

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Introductory Material

Handling Subpoenas

Vikki Bay

May 2009

Scope of Guide

This Action Guide is a how-to-do-it guide for the attorney who wants to subpoena testimony or records in pretrial discovery and at trial in California. After defining the subpoena and the deposition notice, the Action Guide describes when and how to use each, from the initial selection of the appropriate procedure, through service, payment of witness fees, production of consumer and employment records, possible objections, and remedies for noncompliance. The Action Guide emphasizes subpoenas for use in discovery and at trial. For general discussions of discovery, consult other Action Guides.

Abbreviations

Civil Discovery	<u>California Civil Discovery Practice (4th ed Cal CEB 2006)</u>
Civ Proc Before Trial	<u>California Civil Procedure Before Trial (4th ed Cal CEB 2004)</u>
Civ Proc During Trial	<u>California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995)</u>
Crim Law	<u>California Criminal Law Procedure and Practice (Cal CEB Annual)</u>
Handling Expert Witnesses	<u>Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008)</u>

About the Author

Vikki Bay is a Senior Paralegal at the law firm of Brydon Hugo & Parker, in San Francisco. Her expertise is in litigation with an emphasis on complex product liability cases. Her specialty is trial preparation. She obtained her paralegal certification from San Francisco State University in 1991 and is a member of the San Francisco Paralegal Association and the National Notary Association.

Acknowledgments

CEB wishes to thank Katherine S. Eaton, Senior Paralegal at Orbach, Huff & Suarez LLP in Los Angeles for her valuable contributions as a consultant on this Action Guide.

CEB gratefully acknowledges the valuable contributions of Mary Helen Rich, the author of the 2004 and 2006 editions of this Action Guide. CEB also appreciates and gratefully acknowledges the valuable contributions of Patricia Shuler Schimbor, the author of the first edition of this Action Guide, who was formerly of counsel to the Los Angeles office of Hancock, Rothert & Bunshoft.

CEB appreciates and gratefully acknowledges the valuable contributions to previous editions of this Action Guide of the following consultant:

Virginia H. Gaburo, the principal and owner of Virginia H. Gaburo & Associates, a San Diego law firm specializing in construction defect, real estate, employment, family law, and securities litigation. She is and has been actively involved with

legislative drafting, analysis, revisions, and proposals through her activities with local bar associations, the State Bar of California, the California Law Revision Commission, and the California Legislature.

CEB Attorney Editor Francesca Bannerman and Legal Editors Diane Stanton and Enrique De Anda contributed to this title. Administrative support was provided by Debby Harrison and Nila Kanzaria. Leslie Tenney handled copyediting and production. Composition was performed by CEB's Electronic Publishing staff.

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of November 15, 2008, and monitored developments through March 24, 2009.

CEB Citation

Cite this publication as: Handling Subpoenas (Cal CEB Action Guide May 2009).

This Action Guide supersedes Handling Subpoenas (Cal CEB Action Guide December 2006).

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Before Issuing a Subpoena/STEP 1. UNDERSTAND WHAT A SUBPOENA IS AND WHEN TO USE IT

Before Issuing a Subpoena

STEP 1. UNDERSTAND WHAT A SUBPOENA IS AND WHEN TO USE IT

UNDERSTAND SUBPOENA

PURPOSE

A subpoena may be used to:

- a. Obtain *discovery* (which may be in the form of testimony, documents, or other things); or
- b. Procure the attendance of witnesses and documents or other things under their control for *trial* or *hearing*.

NOTE

In this text, the term "deposition subpoena" will be used for subpoenas to obtain discovery. The term "civil subpoena" will be used for subpoenas for attendance at hearing or trial. Either term may be paired with the phrase "duces tecum" when the production of documents or things is requested. See below.

SUBPOENA DEFINED

A "subpoena" is a writ or an order that compels a witness to perform the following tasks (CCP §1985(a)):

- a. Attend and testify at a certain time and place; and/or
- b. Produce records and things (subpoena duces tecum).

SUBPOENA DUCES TECUM DEFINED

"Duces tecum" means "bring with you." A subpoena duces tecum compels a witness to produce records, things, or both. CCP §1985(a)-(b).

GOVERNING STATUTES

- a. Code of Civil Procedure §§1985-1987 apply to civil and deposition subpoenas.
- b. Code of Civil Procedure §§2020.010-2020.510 apply to deposition subpoenas and may modify the provisions of CCP §§1985-1987.

USE ONE OF FIVE SUBPOENA FORMS

Five Judicial Council subpoena forms are available:

- a. Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015, in Appendix A);
- b. Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020, in Appendix B);
- c. Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010, in Appendix C);
- d. Civil Subpoena for Personal Appearance at Trial or Hearing (Judicial Council Form SUBP-001, in Appendix D); and
- e. Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration (Judicial Council Form SUBP-002, in Appendix E).

WHEN TO USE deposition SUBPOENA—DURING DISCOVERY

USE DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

Nonparty Attendance/Testimony

Use a Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015; see [Appendix A](#)) to compel *nonparty witness* attendance and testimony at a deposition. [CCP §2020.310](#). See [steps 7](#) and [9](#), below.

Example: Eyewitness to car accident appears at deposition and answers questions about what she saw.

USE DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

Nonparty Attendance/Testimony and Production

Use a Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020; see [Appendix B](#)) to compel *nonparty witness* attendance, testimony, and production of records and things at a deposition. [CCP §2020.510](#). See [steps 7](#) and [9](#), below.

Example: Eyewitness to car accident appears at deposition, produces photographs she took of accident, and answers questions

USE DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

Nonparty Records Production Only

Use a Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010; see [Appendix C](#)) to compel production of *nonparty* business records produced for copying only, by custodian of records who need not attend or testify. [CCP §2020.410](#). See [steps 3](#), [7](#) and [11](#), below.

Example: A hospital produces for copying medical records of person injured in car accident.

WHEN TO USE civil SUBPOENA—AT TRIAL

USE CIVIL SUBPOENA

Witness Attendance/Testimony

Use a Civil Subpoena (Judicial Council Form SUBP-001; see [Appendix D](#)) to compel either *party or nonparty* witness to attend and testify at trial or other nondeposition proceeding. [CCP §§1985, 1985.1, 1985.2](#).

Example: An eyewitness testifies at trial.

USE CIVIL SUBPOENA (DUCES TECUM)

Witness Attendance/ Testimony and Production

Use a Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration (Judicial Council Form SUBP-002; see [Appendix E](#)) to compel:

- a. Either *party or nonparty* witness to attend and testify at trial or other nondeposition proceeding; and
- b. Either *party or nonparty* witness to produce records and things (subpoena duces tecum) at the hearing or trial. [CCP §1985](#).

Example: An eyewitness testifies at trial and produces photographs of accident.

Records Production Only (Subpoena Duces Tecum)

Custodian of records or other qualified witness, who need not attend or testify, must produce records and things at trial or other nondeposition proceeding (subpoena duces tecum). [CCP §1987.3](#); [Evid C §§1560-1566](#).

Example: A hospital produces plaintiff's billing records for use at trial, but no one from hospital is required to appear and testify.

NOTE

To be admissible at trial over hearsay objection, the documents must qualify as business records under Evid C §1271. To qualify the records as business records, without the testimony of the custodian, it is necessary to obtain a stipulation from opposing counsel or to prepare a declaration that complies with Evid C §§1560, 1561, 1562, and 1271. (See Judicial Council Form SUBP-002, item 3.b., in Appendix E.)

