless, a California court still may decline to enforce a business records deposition subpoena where the records concern transactions that occurred in another state *and* where the other state's laws would be violated if those records were produced for copying. Sink, *California Subpoena Handbook* § 3:9 at 103. For example, another state's laws could be violated if a subpoena sought medical records of patients in Arizona, but Arizona has a consumer protection statute in place that entitles patients to notice and an opportunity to object in Arizona courts if their records are subpoenaed. *Id.* § 3.9 at 99; *In re Jee*, 104 B.R. at 294-95 (holding under Federal Rules of Civil Procedure that to the extent there is subpoena jurisdiction over a deponent, the deponent must produce all documents within his control regardless of location unless the deponent can prove that production would violate the laws of the state where the

documents are located). *But see Cates v. LTV Aerospace Corp.*, 480 F.2d at 623 (holding that the Federal Rules of Civil Procedure cannot be used to force a non-party deponent to produce documents located outside the judicial district).

b. Business Records Located Outside California

If the witness is an organization created under California law and the records are located outside of California, then the records likely would have to be produced. Sink, *California Subpoena Handbook* § 3:9 at 104. This result largely is because jurisdiction over the organization stems from the organization's choice to be created under the laws of California and not from "some delicate form of transactional analysis." *Id*. Therefore, subpoena jurisdiction over the records should not depend on whether the records pertain to transactions that occurred in California. *Id*. Again, courts could make an exception where production of the records would violate the law of another jurisdiction. *Id*.

c. Business Records Located In Foreign Country

There do not appear to be any California cases on point, but where the records are located in a foreign country, courts in other jurisdictions tend to require organizations created under the laws of their jurisdiction to produce those records so long as the records are related to the transactions at issue in the case and where the law of the foreign country would not be violated. Sink, *California Subpoena Handbook* § 3:9 at 107-08. Other courts have stressed that any discovery of records located in a foreign country from a non-party requires application of the Hague Convention. *Id*. at 108.

2. U.S. Organization Not Created Under California Law

a. Business Records Located In California

If the witness is not an organization created under California law but the records are located in California, then the records likely would have to be produced because they are, "at least presumptively, within the jurisdiction of local courts." Sink, *California Subpoena Handbook* § 3.9 at 109-110. An even stronger case for requiring production of the business records exists where "the evidence also concerns transactions which occurred in, or significantly affected persons in California to the extent that these transactions would (in the absence of registration) have sustained in personam jurisdiction over [an] out-of-state organization under International Shoe []…." *Id.* at 110.[59]

b. Business Records Located Outside California

[59] In *International Shoe*, the Supreme Court allowed personal jurisdiction where there were sufficient "minimum contacts" between the party and the forum state such that it would not offend "traditional notions of fair play and substantial justice" to subject that party to the state's jurisdiction. *International Shoe*, 326 U.S. 310, 316 (1945).

If the witness is not an organization created under California law and the records are located outside of California, then whether the records must be produced depends on the extent to which the records pertain to transactions that occurred in or affected California. *See* Sink, *California Subpoena Handbook* § 3:9 at 106-07. In other words, under a minimum contacts analysis, for there to be even a chance that the records would have to be produced, the records at a minimum would have to relate to California transactions. Courts also take into account whether production would violate the laws of the state or the foreign country where the records were located or where the organization was incorporated. *See* Sink, *California Subpoena Handbook* § 3:9 at 106-12.

The California Subpoena Handbook concludes that this situation represents the outer limits of a California court's subpoena jurisdiction over business records, and the analysis should progress according to the *International Shoe* test for minimum contacts sufficient to establish personal jurisdiction. Sink, *California Subpoena Handbook* §§ 3:2 at 65, 3:9 at 106-07 (citing *International Shoe Co.*, 326 U.S. at 315-20). The Rutter Guide takes no position on this issue, and simply states that it is unclear whether a business records deposition subpoena served on a non-party corporation with California contacts compels production of its records located outside of state California. *See* Rylaarsdam & Edmon, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 8:540.4.

3. U.S. Organization Not Created Under California Law And Conducts No Business In California

If an organization is not created under California law and does not conduct any business in California, then its records should not be subject to California's subpoena jurisdiction. Sink, *California Subpoena Handbook* § 3:9 at 113 (citing *Coopman v. Super. Ct.*, 237 Cal. App. 2d 656, 661-62 (1965)). For example, in *Coopman*, the court of appeal concluded that there was no subpoena jurisdiction over a Nevada corporation's business records located in Nevada where the subpoena was served on a corporate officer who resided in California because: (1) the corporation did not conduct business in California; (2) the business records did not affect California; and (3) the officer served with the subpoena was not a California resident for business purposes.[60] *Id.* at 660; 16-195 California Forms of Pleading and Practice—Annotated § 195.34 ("In absence of jurisdiction over foreign corporation, California courts are unable to

[60] The California Subpoena Handbook observes that California courts are divided over the applicability of CCP § 1989 to parties and "the production of … documents located outside of California." Sink, *California Subpoena Handbook* § 3:4 at 78-79 (citing *Boal*, 165 Cal. App. 3d at 810-11 (holding that party may be required to produce documents regardless of their location where the documents sought were in the "presence" of a party over whom the court had personal jurisdiction), *Glass*, 204 Cal. App. 3d at 1052-53 (holding that a foreign corporation may not file suit in California, and then contend that its management may not be required to attend depositions in California pursuant to CCP § 1989 because they were not residents of California), and *Amoco Chem. Co.*, 34 Cal. App. 4th at 559-62 (holding that a witness who resides outside California cannot be compelled to testify in California, even when the witness is a party to the action, unless the witness is a resident of California at the time of service because of CCP § 1989)).

compel officer over whom only personal and not representative jurisdiction has been acquired to produce corporate records." (citing *Coopman*, 237 Cal. App. 2d at 661)). In reaching this conclusion, the court observed that where courts have ordered the production of business records located outside of California, those cases involved situations where: (1) the records belonged to a party to the action; or (2) the owner of the records was doing business within the jurisdiction of the court. *Id.* at 661. The court also recognized that even where the corporation was doing business within the state, "some restraint has been exercised" where the records did not apply to transactions that occurred within the state. *Id.*

VIII. Business Records Deposition Subpoenas For Both Testimony And Production Of Business Records For Copying

California law permits business records deposition subpoenas of non-parties that require both the testimony of the non-party deponent and the production of business records.[61] Cal. Civ. Proc. Code §§ 2020.010, 2020.510. Not only must this type of subpoena comply with the provisions contained in CCP § 2020.510, but it also must comply with all of the requirements for an oral deposition subpoena set forth in CCP § 2020.310 as well. *See* Cal. Civ. Proc. Code § 2020.510(a)(1). Again, it is mandatory that a practitioner use Judicial Council Form SUBP-020 (Deposition Subpoena For Personal Appearance And Protection Of Documents And Things).[62]

A. Provisions Applicable To Business Records Deposition Subpoena For Testimony And Production Of Business Records For Copying

1. Who must receive notice of the subpoena for production and testimony?

- The subpoenaing party must serve all parties who have appeared in the action with a notice. Cal. Civ. Proc. Code § 2025.240(a).

2. What documents must be served along with the deposition notice?

- An identical copy of the deposition subpoena must be served with the deposition notice. Cal. Civ. Proc. Code § 2025.240(c).

3. What information must the deposition notice contain?[63]

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[61] Here, a non-party deponent is required to produce not only business records (journals, account books, reports, etc.) as discussed above (*supra* at 20) but also documents and tangible things. Cal. Civ. Proc. Code § 2020.510. It is therefore arguable that this encompasses a broader range of "documents" than those required for business records only deposition subpoenas. *See* Cal. Civ. Proc. Code § 2020.410(a).

[62] http://www.courtinfo.ca.gov/cgi-bin/forms.cgi.

[63] Again, as with oral deposition subpoenas, the required contents of a deposition notice and a deposition subpoena for the production of business records and testimony of a non-party

- The deposition notice must list all the parties that are to be served with it. Cal. Civ. Proc. Code § 2025.240(a). This list may appear either in the body of the notice or the accompanying proof of service. *Id.*

- The subpoena must identify the deponent, including address and telephone number (if known). Cal. Civ. Proc. Code § 2025.220(a)(3).