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 2.
UNDERSTAND DIFFERENCE BETWEEN DEPOSITION SUBPOENA, DEPOSITION NOTICE, AND AGREEMENT TO APPEAR

When Seeking Discovery From a Witness

STEP 2. UNDERSTAND DIFFERENCE BETWEEN DEPOSITION SUBPOENA, DEPOSITION NOTICE, AND AGREEMENT TO APPEAR

USE DEPOSITION SUBPOENA

Use a deposition subpoena to compel:

- a. *Nonparty* deposition attendance and testimony *only* (CCP §2020.310) (Judicial Council Form SUBP-015, in Appendix A);
- b. *Nonparty* deposition attendance and testimony *and* production of records and things (CCP §2020.510) (Judicial Council Form SUBP-020, in Appendix B);
- c. *Nonparty* business records production only (CCP §2020.410) (Judicial Council Form SUPB-010, in Appendix C).

NOTE

For discussion of the scope of deposition inquiry, see California Civil Discovery Practice, chaps 5 and 6 (4th ed Cal CEB 2006), referred to throughout this Action Guide as Civil Discovery; Handling Depositions (Cal CEB Action Guide February 2007), referred to throughout this Action Guide as Depositions.

USE DEPOSITION NOTICE

Use a deposition notice (CCP §§2025.210-2025.240) instead of a subpoena to compel:

- a. *Party* or *party-related* witness's (see below) attendance and testimony at deposition (CCP §2025.280(a));
- b. *Party* or *party-related* witness's (see below) attendance and testimony, and production of records and things at deposition. CCP §2025.280(a).

NOTE

You cannot use a deposition notice to compel a nonparty to attend, testify, or produce records and things, but you can use it to compel a *party* or *party-related witness* to attend, testify, or produce.

PARTY DEFINED

A "party" is the plaintiff, defendant, cross-complainant, or cross-defendant in a lawsuit.

PARTY-RELATED WITNESS DEFINED

A "party-related witness" is:

- a. Anyone benefiting from an action, *e.g.*, someone entitled to a portion of the recovery (see CCP §1987(b) (notice to appear); see also *Southern Cal. Edison Co. v Superior Court* (1972) 7 C3d 832, 103 CR 709 (class members));
- b. An officer, director, managing agent, or employee of a party (CCP §2025.280(a)); or
- c. A party's expert witness (CCP §2034.460).

Sample Form: For sample deposition notice under CCP §§2025.210-2025.240, see Civil Discovery §5.216.

NOTICE REQUIREMENTS

For deposition notice requirements, see CCP §§2025.210-2025.240. See also Depositions.

HOW TO SERVE NOTICE

Serve a copy of the deposition notice on *every other party* who has appeared in the action. CCP §2025.240(a).

NOTE

If you subpoena a nonparty witness to appear at a deposition (CCP §2025.280(b)) with or without the production of records and things, also serve all parties to the action with *both* a copy of the subpoena *and* a notice of the deposition. CCP §§2020.010, 2020.310, 2020.510(a).

WHEN WITNESS AGREES TO APPEAR WITHOUT SUBPOENA OR NOTICE

You *may* consider relying on:

- a. A stipulation with opposing counsel that the nonparty witness will appear; or
- b. A nonparty witness's agreement to appear voluntarily.

Use Caution

Use caution if relying on one of these agreements, because:

- a. There are no statutory penalties for breaking an agreement to appear; and
- b. You may be penalized as a result of a witness's failure to attend. See CCP §2025.440.

NOTE

The better practice is to obtain an agreement from the witness to accept service and memorialize the agreement in a confirming letter. See Appendix G for a sample letter to use when a witness agrees to accept service.

Further Research: See CCP §§2020.010-2020.510, 2025.010-2025.620; Civil Discovery, chap 5; Depositions; steps 6 and 9, below.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 3.
UNDERSTAND REQUIREMENTS OF EACH DEPOSITION PROCEDURE AND DETERMINE WHICH TO USE

STEP 3. UNDERSTAND REQUIREMENTS OF EACH DEPOSITION PROCEDURE AND DETERMINE WHICH TO USE

CHOOSE APPROPRIATE PROCEDURE

Choose the deposition procedure based on the type of information you seek *and* the nature of the witness from whom you seek it.

ATTENDANCE / TESTIMONY ONLY

NONPARTY WITNESS PROCEDURE

Use a Deposition Subpoena for Personal Appearance for *nonparty* witness attendance and testimony without the production of records, documents, or other things. [CCP §2020.310](#); Judicial Council Form SUBP-015, in [Appendix A](#).

PARTY OR PARTY-RELATED WITNESS PROCEDURE

Use a notice of deposition for *party or party-related* witness attendance and testimony without the production of records, documents, or other things. [CCP §2025.280\(a\)](#).

NOTE

Ordinarily, anyone other than the deponent may attend a deposition by telephone or other "remote electronic means." [CCP §2025.310\(a\)](#). For good cause shown and in the absence of prejudice to any party, a nonparty deponent may appear by telephone, but a party deponent must appear in person. [CCP §2025.310\(b\)](#). See also [CCP §2017.730\(a\)](#) (use of technology on complex cases, coordinated cases, and cases exempt from the Trial Court Delay Reduction Act ([Govt C §§68600-68620](#))). For discussion of the use of technology in discovery, see [Civil Discovery, chap 4](#).

Further Research: [CCP §§2020.310, 2025.210-2025.240](#); [Cal Rules of Ct 3.1010](#). See [step 2](#), above, and [step 9](#), below.

ATTENDANCE / TESTIMONY AND RECORDS OR THINGS

NONPARTY WITNESS PROCEDURE

Use a Deposition Subpoena for Personal Appearance and Production of Documents and Things ([CCP §2020.510](#); Judicial Council Form SUBP-020, in [Appendix B](#)) if you require:

- a. A nonparty custodian's personal attendance and testimony; and
- b. The production of *original* documents and tangible things, including business records from nonparty witness.

Pay Costs of Record Production

Pay the reasonable costs that a *nonparty* witness incurs in producing records. See [Evid C §1563\(b\)](#), and [step 22](#), below.

Pay Witness and Transportation Fees

Pay \$35 per day and \$.20 per mile transportation fees for attendance of the custodian of records or other qualified witness who is *not* a party. [Evid C §1563\(c\)](#); [Govt C §68093](#); see [step 22](#), below.

PARTY OR PARTY-RELATED PROCEDURE

Use a notice of deposition to compel appearance and testimony and production of documents or tangible things by party or party-related witness. [CCP §2025.280\(a\)](#).

PROCEDURE TO OBTAIN COPIES AFTER DEPOSITION

To obtain copies after a deposition, regardless of whether *the witness was a party or nonparty*:

a. Ask the deposition officer (at an oral deposition, usually the court reporter; see CCP §§2025.570, 2093(b)) to:

(1) Copy originals and return them to the custodian; and

(2) Affix copies to the deposition transcripts; or

b. Ask the deposition officer to allow the custodian to retain originals after the deposition is completed and supply copies to all parties.

Cross-Reference: On how to complete a Deposition Subpoena for Personal Appearance and Production of Documents and Things, see step 9, below.

Further Research: See Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 69 CR2d 635 (deposition transcripts are not business records for purposes of former CCP §2020(d) (now CCP §2020.410)). See also discussion of Business Records Only, below.

BUSINESS RECORDS ONLY

NONPARTY PROCEDURE

Use a Deposition Subpoena for Production of Business Records (CCP §2020.410; Judicial Council Form SUBP-010, in Appendix C) if you want business records for copying only without the nonparty custodian's attendance/testimony.