- If, in addition to the stenographic recording of the deposition,[64] the subpoenaing party wants to record the deposition with audio or video, then the notice must state that the deposition will be recorded in that manner. Cal. Civ. Proc. Code § 2025.220(a)(5).

- If the deponent is an organization, the notice must describe with reasonable particularity the matters upon which it will be examined. Cal. Civ. Proc. Code § 2025.230.

4. What information must the subpoena contain?

- The subpoena must specify for the witness the time and place for the deposition. Cal. Civ. Proc. Code §§ 2020.310(a).

- The subpoena must describe: (1) the nature of the deposition; (2) the rights and duties of the deponent; and (3) the penalties for any failure to comply with the subpoena. Cal. Civ. Proc. Code § 2020.310(b).

- If in addition to the stenographic recording of the deposition,[65] Cal. Civ. Proc. Code § 2020.310(b), the requesting party wants to record the deposition with audio or video, the subpoena must state that the deposition will be recorded in that manner, Cal. Civ. Proc. Code § 2020.310(c).

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deponent are substantially similar. *Compare* Cal. Civ. Proc. Code §§ 2025.220-2025.240, *with* Cal. Civ. Proc. Code §§ 2020.310 and 2020.510.

[64] Unless otherwise agreed to by the parties or ordered by the court, all depositions must be recorded by a stenographer who is "a person certified pursuant to Article 3 (commencing with Section 8020) of Chapter 13 of Division 3 of the Business and Professions Code." Cal. Civ. Proc. Code § 2020.330(b).

[65] "If taken stenographically, it shall be by a person certified pursuant to Article 3 (commencing with Section 8020) of Chapter 13 of Division 3 of the Business and Professions Code." Cal. Civ. Proc. Code § 2020.330(b).

- If the deposition is going to be conducted using instant visual display, the subpoena must contain that information as well. Cal. Civ. Proc. Code § 2020.310(d).

- If the deponent is an organization, the subpoena must: (1) describe with reasonable particularity the matters upon which the deponent is to be examined; and (2) advise the organization of its duty to designate an employee who is the most qualified to attend the deposition and testify on its behalf respecting any information known or reasonably available to the deponent.[66] Cal. Civ. Proc. Code § 2020.310(e).

- The subpoena must specify any testing or sampling that is being sought. Cal. Civ. Proc. Code § 2020.510(a)(3).

5. How do the documents sought by the subpoena have to be described?

- The subpoena must designate the records to be produced "by specifically describing each individual item or by reasonably particularizing each category of item." Cal. Civ. Proc. Code § 2020.510(a)(2).

- Again, the categories of documents must be reasonably particularized from the standpoint of the non-party to whom the demand is being made. *Calcor*, 53 Cal. App 4th at 222.

6. When must the non-party witness appear to be deposed and produce documents?

- Since this subpoena also compels the production of documents, a "sufficient time" to comply with the subpoena is probably at least that established for a business records only subpoena—20 days after issuance of the subpoena or 15 days after service of the subpoena, whichever is later. *See* Cal. Civ. Proc. Code §§ 2020.220(a), 2020.410(c). This date is extended 5 calendar days if the subpoena is served by U.S. mail and 2 court days if by express mail. *See* Cal. Civ. Proc. Code § 1013(a), (b).

[66] As discussed previously in the context of a testimony only deposition subpoena (supra note 24), an organization's responsibility is not entirely clear, but at the very least, the designated witness should have some familiarity with the documents produced at the deposition.

7. Does the deponent have to appear at the oral deposition in person?

- A non-party deponent may appear telephonically or by videoconference with the court's approval after demonstrating good cause and no prejudice to any party. *See* Cal. R. Ct. 3.1010(d).

8. Who is authorized to conduct the oral deposition?

- An oral deposition must be conducted and supervised by an officer "authorized to administer an oath." Cal. Civ. Proc. Code § 2025.320.