NOTE

Counsel does not need to explore other means of discovering relevant information from a nonparty (*e.g.*, independent assets investigation) before seeking that information through a deposition subpoena for production of business records. Hecht, Solberg, Robinson, Goldberg & Bagley LLP v Superior Court (2006) 137 CA4th 579, 40 CR3d 446.

Select Deposition Officer

The deposition officer you select:

a. Must be (Bus & P C §§22450-22451):

(1) A professional photocopier registered under Bus & P C §§22450-22463; or

(2) Exempt from the registration requirements of Bus & P C §§22450-22463, *e.g.*, a certified shorthand reporter; and

b. Cannot be (CCP §2020.420):

(1) Financially interested in the proceedings; or

(2) A relative or employee of any of the parties' attorneys. See Depositions.

NOTE

The deposition officer cannot be a law firm. This could be the basis of an objection if a third party is not used.

Pay Costs of Records Production

Pay reasonable costs nonparty witness incurs in producing business records (Evid C §1563(b); see step 22, below);

Pay Nonparty Witness Fees

Pay \$15 if records are delivered to you, as attorney, or to your representative. Evid C §1563(b)(6); see step 22, below.

Cross-Reference: For how to complete the subpoena form for Production of Business Records only, see step 11, below.

SELECT METHOD TO OBTAIN COPIES FROM NONPARTY

Use the most convenient of the following alternative methods to obtain copies of the business records from nonparty witness (CCP §2020.430):

Witness Produces Copies, Affidavit

The witness delivers business record copies in a sealed envelope to the deposition officer (often a representative of a registered copying service; see discussion, above, on selecting a deposition officer), plus an affidavit that (Evid C §1561):

- a. States that the affiant has authority to certify the records (Evid C §1561(a)(1));
- b. States that the records are true copies of all the documents described in the subpoena (Evid C §1561(a)(2));
- c. States that the records were prepared by business personnel in the ordinary course of business at or near the time of the (Evid C §1561(a)(3)):
 - (1) Act;
 - (2) Condition; or
 - (3) Event;
- d. Identifies the records (Evid C §1561(a)(4));
- e. Describes the method of record preparation (Evid C §1561(a)(5)); and
- f. If the business has only part or none of the business records requested, states that the custodian is delivering all available records. Evid C §1561(b).

NOTE

To ensure that the subpoenaed records meet the statutory requirements, it is helpful to supply an affidavit (as described above) at the time of service of the subpoena. See Appendix I for a sample affidavit.

Deposition Officer Picks Up Copies

If the deposition officer picks up copies:

- a. The witness delivers to the deposition officer (often a representative of a registered copying service; see Select Deposition Officer, above), at the witness's office, copies of the business records (without affidavit and not in a sealed envelope); and
- b. The witness executes an affidavit, usually prepared by the deposition officer, authenticating the records (see discussion of when witness produces copies, above). Evid C §1561.

Witness Allows Copies to Be Made

If the witness allows the deposition officer to make copies:

- a. The deposition officer copies the original business records at the witness's office (if, *e.g.*, the witness does not have a photocopy machine or prefers not to make the copies or voluminous records would be more easily copied onto microfilm); and
- b. The witness executes an affidavit, usually prepared by the deposition officer, authenticating the records (see discussion of when witness produces copies, above). Evid C §1561.

NOTE

Normally, when a witness allows copies to be made, the deposition officer, usually an employee of the registered copying service, brings copying or microfilm equipment to the witness's office and copies records there.

Attorney Inspects and Copies

If the witness allows you, the subpoenaing attorney, or your representative, to inspect and/or copy the business records at the witness's office during normal business hours (see Evid C §1560(e)):

- a. The witness executes an affidavit authenticating records (see discussion of when witness produces copies, above) (Evid C §1561); and
- b. You or your representative prepare an affidavit that the copies are true copies of all records delivered to you for copying. Evid C §1561(c).

PROCEDURE TO OBTAIN COPIES

The deposition officer will (CCP §2020.440):

- a. Provide you with a copy of the business records promptly on or after the deposition date (and after receipt or making of the copy of business records) if you did not copy them yourself; and
- b. Provide a copy to other parties who have asked to purchase it.

NOTE

You cannot use a business records subpoena under CCP §2020.410 to get a copy of a deposition transcript from the reporter, because the transcript is the product of the reporter's business, not a record of it. Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 69 CR2d 635 (deposition transcripts are not business records for purpose of former CCP §2020(d) (now CCP §2020.410)).

PARTY OR PARTY-RELATED WITNESS PROCEDURE

Use CCP §§2031.010-2031.060 (inspection demand) to obtain business records from party or party-related witness. See Civil Discovery §§8.1-8.33.

Further Research: See CCP §§2020.010-2020.510; Evid C §§1560-1563; Civil Discovery §§5.85-5.93.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 4. VERIFY WITNESS'S RESIDENCE AT TIME OF SERVICE

STEP 4. VERIFY WITNESS'S RESIDENCE AT TIME OF SERVICE

RESIDENCE OF WITNESS AT SERVICE AFFECTS SUBPOENA

California Residents

Only a witness who is a California resident at the time of service *must* appear as a witness. CCP §§1989, 2020.229(c); see *In re Morelli* (1970) 11 CA3d 819, 91 CR 72, overruled on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287, 100 CR2d 320.

Out-of-State Residents

For out-of-state depositions, see CCP §2026.010; for foreign depositions, see CCP §2027.010. See also Depositions, steps 11-12; Civil Discovery, chaps 12-13.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 5.
ARRANGE DEPOSITION SITE

STEP 5. ARRANGE DEPOSITION SITE

HOW TO ARRANGE

Arrange a deposition site depending on the nature of the witness (*i.e.*, whether a natural person or an organization) and the witness's residence:

Natural Person—Party or Nonparty

If the witness is a natural person, whether party or nonparty, take the deposition either (CCP §2025.250(a)):

- a. Within 75 miles of the deponent's residence; or
- b. Within:
 - (1) The county where the action is pending; and
 - (2) 150 miles of the deponent's residence.

Natural Person—Party

In addition to the rules above, a party may move to depose a natural person who is a party or party-related witness at a location outside the parameters specified in CCP §2025.250(a) based on:

- a. A declaration showing a reasonable and good faith attempt at informal resolution of an issue (CCP §2025.260(a)); and
- b. The court's consideration of the following factors (CCP §2025.260(b)):
 - (1) Whether the moving party selected the forum;
 - (2) Whether the deponent will be present to testify at trial;
 - (3) The deponent's convenience;
 - (4) The feasibility of other discovery methods (*e.g.*, deposition by written questions);
 - (5) The number of depositions sought to be taken outside the geographic limits of CCP §2025.250;
 - (6) Expense to parties if deposition is taken within the limits of CCP §2025.250; and
 - (7) The whereabouts of deponent at the time deposition is scheduled.

Organization—Party

If the witness is a party organization, take the deposition either (CCP §2025.250(b)):

- a. Within 75 miles of the organization's principal executive or business office in California; or
- b. Within:
 - (1) The county where the action is pending; and
 - (2) 150 miles of the organization's principal executive or business office in California.

Organization—Nonparty

If the witness is a nonparty organization, take the deposition (CCP §2025.250(c)-(d)):

- a. Within 75 miles of designated principal California office; or

b. If no principal office in California, either:

- (1) In the county where the action is pending; or
- (2) Within 75 miles of any of its California executive or business offices.

Expert Witness

Take the deposition of an expert witness within 75 miles of the courthouse where action is pending. CCP §2034.420.

NOTE

If you seek only records or other physical evidence, you are not subject to any distance requirements. See CCP §2020.410(c).

Further Research: See CCP §§1989, 2020.010-2020.510; Depositions, step 9; Civil Discovery §§5.24-5.30. See also Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008), referred to throughout this Action Guide as Handling Expert Witnesses.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 6. SET DATE AND REVIEW WHEN TO SERVE DEPOSITION SUBPOENA AND/OR NOTICE OF DEPOSITION

STEP 6. SET DATE AND REVIEW WHEN TO SERVE DEPOSITION SUBPOENA AND/OR NOTICE OF DEPOSITION

SET DEPOSITION AND/OR PRODUCTION DATE

- a. Decide the date for a deposition and/or production of records and things; and
- b. Conform with service and other requirements set forth below, including time limits for serving a notice of deposition on all parties. See *When to Serve Deposition Subpoena for Business Records Only*, below.

Consider Discovery Deadlines

When setting the deposition and/or production date, be aware that discovery closes:

- a. **30 days** before trial in typical case (CCP §2024.020(a)); and
- b. **5 days** before trial in unlawful detainer action (CCP §2024.040(b)(1)).

NOTE

In actual practice, you will select a convenient date before the discovery deadline and count backwards to be sure that you serve the witness with the subpoena in time to meet requirements.

WHEN TO SERVE DEPOSITION SUBPOENA FOR ATTENDANCE/TESTIMONY (WITH OR WITHOUT RECORDS)

Do both steps below to require a nonparty's:

- a. Attendance and testimony (CCP §2020.310; Judicial Council Form SUBP-015, in Appendix A); or
- b. Attendance and testimony *plus* production of records and things (CCP §2020.510; Judicial Council Form SUBP-020, in Appendix B).

Serve Subpoena on Witness

Serve the subpoena by personal service on a witness in time for the witness to (CCP §2020.220(a)):

- a. Locate and produce the designated records, things, or both in light of the amount of material requested; and/or
- b. Travel to the site. For how to serve, see step 20, below.

Example: If you want to depose an out-of-town witness and obtain production of voluminous records on March 10, you must serve the subpoena sufficiently before that date to allow the witness time to locate the records and travel to the site.

NOTE

Use personal service on a witness except in certain circumstances, *e.g.*, when serving certain public employee witnesses. CCP §§2020.220, 2025.280(b); Govt C §68097.3. For discussion of how to serve public employees, see step 20, below. See also CCP §1987(a).

Serve Copy of Subpoena and Notice of Deposition on All Parties

Serve a copy of the subpoena and notice of deposition on *all parties* at least (CCP §§1013, 2016.050, 2025.270):

- a. **10 days** before deposition date, if personally served;
- b. **15 days**, if notice is served by mail to a California address;

- c. **20 days**, if mailed to another state;
- d. **30 days**, if mailed outside the United States; or
- e. **10 days, plus 2 court days**, if notice is served by fax, express mail, or other method of overnight delivery.

Caution: You may serve by fax only if all parties agree in writing. CCP §1013(e). The provisions of CCP §1013, including those for fax, express mail, and overnight delivery, apply to discovery proceedings (see CCP §2016.050).

Unlawful Detainer Action

In an unlawful detainer action, schedule the deposition for date (CCP §2025.270(b)):

- a. At least **5 days** after service of the deposition notice; and
- b. No later than **5 days** before trial.

CONSUMER AND EMPLOYMENT RECORDS

If you seek attendance/testimony *and* production of records that are also personal records of a consumer (*e.g.*, medical records) or employment records, you must satisfy special requirements. See steps 24-27, below, for consumer records and steps 28-31, below, for employment records.

WHEN TO SERVE DEPOSITION SUBPOENA FOR BUSINESS RECORDS ONLY

To obtain nonparty business records only, do *all* the following:

Serve Subpoena on Witness

- a. Serve a subpoena on the witness by *personal service* (CCP §2020.220); and
- b. Set a deposition date that is the *later* of (CCP §2020.410(c)):
 - (1) **20 days** after subpoena is *issued*; or
 - (2) **15 days** after subpoena is *served*;

Example: To have only business records produced on March 25, issue the subpoena on March 5 and serve the witness on March 10.

NOTE

When seeking records from nonparty state agencies, serve subpoenas directly on each state agency from which records are sought, even if the state is a party to the litigation. *People ex rel Lockyer v Superior Court (Cole Nat'l Corp.)* (2004) 122 CA4th 1060, 19 CR3d 324.

Serve Copy of Subpoena on All Parties

Serve a copy of the deposition subpoena on all parties instead of a deposition notice *at least* (CCP §§1013, 2025.270-2025.280):

- a. **10 days** before deposition date, if personally served;
- b. **15 days**, if served by mail to a California address;
- c. **20 days**, if mailed to another state;
- d. **30 days**, if mailed outside the United States; or
- e. **10 days plus 2 court days** if copy of subpoena is served by fax, express mail, or other overnight delivery. You may serve by fax only if all parties agree in writing. CCP §1013(e).

NOTE

You do *not* need a deposition notice when seeking *only* nonparty business records. CCP §§2025.280(b), 2020.430.

WHEN TO SERVE DEPOSITION NOTICE FOR PARTY ATTENDANCE/TESTIMONY (WITH OR WITHOUT RECORDS)

Serve a deposition notice for party attendance on all parties *at least* (CCP §§1013, 2025.270):

- a. **10 days** before the deposition, if notice is personally served;
- b. **15 days** before the deposition, if notice is mailed to a California address;
- c. **20 days** before the deposition, if notice is mailed to another state;
- d. **30 days** before the deposition, if notice is mailed outside the United States; or
- e. **10 days plus 2 court days** before the deposition, if notice is delivered by fax, express mail, or other overnight delivery. You may serve by fax only if all parties agree in writing. CCP §1013(e).

Example: If you want to depose a party on March 25, you must serve the notice of deposition by personal service on all parties by March 15.

NOTE

Remember that a court reporter generally needs about 10 days to prepare the transcript. If you need the transcript by a certain date and do not want to pay the extra fees for expedited transcript preparation, you will need to add the time for preparing the transcript into your calculation.

CONSUMER AND EMPLOYMENT RECORDS

If the records are personal records of a consumer (*e.g.*, medical records) or employment records, you must satisfy special requirements; see steps 24-27, below, for consumer records and steps 28-31, below, for employment records.

Further Research: See CCP §§2020.010-2020.510, 2025.010-2025.620; Depositions, step 8; and Civil Discovery §§5.16-5.25.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 7. SELECT APPROPRIATE DEPOSITION SUBPOENA FORM

STEP 7. SELECT APPROPRIATE DEPOSITION SUBPOENA FORM

AVAILABLE DEPOSITION SUBPOENA FORMS

Depending on the deposition procedure you choose, select one of three Judicial Council forms:

Attendance/Testimony Only

Judicial Council Form SUBP-015 ([CCP §2020.310](#)), in [Appendix A](#), to compel attendance and testimony only; or

Attendance/Testimony and Production of Records and Things

Judicial Council Form SUBP-020 ([CCP §2020.510](#)), in [Appendix B](#), to compel attendance, testimony, and the production of records and things; or

Business Records Only

Judicial Council Form SUBP-010 ([CCP §2020.410](#)), in [Appendix C](#), to compel production of business records only.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 8.
DETERMINE WHO WILL ISSUE SUBPOENA; OBTAIN PROPER FORM

STEP 8. DETERMINE WHO WILL ISSUE SUBPOENA; OBTAIN PROPER FORM

WHO ISSUES SUBPOENA

Decide whether to obtain the proper form and issue the subpoena yourself or have the clerk of court issue it.