- That officer cannot have a financial interest in the action and cannot be a relative or an employee of any of the parties or their attorneys. Cal. Civ. Proc. Code § 2025.320(a).[67]

9. Does the subpoena have to be accompanied by an affidavit showing good cause?

- If the subpoena seeks the production of documents for copying, it does not have to be accompanied by a declaration or affidavit showing good cause as generally is required by CCP 1985(b). Cal. Civ. Proc. Code § 2020.510(b); *Terry*, 175 Cal. App. 4th at 357 (finding CCP sections 1985 and 1987.5 are superseded by CCP § 2020.510).

10. Does the non-party's production have to be accompanied by an affidavit?

- Yes. The production must be accompanied by an affidavit from the custodian (or other qualified witness) that complies with California Code of Evidence § 1561(a). Cal. Civ. Proc. Code § 2020.430(a)(2). Essentially, this affidavit describes the mode of preparation for the production and affirms: (1) the affiant is the custodian of the records and has the authority to certify them; (2) the records delivered or made available are a true copy of those described in the subpoena; (3) the records were prepared in the ordinary course of business; and (4) the identity of the records. Cal. Evid. Code § 1561(a).

11. Does the non-party have to provide a "privilege log"?

[67] Any objections to the deposition officer's qualifications must be made before the deposition begins or as soon after that as the basis for the objection becomes known or could have reasonably become known. Cal. Civ. Proc. Code § 2025.320(e).

- If a non-party withholds a document on the basis of privilege or that the information sought is protected work product, the objection/response must include "sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." Cal. Civ. Proc. Code § 2031.240.

B. Consumer/Employee Business Records

In order to protect the privacy interests of consumers and workers, CCP § 1985.3 and CCP § 1985.6 establish special notification procedures for consumers and workers where their information could be discovered by a subpoena. Thus, if the subpoena is directed to a "witness" as defined by CCP § 1985.3 and the records are consumer records, then service of the deposition subpoena must be accompanied by either: (1) a copy of the proof of service to the consumer as described in CCP § 1985.3(e); or (2) the consumer's written authorization of release as described in CCP § 1985.3(c)(2). Cal. Civ. Proc. Code § 2020.510(c). Cal. Civ. Proc. Code §§ 1985.3, 1985.6, 2025.240(b). The CDA incorporates these provisions for business records deposition subpoenas to non-parties. Cal. Civ. Proc. Code §§ 2020.030, 2020.410(d). For non-parties, however, as set forth above, the process is modified in two ways: (1) an affidavit demonstrating good cause is not required; and (2) production must occur no earlier than either 20 days after issuance of the subpoena or 15 days after service of the subpoena, whichever is later. If the subpoenaing party fails to comply with notice and timing procedures set forth in CCP § 1985.3, the non-party may refuse to produce the consumer records. *See Sasson v. Katash*, 146 Cal. App. 3d. 119, 125, 125 n.4 (1983).

C. Location Of The Deposition

The rules regarding the location of the testimonial portion of the deposition are the same as they are for oral deposition subpoenas (*supra* at 19-20). *See* Cal. Civ. Proc. Code § 2025.250(c).

D. Witness Fees And Reasonable Costs

In return for responding to this type of deposition subpoena, a non-party witness is entitled to a reimbursement for both witness fees and the reasonable costs associated with production (*supra* at 19-20, 31-32). *See* Cal. Civ. Proc. Code §§ 1986.5, 2020.230(a); Cal. Evid. Code § 1563.

E. Opposing The Jurisdiction Of A Deposition Subpoena For Business Records And Testimony Based On The Location Of The Records

A non-party can attempt to oppose the subpoena jurisdiction of a deposition subpoena for business records and testimony based on whether: (1) the non-party is an organization or a natural person; and (2) the location of the records. *See* Part VII.F. *supra*.