ATTORNEY OF RECORD

OBTAIN SUBPOENA

If you will issue the subpoena, obtain the *blank* mandatory Judicial Council form for the deposition subpoena appropriate for your deposition:

- a. From your local court;
- b. From the California Judicial Council Forms Manual pp 1-27-1-39 (Cal CEB 1981);
- c. From an electronic forms-drafting software package; or
- d. From the California Courts website at <http://www.courtinfo.ca.gov>.

NOTE

As attorney of record, you may sign and issue the subpoena. See CCP §§1985(c), 2020.210(b); Govt C §68097.1. School district governing boards are also authorized to issue subpoenas to percipient witnesses before and during student expulsion hearings, in accordance with CCP §§1985-1985.2. Ed C §48918.

COUNTY CLERK

OBTAIN ISSUED SUBPOENA

If the clerk will issue the subpoena, obtain a signed and sealed, *but otherwise blank*, Judicial Council form deposition subpoena from the clerk of court where the action is pending. See CCP §§1986(a), 2020.210(a).

Police and Other Government Officers

As attorney of record, you can issue a subpoena for service on police and other government officers (see CCP §§1985(c), 2020.210(b); Govt C §68097.1), although you may want to check local police practice, because some police departments still insist that the clerk issue the subpoena.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 9.
COMPLETE SUBPOENA FORM FOR PERSONAL ATTENDANCE / TESTIMONY ONLY

STEP 9. COMPLETE SUBPOENA FORM FOR PERSONAL ATTENDANCE / TESTIMONY ONLY

COMPLETE CAPTION

Complete the caption of the Deposition Subpoena for Personal Appearance by including:

- a. The name, address, bar number, and telephone and fax numbers of the attorney for subpoenaing party (e-mail address is optional);
- b. The name of the subpoenaing party;
- c. The name and address of the court;
- d. The names of the plaintiff and the defendant; and
- e. The case number.

IDENTIFY THE WITNESS

If the witness to whom the subpoena is directed is:

- a. A natural person, provide the witness's, name, address, and telephone number, if known.
- b. Not a natural person:
 - (1) Either:
 - (a) Provide the entity's name, or
 - (b) Identify the deponent as the "Person Most Knowledgeable concerning the matters described in Item 2 (below), " and
 - (2) Provide the address and telephone number of the entity.

Sample Form: See [Appendix A](#) for completed deposition subpoena for personal appearance.

ITEM 1

To fill out item 1:

Time and Place

Designate the date, time, and address for the witness's appearance.

Item 1(a)

Check box 1(a) if the deponent is *not* a natural person (*i.e.*, an organization) and you want it to designate one or more persons to testify on its behalf.

Item 1(b)

Check box 1(b) if the deposition is to be recorded stenographically, and check additional box(es) if it is to be recorded by audio and/or video technology.

Item 1(c)

Check box 1(c) if the video recording of the deposition is intended for possible use at trial under [CCP §2025.620\(d\)](#).

NOTE

Remember that your deposition notice should also state your intention to use at trial a video recording of the deposition testimony under CCP §2025.620(d). See CCP §2025.220(a)(6).

ITEM 2

Item 2 of the form advises a deponent who is a representative of a business or other entity of the matters on which he or she will be examined.

ITEM 3

Item 3 advises a deponent:

Nature of a Deposition

Of the nature of a deposition and of a deponent's rights and duties.

Witness Fees

That a deponent is entitled to witness fees. See step 22, below.

NOTE

You need not pay witness fees to the employing agency of a police or other government officer as a condition of *obtaining* a subpoena, but you must pay the fee when the subpoena is served. The statutory fee is \$150 (at time of printing of this Action Guide). See Govt C §§68097.1-68097.4. See also step 22, below.

SIGN SUBPOENA

If you are issuing the subpoena, sign it as the "person issuing the subpoena." See signature line, Deposition Subpoena for Personal Appearance, in Appendix A. See also CCP §§1985, 2020.210(b).

NOTE

A seal is not required if you sign the subpoena. CCP §§1985, 2020.210(b).

Further Research: CCP §§2020.310, 2020.510; Civil Discovery §§5.55, 5.60.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 10.
COMPLETE DEPOSITION SUBPOENA FORM FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

STEP 10. COMPLETE DEPOSITION SUBPOENA FORM FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

COMPLETE CAPTION

Complete the caption of the Deposition Subpoena for Personal Appearance and Production of Documents and Things ([Appendix B](#)) by including:

- a. The name, address, bar number, and telephone and fax numbers of the attorney for subpoenaing party (e-mail address is optional);
- b. The name of the subpoenaing party;
- c. The name and address of the court;
- d. The name of the plaintiff and defendant; and
- e. The case number.

IDENTIFY THE WITNESS

If the person to whom the subpoena is directed is:

- a. A natural person, provide the witness's name, address, and telephone number, if known.
- b. Not a natural person, and:
 - (1) The name of the appropriate representative is known, provide the name of the representative and the name, address, and phone number, if known, of the entity:
 - (2) The name of the appropriate representative of the entity is unknown, identify the deponent as either:
 - (a) The "Custodian of Records" and provide the name, address, and phone number, if known, of the entity; or
 - (b) The "Person Most Knowledgeable regarding the matters described in item 4 of this subpoena" and provide the name, address, and phone number, if known, of the entity.

ITEM 1

Designate the date, time, and address for witness's appearance.

Item 1(a)

Check box 1(a) if the deponent is *not* a natural person (*i.e.*, an organization) and you want it to designate one or more persons to testify on its behalf.

Item 1(b)

Item 1(b) orders the witness to produce documents and things described in Item 3, below.

Item 1(c)

Check box 1(c) if the deposition is to be recorded stenographically, and check additional box(es) if it is to be recorded by audio and/or video technology.

Item 1(d)

Check box 1(d) if the video recording of the deposition is intended for possible use at trial under CCP §2025.620(d).

NOTE

Remember that your deposition notice should also state your intention to use at trial a video recording of the deposition testimony under CCP §2025.620(d). See CCP §2025.220(a)(6).

ITEM 2

Item 2 advises the custodian of records that personal attendance is required, along with the original records. Existing procedures that authorize the production and transmittal of copies of business records accompanied by an affidavit from the custodian of records (Evid C §§1560(b), 1561, 1562) are specifically deemed insufficient compliance.

ITEM 3

To fill out Item 3:

a. Describe documents and things to be produced by specifically describing in item 3 each (CCP §2020.510(a)(2)-(3)):

(1) Individual item; or

(2) Particular category of item; and/or

(3) Any testing or sampling sought; and

b. Check the additional box if descriptions continue on attachment 3.

NOTE

You do *not* need to prepare an affidavit to accompany the Deposition Subpoena for Personal Appearance and Production of Documents and Things. See CCP §2020.510(b).

ITEM 4

To fill out item 4:

a. Specify if the deponent is a representative of a business or other entity; and

b. Describe the matters on which the witness is to be examined.

ITEM 5

Item 5 advises a deponent who is a custodian of consumer or employee records and who has been served with a motion to quash or an objection that, *before* the witness is required to produce records, deponent must obtain a court order or agreement reached between the parties, witness, and consumer/employee.

ITEM 6

Item 6 advises a deponent:

Nature of a Deposition

Of the nature of a deposition and of a deponent's rights and duties; and

Witness Fees

That a deponent is entitled to witness fees. See step 22, below.

NOTE

You need not pay witness fees to the employing agency of a police or other government officer as a condition of *obtaining* a subpoena, but you must pay the \$150 fee (at time of printing of this Action Guide) when the subpoena is served. See Govt C §§68097.1-68097.4. See also step 22, below.

SIGN SUBPOENA

If you are issuing the subpoena, sign it as the "person issuing the subpoena." See signature line, Deposition Subpoena for Personal Appearance and Production of Documents and Things, in Appendix B. See also CCP §§1985, 2020.210(b).

NOTE

A seal is not required if you sign the subpoena. CCP §§1985, 2020.210(b).

Further Research: CCP §§2020.310, 2020.510; Civil Discovery §§5.55, 5.61.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Seeking Discovery From a Witness/STEP 11.
COMPLETE DEPOSITION SUBPOENA FORM FOR PRODUCTION OF BUSINESS RECORDS ONLY

STEP 11. COMPLETE DEPOSITION SUBPOENA FORM FOR PRODUCTION OF BUSINESS RECORDS ONLY

COMPLETE CAPTION

Complete the caption of the Deposition Subpoena for Production of Business Records by including:

- a. The name, address, bar number, and telephone and fax numbers of the attorney for the subpoenaing party (e-mail address is optional);
- b. The name of the subpoenaing party;
- c. The name and address of the court;
- d. The names of the plaintiff and defendant; and
- e. The case number.

IDENTIFY THE WITNESS

Identify the business entity from whom the business records are sought by providing the name, address, and telephone number of the entity.

Sample Form: See [Appendix C](#) for sample completed deposition subpoena for business records only.

ITEM 1

Item 1 of the Business Records Subpoena orders the witness to produce the records at the designated time and place, but *not* before. To complete item 1:

Deposition Officer

State the name of deposition officer. For necessary qualifications of deposition officer and discussion of procedure to obtain copies of business records only, see Business Records Only in [step 3](#), above.

Time and Place

Designate the date, time, and place for witness to produce records.

NOTE

If producing documents to the deposition officer at the witness's address, list the deposition officer and deposition officer's phone number, but also be sure to list the address of the location where the documents are to be photocopied on the designated date.

Item 1(a)

Check box 1(a) if you want the witness to deliver a copy of the records to the deposition officer at the address in item 1.

NOTE

This item is usually selected for obtaining copies of bank records via subpoena.

Item 1(b)

Check box 1(b) if you want the witness to deliver a copy of the records to the deposition officer at the *witness's* address.

Item 1(c)

Check box 1(c) if you want the witness to make the original records available for inspection by your representative at the *witness's*

address.

NOTE

This item is always used for subpoenas sent to medical facilities to obtain medical records of a patient.

ITEM 2

Item 2 advises the witness:

- a. To produce the records by the date and time shown in item 1, but no sooner than 20 days after subpoena is issued, or 15 days after subpoena is served, *whichever date is later* (CCP §2020.410(c));
- b. That the witness may recover costs of producing records (Evid C §1563(b)); and
- c. To include a custodian or qualified witness affidavit with the records.

ITEM 3

In item 3, identify the business records to be produced by specifically describing *each* (CCP §2020.410(a)):

- a. Individual item; or
- b. Category of item.

ITEM 4

Item 4 advises a deponent who is a custodian of consumer or employee records and who has been served with a motion to quash or an objection, that *before* the deponent is required to produce records, a court order or agreement reached between the parties, deponent, and consumer/employee must be obtained.

NOTE

You do *not* need to prepare an affidavit or declaration as you would for a civil subpoena duces tecum. See CCP §§1987.5, 2020.410(c). See also step 17, below.

SIGN SUBPOENA

- a. If you are issuing the subpoena, sign it as the "person issuing the subpoena." See signature line, Deposition Subpoena for Production of Business Records, in Appendix C. See also CCP §§1985, 2020.210(b).
- b. No seal is required if you sign the subpoena. CCP §§1985, 2020.210(b).

NOTE

When requesting bank records, it is almost always better to request copies of bank statements and *not* copies of checks, because of the number of pages produced and costs associated with the records production. If one or more of the issues in dispute has to do with the checks themselves (*e.g.*, an issue of whether a particular check was forged), as opposed to the receipt and expenditure of funds, then the checks should be subpoenaed for examination.

Further Research: See CCP §2020.430; Civil Discovery §§5.85-5.93.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 12. DETERMINE WHETHER TO USE NOTICE TO APPEAR, CIVIL SUBPOENA, OR AGREEMENT TO APPEAR (WITHOUT PRODUCTION OF DOCUMENTS OR THINGS)

When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding

STEP 12. DETERMINE WHETHER TO USE NOTICE TO APPEAR, CIVIL SUBPOENA, OR AGREEMENT TO APPEAR (WITHOUT PRODUCTION OF DOCUMENTS OR THINGS)

NOTICE TO APPEAR

NOTICE TO APPEAR DEFINED

A "notice to appear" is a written notice *instead* of a subpoena, requesting attendance at trial or other nondeposition proceeding of (CCP §1987(b)):

- a. A party;
- b. A person benefiting from an action; or
- c. An officer, director, or managing agent of any such party or person.

WHEN TO SERVE

Serve the notice to appear at least **10 days** before the time required for attendance, unless the court orders a shorter time. CCP §1987(b).

Sample Form: See California Trial Practice: Civil Procedure During Trial §4.69 (3d ed Cal CEB 1995), referred to throughout this Action Guide as Civ Proc During Trial.

CIVIL SUBPOENA

CIVIL SUBPOENA DEFINED

A "civil subpoena" compels testimony and production of records by any *witness, party or nonparty*, at a:

- a. Court trial or hearing (CCP §1986(a));
- b. Proceeding before a commissioner or a non-California court (CCP §1986(b));
- c. Proceeding out of court before a judge, justice, or other officer authorized to administer oaths or take testimony under California law (CCP §1986(c)); or
- d. Judicial arbitration (Cal Rules of Ct 3.823(c)).

WHEN CIVIL SUBPOENA REQUIRED

You must use a civil subpoena, *not* a notice to appear, to compel (see CCP §§1985, 1987(b)):

- a. Testimony from a *nonparty* witness; or
- b. Production from *nonparty* witness of:
 - (1) Books;
 - (2) Documents; or

(3) Other things. See [step 13](#), below, for discussion of subpoena duces tecum.

WHEN OPTIONAL

You may choose to use a civil subpoena rather than a notice to appear (*e.g.*, when deadline has passed to use notice to appear) to compel attendance of (see [CCP §§1985, 1987\(b\)](#)):

- a. A party;
- b. A person benefiting from the action; or
- c. An officer, director, or managing agent of any such party or person.

IF PARTIES AGREE TO CHANGE TIME FOR APPEARANCE

- a. You may agree with the subpoenaed party to change the time of appearance ([CCP §1985.1](#)).
- b. If a party fails to appear under new agreement, that party can be held in contempt (see [step 38](#), below).

NOTE

You should put any agreement to change the time of an appearance in writing to help prove contempt if the party does not appear.

WHEN TO SERVE

See [step 21](#), below, for when to serve a civil subpoena.

Sample Form: See [Appendix E](#) for sample civil subpoena duces tecum. See also [step 16](#), below.

AGREEMENT TO APPEAR

WITNESS AGREES TO APPEAR

You *may* be tempted to rely on:

- a. A stipulation with opposing counsel that witness will appear at the trial; or
- b. The witness's agreement to appear voluntarily without a subpoena.

Use Caution

Use *caution* if you are considering relying on one of these agreements, because:

- a. There are no penalties for failure to appear if there is no subpoena; and
- b. If you have subpoenaed the witness, you are more likely to get the trial continued if the witness does not appear.

NOTE

The better practice is to obtain an agreement from the witness to accept service and memorialize the agreement in a confirming letter. See also [Appendix G](#) for a sample letter confirming a witness's agreement to accept service of deposition subpoena, which can be modified for an agreement to accept service of a trial subpoena.