1. Organization

a. Custodian Is A Resident Of California

If the custodian is a resident of California, then the custodian must testify. The custodian also must produce business records located in California, and probably has to produce records located outside of California depending on their relation to California. Thus, as to the records sought, the analysis is much the same as with a business records deposition subpoena.

b. Custodian Is A Non-Resident Of California

Regardless of the location of the records, if the organization's custodian of records is not a resident of California, the custodian cannot be compelled to appear at a deposition or to produce documents pursuant to CCP § 1989.[68]

2. Natural Persons

a. Non-Resident

If the witness is a non-resident natural person and the subpoena seeks to obtain private records unrelated to business, then CCP § 1989 applies, and the witness cannot be required to produce the records. Sink, *California Subpoena Handbook* § 3:9 at 98-99.

b. Resident And Records Located In California

If the witness is a natural person resident of California and the records are located in California, then the records likely are subject to the subpoena jurisdiction of California courts and must be produced. Sink, *California Subpoena Handbook* § 3:9 at 95-96, 99. Again, a California court may still decline to enforce the subpoena where the records concern transactions that occurred in another state or where the other state's laws would be violated if those records were produced for copying. *Id.*

c. Resident And Records Located Outside California

If the witness is a natural person resident and the records are not located in California, a deposition subpoena likely cannot compel their production. Sink, *California Subpoena Handbook* § 3:9 at 96-97. Although there is no case on point to date, a California court would probably not attempt to force a non-party natural person to go to another state in order to retrieve and produce the records. *Id.* § 3:9 at 97. This is especially true under an *International Shoe* minimum contacts analysis where the witness demonstrates that the business records are concerned solely with transactions unrelated to, or unconnected with, California. *Id.* A California court might also consider whether the production of those records would violate the laws of the state where the business records are located. *Id.*

IX. Written Deposition Subpoenas

[68] "A witness … is not obligated to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service." Cal. Civ. Proc. Code § 1989.

California law permits written depositions of non-parties. Cal. Civ. Proc. Code §§ 2020.010(a), 2028.010. Subject to the following modifications regarding notice, all provisions for taking oral depositions – CCP § 2025.010 *et seq.* (*supra* at 16-20) – also apply to written depositions:

- The notice shall include the name, address, and descriptive title of the deposition officer. Cal. Civ. Proc. Code § 2028.020(a).

- The date, time, and place for the deposition may be left to the future determination of the deposition officer. Cal. Civ. Proc. Code § 2028.020(b).

See Cal. Civ. Proc. Code § 2028.010.

As opposed to other forms of non-party discovery, any objections to the form of a question contained in the written deposition subpoena must be served within 15 days after service of the question on all parties entitled to notice of the deposition. *See* Cal. Civ. Proc. Code § 2028.040(a).

X. Non-Party Discovery In California Arbitrations

There is a limited right to non-party discovery in California contractual arbitrations. *See* Cal. Civ. Proc. Code § 1282.2(a)(2) (parties may demand exchange of witness lists and copies of the documents to be presented at the hearing where amount in controversy exceeds $50,000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 106 n.11 (2000) ("a limitation on discovery is one important component of the 'simplicity, informality, and expedition of arbitration'"), abrogated in part on another ground in *ATT Mobility LLC. v. Concepcion*, 563 U.S. __, 131 S.Ct. 1740, 1746 (2011). The CDA's full range of discovery devices only are available: (1) where the contract's arbitration agreement expressly incorporates CCP § 1283.05; or (2) where the dispute involves a tort claim for personal injury. *See* Cal. Civ. Proc. Code § 1283.1; *Alexander v. Blue Cross of Cal.*, 88 Cal. App. 4th 1082, 1088 (2001) (finding that broad discovery pursuant to CDA is only available where provided for in the arbitration agreement or in an arbitration arising from injury or wrongful death).

Under certain circumstances, non-party discovery also may be available in contractual arbitration for certain statutory claims. *Armendariz*, 24 Cal. 4th at 106. For example, in the context of a sex discrimination case brought under California's Fair Employment and Housing Act, the California Supreme Court concluded "it is undisputed that some discovery is often necessary for vindicating a FEHA claim. Accordingly, whether or not the employees in this case are entitled to the full range of discovery provided in Code of Civil Procedure section 1283.05, they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim…." *Id*.