Further Research: See [CCP §§1986-1987](#); [Civ Proc During Trial §§4.2-4.5, 4.20](#).

On-Call Agreement

LETTER AND "ON-CALL" AGREEMENT

Unless you are certain that the date and time you listed on the subpoena is when you want the witness to testify, you should have a letter and an "on-call" agreement given to the witness at the same time the subpoena is served. See sample letter and agreement in [Appendix J](#).

NOTE

Witnesses will be much more flexible and cooperative if you show respect for their time. Sometimes something as simple as an offer to keep the witness posted as to the trial's progress to avoid wasting the witness's time will result in a more cooperative witness.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 13. DETERMINE WHETHER TO USE NOTICE TO APPEAR AND PRODUCE OR CIVIL SUBPOENA DUCES TECUM

STEP 13. DETERMINE WHETHER TO USE NOTICE TO APPEAR AND PRODUCE OR CIVIL SUBPOENA DUCES TECUM

NOTICE TO APPEAR AND PRODUCE

NOTICE TO APPEAR AND PRODUCE DEFINED

A "notice to appear and produce" is a written notice, *instead* of a subpoena, requesting attendance and production of books, documents, and/or things at trial or other nondeposition proceeding of ([CCP §1987\(b\)](#)):

- a. A party;
- b. A person benefiting from an action; or
- c. An officer, director, or managing agent of any such party or person.

WHEN TO SERVE

Serve the notice to appear and produce **20 days** before trial, or within a shorter time period if the court orders. [CCP §1987\(c\)](#).

Sample Form: For sample form of notice to appear and produce, see [Civ Proc During Trial §4.70](#).

CIVIL SUBPOENA DUCES TECUM

CIVIL SUBPOENA DUCES TECUM DEFINED

A civil subpoena duces tecum compels production from either a party witness or a nonparty witness, but *usually from a nonparty witness*, of ([CCP §1985](#)):

- a. Books;
- b. Documents; or
- c. Other items required by law, *e.g.*, electronic media.

Sample Form: See [Appendix E](#) for a sample completed subpoena duces tecum form.

WHEN CIVIL SUBPOENA DUCES TECUM REQUIRED

If you seek production of, *e.g.*, books or documents from a *nonparty*, you must use this form rather than using notice to appear and produce, as you would for a party. [CCP §1985](#).

WHEN OPTIONAL

You may choose to use a civil subpoena duces tecum, *e.g.*, when the deadline has passed to serve notice to appear and produce (see this step, above), to compel production by:

- a. A party;
- b. A person benefiting from the action; or
- c. An officer, director, or managing agent of such party or person.

WHEN TO SERVE

See step 21, below, for when to serve a subpoena.

Further Research: See CCP §§1985, 1987; Civ Proc During Trial §§4.2-4.5, 4.36-4.39.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 14. DETERMINE LOCATION OF WITNESS AND TIMING OF SUBPOENA

STEP 14. DETERMINE LOCATION OF WITNESS AND TIMING OF SUBPOENA

WHEN SUBPOENA EFFECTIVE

Only witnesses who actually live in California at the time of service must appear. CCP §1989. See *In re Morelli* (1970) 11 CA3d 819, 91 CR 72, overruled on other grounds in *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287, 100 CR2d 320.

SCOPE OF SUBPOENA

California residents at the time of service may be compelled to attend and testify before any court, judge, justice, or any other officer, *i.e.*, they may be compelled to attend trial *anywhere* in the state. See CCP §1989.

ALTERNATIVES TO SUBPOENA

If you suspect that a witness may be outside the territorial reach of a subpoena at the time of trial (see Evid C §240; CCP §2025.620(c)):

- a. Depose the witness early in the proceedings; and
- b. Introduce the deposition at trial on the ground that witness is "unavailable."

NOTE

If the deponent is a key witness, you may want to videotape the deposition for use at trial. See Civil Discovery §§5.75-5.85.

WHEN TO SERVE SUBPOENA

When you serve the subpoena, allow the witness a reasonable time to prepare for and travel to the court proceeding. CCP §1987(a).

CONSUMER AND EMPLOYMENT RECORDS

Caution: Different deadlines and procedures apply if you are requesting consumer records or employment records. See steps 24-27, below, for consumer records and steps 28-31, below, for employment records.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 15. DETERMINE WHO WILL ISSUE THE CIVIL SUBPOENA

STEP 15. DETERMINE WHO WILL ISSUE THE CIVIL SUBPOENA

USE PROPER FORM

Use Civil Subpoena (Judicial Council Form SUBP-001) to compel testimony by any witness, party, or nonparty.

Sample Form: For a sample completed form, see [Appendix D](#).

APPEARANCE IN CALIFORNIA

You Issue Subpoena

The attorney of record may sign and issue the civil subpoena, without the court's seal or the signature of clerk or other official ([CCP §1985\(c\)](#)); or

Court Issues Subpoena

You may obtain signed and sealed blank subpoena from ([CCP §§1985\(c\), 1986\(a\), \(c\)](#)):

- a. The clerk of court where the action is pending;
- b. A judge of the court where the action is pending; or
- c. If not issued for a court appearance, the judge, justice, or other officer before whom attendance is required (*e.g.*, arbitrator).

If Subpoenaing Police or Similar Public Officer

On issuing a subpoena for a police officer or other similar officer, see [step 8](#), above.

APPEARANCE IN OUT-OF-STATE OR FEDERAL FORUM

If you seek to compel a witness to attend in an out-of-state or federal forum, obtain a subpoena from the clerk of the court of the county where the witness will be examined. [CCP §1986\(b\)](#).

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 16. COMPLETE THE CIVIL SUBPOENA FORM

STEP 16. COMPLETE THE CIVIL SUBPOENA FORM

COMPLETE CAPTION

Complete the caption of the Civil Subpoena with the following information:

- a. The name, address, bar number, and telephone number of the attorney for the subpoenaing party (e-mail address is optional);
- b. The name of the subpoenaing party;
- c. The name and address of the court;
- d. The names of the plaintiff and defendant; and
- e. The case number.

IDENTIFY THE WITNESS

Identify the witness to whom the subpoena is directed by providing the witness's name, address, and telephone number, if known.

Sample Form: See sample completed Civil Subpoena in [Appendix D](#).

ITEM 1

To complete item 1, designate date, time, and place for witness to appear.

ITEM 2

To complete item 2, state the name and telephone number of ([CCP §§1985.1-1985.2](#)):

- a. Yourself as attorney of record for the subpoenaing party; or
- b. Person you designate to receive questions about the subpoena.

ITEM 3

Item 3 advises witness that he or she is entitled to witness fees. See [step 22](#), below.

SIGNATURE

Sign signature line as for a deposition subpoena. See [steps 9-10](#), above.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 17. COMPLETE THE SUBPOENA DUCES TECUM FORM AND ACCOMPANYING DECLARATION

STEP 17. COMPLETE THE SUBPOENA DUCES TECUM FORM AND ACCOMPANYING DECLARATION

COMPLETE CAPTION

Complete caption of the Civil Subpoena (Duces Tecum) with the following information:

- a. The name, address, bar number, and telephone number of the attorney for the subpoenaing party (e-mail address is optional);
- b. The name of the subpoenaing party;
- c. The name and address of the court;
- d. The names of the plaintiff and defendant; and
- e. The case number.

IDENTIFY THE WITNESS

If the person to whom the subpoena is directed is:

- a. A natural person, provide the witness's name, address, and telephone number, if known.
- b. Not a natural person, identify the witness as "Custodian of Records" and provide the name, address and phone number, if known, of the entity.