Parties to contractual arbitration separately may agree to permit additional discovery or discovery pursuant to the rules of the arbitration organization handling the matter (AAA or JAMS). But incorporation of CCP § 1283.05 into the arbitration agreement *is the only clearly permissible basis for non-party discovery*. Quite simply, a contractual provision providing for

non-party discovery – whether by agreement between the parties or through an arbitration organization's rules – is insufficient because "one must be a party to an arbitration agreement to be bound by it." *Buckner v. Tamarin*, 98 Cal. App. 4th 140, 142 (2002). Similarly, an arbitration organization has no authority to require discovery of a non-party unless authorized by statute. Just as a non-party "cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration," that same non-party cannot be compelled to comply with discovery demands he has not agreed to subject himself to absent some statutory authority requiring him to do so—CCP § 1283.05. *See id.*

Arbitrators still possess authority to order non-party witnesses to attend and produce documents at an arbitration hearing or attend a deposition for use later as evidence. *See* Cal. Civ. Proc. Code §§ 1282.6(a), 1283. This, however, is not discovery and is comparable to a trial court's authority to issue subpoenas requiring witnesses to appear at trial and bring documents. *See* Cal. Civ. Proc. Code § 1985.[69]

Notwithstanding this limited avenue for obtaining non-party discovery – incorporation of CCP § 1283.05 or possibly to "vindicate" a statutory claim – parties involved in an arbitration routinely seek non-party discovery even though they failed to incorporate CCP § 1283.05. Many non-parties will respond in good faith to such subpoenas issued by an arbitrator because they are unaware that the subpoena is defective unless CCP § 1283.05 is incorporated. *See* Cal. Civ. Proc. Code § 1283.1.

Thus, an initial step for any non-party responding to an arbitration subpoena should be to request a copy of the applicable arbitration agreement and determine whether CCP § 1283.05 was incorporated. The subpoenaing party may try to argue that regardless of what actually is set forth in the arbitration agreement, now that the arbitration has begun, the parties have determined that non-party discovery is essential to resolving their claims and defenses. But parties cannot reach an agreement to permit non-party discovery after the fact – regardless of whether their arbitrator concurs – because "[i]t goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *see Goldman v. SunBridge Healthcare, LLC*, 220 Cal. App. 4th 1160, 1169 (2013) ("a person who is not a party to an arbitration agreement is not bound by it").

Significantly, non-parties are not penalized for taking a hard line when it comes to discovery in contractual arbitration because, as opposed to parties, they are entitled to full judicial review of the arbitrator's decision. *See Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.*, 44 Cal. 4th 528, 534-39 (2008) (non-party must first oppose discovery requests before arbitrator, but then is entitled to "full judicial review" of the arbitrator's order because limited judicial review of arbitration decisions is inapplicable to non-parties). Moreover, monetary sanctions are available to non-parties – consisting of attorney's fees and costs – for successfully moving for a protective order or opposing a motion to compel. *See* Cal. Civ. Proc. Code §§ 2031.060(h), 2031.320(b).

[69] As opposed to the corresponding provision of the Federal Arbitration Act (9 U.S.C. § 7), no California court has construed CCP § 1282.6 as allowing arbitrators to order pre-hearing discovery.

XI. Non-Party Discovery Outside California For Use In A California Action

A party may obtain discovery – including the production of documents – from non-parties outside of California by taking an oral or written deposition. *See* Cal. Civ. Proc. Code §§ 2026.010(a), 2026.010(c), 2028.010.[70] However, since a subpoena issued by a California court and served outside California has no legal effect, California parties have to rely on the power of the courts of the state where the deposition is to be taken. Sink, *California Subpoena Handbook* § 3:3 at 68; Hogan & Weber, 1-4 *California Civil Discovery* § 4.2.[71]

Thus, in order to compel the oral or written deposition of a non-resident/non-party witness and the production of documents, a subpoena must be issued and served on that witness pursuant to the laws of the state where the deposition or production is to occur. *See* Cal. Civ. Proc. Code § 2026.010(c) ("If the deponent is not a party to the action … a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state … where the deposition is to be taken to compel the deponent to … testify, as well as to produce any document or tangible thing ….").

A. California Provisions For Obtaining Discovery Outside California

1. Does the subpoenaing party have to obtain a commission?[72]

- California does not require the subpoenaing party to obtain a commission for discovery outside California. *See* Cal. Civ. Proc. Code § 2026.010.

- While California does not require a commission, other foreign jurisdictions may, and in that case, a subpoenaing party may obtain a commission from the clerk of the court where the action is pending that authorizes the deposition in another state. *See* Cal. Civ. Proc. Code § 2026.010(f).

2. How does the subpoenaing party obtain a commission?

[70] For out-of-state discovery, "[t]he only discovery devices available against a nonparty are oral and written depositions." Hogan & Weber, 1-4 *California Civil Discovery* § 4.2 (citation omitted).

[71] "California courts cannot compel a nonparty located beyond the state's borders to appear for a deposition in California or any other state, including the state of his residence. Instead, they must rely on the courts at the deposition site to issue a subpoena." Hogan & Weber, 1-4 *California Civil Discovery* § 4.2.

[72] "The commission gives the out-of-state court a foundation to issue a subpoena to compel the wit-ness to attend the deposition." *California Civil Discovery Practice* §§ 12.34-12.35, 12.40-12.41.

- If the foreign jurisdiction requires a commission, an order may be obtained by an ex parte application. Cal. Civ. Proc. Code § 2026.010(f).

3. Before whom may the deposition take place?

- The deposition must be taken before a person: (1) authorized to administer oaths under the laws of the United States or the place where the deposition is to take place; or (2) appointed by the California court in which the action is pending. Cal. Civ. Proc. Code § 2026.010(d).

B. California Procedure To Obtain Discovery From Foreign Countries

In order to obtain discovery from a non-party in a foreign country, a party "serving a deposition notice under this section shall use any process and procedures required and available under the laws of the foreign nation where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document or tangible thing for inspection, copying, and any related activity." Cal. Civ. Proc. Code § 2027.010(c). The forum court in California may issue "a commission, letters rogatory, or a letter of request" in order to help facilitate the discovery process if it determines it "is necessary or convenient." Cal. Civ. Proc. Code § 2027.010(e).

C. Witness Fees And Reasonable Costs

It is unclear whether a non-resident, non-party witness would be entitled to witness fees or the reasonable costs associated with production under the California Code of Evidence. However, witness fees and costs also may be available under the laws of the state where the subpoena was issued.

D. Choice-Of-Law Issues

1. California Discovery Law Applies To The Conduct Of Oral Depositions For Use In A California Matter

Even though the oral deposition of a non-party may take place outside of California, that deposition is conducted according to California law.[73] *See* Cal. Civ. Proc. Code § 2026.010(a)

[73] "In essence, [CCP] Sections 2025.010, 2026.010 and 2028.010 collectively say that, *as far as California is concerned*, a party who wishes to depose a nonparty *outside* California is to follow the same procedures used for a nonparty's deposition *within* California…." 1-4 *California Civil Discovery* § 4.2; *Snyder v. Superior Court*, 9 Cal. App. 3d 579, 584 (1970) ("In designating the procedure to be followed for such out-of-state depositions as that set forth in [CCP] section 2019, the Legislature has thus provided that the procedure for taking depositions out of this state, but within the United States, is identical to taking them within this state.").

(except as modified by CCP § 2026.010, out-of-state depositions are taken in the same manner as a deposition in California pursuant to CCP § 2025.010); *California Civil Discovery Practice* (4th ed. Cal CEB 2008) § 12.11 ("Although CCP § 2026.010(c) requires a party to notice an out-of-state deposition according to the other state's laws, California law governs discovery disputes between the parties in California cases.").

Thus, while the deposition of a non-resident/non-party witness is compelled by the law of the state in which the witness resides, *see California Civil Discovery Practice* § 12.9, the deposition itself is taken in the same manner as if it were taken in California, *id.* § 12.45; Hogan & Weber, 1-4 *California Civil Discovery* § 4.2 (observing that the CCP collectively demonstrate that as far as California is concerned, California procedures apply to an out-of-state deposition); *International Ins. Co. v. Montrose Chemical Corp. of Calif.*, 231 Cal. App. 3d 1367, 1371 (1991) (holding that although procedure for compelling attendance at a deposition of a nonresident is governed by the foreign state's laws, California law governed a discovery dispute between the parties to a California litigation regarding a motion to compel production of documents used to refresh a deponent's memory, so that parties could not seek protection from California's liberal discovery laws).

2. Discovery Law Of State That Issued The Subpoena Is Also Applicable

The laws of the state where the deposition or production is to occur will apply to: (1) the issuance of the subpoena; (2) compelling the attendance of a deponent or production of documents; (3) sanctions; and (4) issues regarding privileges. *California Civil Discovery Practice* §§ 12.9-12.10; *see* Rylaarsdam & Edmon, *Cal. Prac. Guide: Civ. Proc. Before Trial* § 8:642.1 ("any issue as to privileges claimed by the nonresident witness is apparently determined by the law of the place where the deposition is taken"); *see* Cal. Civ. Proc. Code § 2026.010(c) (deposing party shall use "process and procedures … available under the laws of the state … where the deposition is to be taken"). Although no California court has ruled on this exact issue, in a situation where a party to an out-of-state action sought discovery from a non-party in California, a court of appeal has ruled that the CDA applied. *Unzipped Apparel*, 156 Cal. App. 4th at 130 (holding that although dispute arose from a New York action, California law governed a discovery dispute where a New York party sought discovery from a California non-party through the mechanisms provided by California courts). Practically speaking, the laws of both states are applicable to some degree because while the courts of the foreign state may have jurisdiction over the responding party, the California courts have jurisdiction over the subpoenaing party.

E. Procedures For Opposing Discovery Outside California

1. Motion To Quash

A motion to quash must be made in the state court that issued the subpoena pursuant to that state's procedures. *California Civil Discovery Practice* § 12.44. Thus, if the deponent seeks to oppose the subpoena in the state court that issued the subpoena, then that state's laws control the procedure to be followed and the grounds for objecting and obtaining protective orders. *California Civil Discovery Practice* § 12.44.

2. Objections And Motion For Protective Order

Any objections or motions related to the deposition or production should be made in the California court in which the action is pending. *See California Civil Discovery Practice* § 12.43. Moreover, the procedures and grounds for making such objections and obtaining protective orders should follow California discovery law—CCP § 2025.010. *California Civil Discovery Practice* § 12.43.

F. Membership In California Bar

Significantly, an attorney who defends the deposition of a non-resident/non-party witness in a California matter does not have to be a member of the California bar. *Cf. California Civil Discovery Practice* §§ 12.21, 12.24 (observing that local counsel can appear at the deposition on behalf of California counsel and advising that local counsel should be familiarized with California rules of procedure and evidence regarding depositions). Nevertheless, since California law applies to the taking of the deposition, it probably would be beneficial if local counsel were advised of the California rules of procedure and evidence regarding depositions.

Appendix

GEOGRAPHIC LIMITS FOR THE LOCATION OF ORAL DEPOSITIONS		
Deponent	**Party**	**Non-Party**
Deposition in California		
Natural person. CCP § 2025.250(a)	1) Within 75 miles of deponent's residence; or 2) within county where action is pending and within 150 miles of deponent's residence.	1) Within 75 miles of deponent's residence; or 2) within county where action is pending and within 150 miles of deponent's residence.
Organization CCP § 2025.250(b), (c)		
▪ With a designated principal executive office in California	1) Within 75 miles of principal executive office; or 2) in county where action is pending and within 150 miles of the principal executive office.	Within 75 miles of principal executive office, unless deponent consents to a more distant place.
▪ Without such a designated office	1) Within 75 miles of any business or executive office; or 2) (at option of party noticing deposition) in county where action is pending.	1) Within 75 miles of any business or executive office; or 2) (at option of party noticing deposition) in county where action is pending.
Deposition in Another State		
Natural person or entity CCP § 2026.010(b)	Within 75 miles of deponent's residence or business office.	Depends on law of state in which deposition is taken.

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