Sample Form: See [Appendix E](#) for sample completed Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing.

ITEM 1

List the date, time, and place for witness's appearance. Include the court department and judge's name.

ITEM 2

Item 2 advises a deponent who is a custodian of consumer or employee records, and who has been served with a motion to quash or an objection, that *before* the deponent is required to produce records, the deponent must obtain a court order or agreement reached between the parties, deponent, and consumer/employee.

ITEM 3

To complete Item 3, check only one box:

Item 3(a)

Check box 3(a) for the witness's personal appearance and production of things;

Item 3(b)

Check box 3(b) when the witness's personal appearance is not required if the witness adheres to the requirements in producing the records described in the declaration or affidavit and complies with [Evid C §§1560-1562, 1271](#).

NOTE

If you checked box 3(b), you should also serve a letter with the subpoena, explaining to the witness or custodian of records how and where to deliver the documents to trial or arbitration. After service of the subpoena, follow up with the witness by telephone to make sure the witness has complied with the requested procedure. After the witness has produced the documents, call the court or arbitrator to verify that the documents have been produced as required. It is not uncommon for subpoenaed documents to fail

to make it into the proper courtroom when required. The explanatory letter given to the witness, coupled with the follow-up telephone calls to the witness and to the court, will prevent unnecessary (and unpleasant) surprises in the courtroom on the date of trial.

ITEM 4

To complete Item 4, state the name and telephone number of the following (CCP §§1985.1-1985.2):

- a. The attorney of record for the subpoenaing party; or
- b. The person designated to receive questions about the subpoena.

ITEM 5

Item 5 advises the witness that he or she is entitled to witness fees. See step 21, below.

SIGNATURE

Sign the signature line as for a deposition subpoena. See steps 9-10, above.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Attendance/Production at a Civil Trial or Other Nondeposition Proceeding/STEP 18. PREPARE DECLARATION ACCOMPANYING SUBPOENA DUCES TECUM

STEP 18. PREPARE DECLARATION ACCOMPANYING SUBPOENA DUCES TECUM

INCLUDE IN DECLARATION

A declaration or affidavit *must* accompany the subpoena duces tecum form, setting forth (CCP §1985):

Things You Want

Specifically, the exact matters or things you want produced;

Good Cause

Good cause for production of matters and things described (see *Associated Brewers Distrib. Co. v Superior Court* (1967) 65 C2d 583, 55 CR 772);

Materiality

In detail, how matters or things are material to the *issues* in the case (see *Pacific Auto. Ins. Co. v Superior Court* (1969) 273 CA2d 61, 77 CR 836); and

Witness Has Custody or Control

That the desired matters or things are in the witness's possession or control.

Sample Form: For sample declaration, see Appendix E.

RETAIN THE ORIGINAL

Remember to:

- a. Keep original declaration or affidavit until final judgment in the action; and
- b. File it with the court *only* on reasonable request from a party or *affected* witness. CCP §1987.5.

Further Research: See CCP §1985; Civ Proc During Trial §§4.7-4.14.

© The Regents of the University of California

When Serving the Deposition or Civil Subpoena

STEP 19. REVIEW WHO CAN SERVE THE SUBPOENA

WHO SERVES

Anyone may serve the subpoena (CCP §§1987(a), 2020.220(b)) (*e.g.*, sheriff/marshal, or constable, for a \$30 fee). See Govt C §26743.

NOTE

Although anyone may serve the subpoena (CCP §1987(a)), because service may become an issue and the person who served it might have to testify, it is wise to entrust service to a credible person over 18 who is not a party to the litigation. See, *e.g.*, CCP §414.10 requirements for service of summons.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Serving the Deposition or Civil Subpoena/STEP 20.
CHOOSE APPROPRIATE METHOD OF SERVICE

STEP 20. CHOOSE APPROPRIATE METHOD OF SERVICE

HOW TO SERVE

Use appropriate method of serving subpoena:

PERSONAL SERVICE

NATURAL PERSON

Use personal service on a deponent or witness who is a natural person. CCP §§1987, 2020.220(b).

NOTE

To seek contempt if the witness disobeys the subpoena, you *must* have had the subpoena *personally* delivered. See step 38, below

MINOR 12 OR OLDER

If the deponent or witness is a minor and at least 12 years old:

a. Deliver *personally* to the minor (CCP §1987(a)) and to the:

- (1) Parent;
- (2) Guardian;
- (3) Conservator, or similar fiduciary; or

b. If you cannot, with reasonable diligence, locate any of the above, serve any person:

- (1) Having care or control of the minor;
- (2) With whom the minor resides; or
- (3) By whom the minor is employed.

MINOR UNDER 12

If the deponent is a minor under age 12, deliver the subpoena *personally* to people named above, but not to the minor.

MINOR UNDER JURISDICTION OF COURT

If a minor is under the jurisdiction of the court under Welf & I C §300, §601, or §602, and is not in the custody of a parent or guardian, then also serve the designated agent for service of process at the department under whose jurisdiction the minor has been placed (*e.g.*, county child welfare office or probation department). CCP §1987(a).

ORGANIZATION

For a deponent or witness that is an organization, personally deliver to any (CCP §§1987, 2020.220(b)):

- a. Officer;
- b. Director;
- c. Custodian of records; or

- d. Agent or employee authorized by the organization to accept service.

NOTE

Hospitals often have a legal liaison who will accept service on behalf of a doctor on staff. The liaison will usually agree to accept service by mail. Call the hospital's main number and ask for the department that arranges doctors' depositions. Confirm the doctor's hourly rate, and if the deposition is to take place at the hospital, ask the liaison to arrange the conference room.

SERVICE ON CERTAIN PUBLIC EMPLOYEES

PEACE OFFICER AND OTHER PUBLIC EMPLOYEES WHO WITNESSED OR INVESTIGATED IN COURSE OF DUTY

Government Code §68097.1(a) governs service of a subpoena to compel attendance, at trial or other proceeding, of a public employee who has witnessed or investigated an event *in the course of duty*, including a:

- a. Department of Justice employee who is:
 - (1) A peace officer; or
 - (2) An analyst in a technical field;
- b. Peace officer of the Department of the California Highway Patrol;
- c. Peace officer member of the State Fire Marshal's Office;
- d. Sheriff;
- e. Deputy sheriff;
- f. Marshal;
- g. Deputy marshal;
- h. District Attorney inspector;
- i. Probation officer;
- j. Building inspector;
- k. Firefighter;
- l. City police officer.

How to Serve Peace Officer Public Employee

When serving peace officer public employees, personally deliver subpoena to one of the following (Govt C §68097.1(a)):

- a. The employee personally;
- b. The employee's immediate superior at the public entity by which he or she is employed (two copies); or
- c. An agent designated by the immediate superior to accept service (two copies).

NOTE

In most counties, there is a court liaison for the police, firefighters, and certain other government employees, who is authorized to accept civil and deposition subpoenas. To locate the court liaison, contact the non-emergency number and ask for the agent who accepts service of subpoenas. Remember to get a name. When you contact the court liaison, it helps if you have the badge number of the officer you are subpoenaing.

At the option of the local agencies involved, criminal subpoenas may now be served to peace officers by "electronic means," such

as e-mail and fax. See Pen C §1328(c).

OTHER STATE OR TRIAL COURT EMPLOYEES WHO GAINED EXPERIENCE IN COURSE OF DUTY

Government Code §68097.1(b) governs service of a subpoena to compel any *other* state or trial court employee to appear at trial or other proceeding in connection with a matter in which he or she has gained experience in the course of duty.

How to Serve Other State or Trial Court Employees

To serve other state or trial court employees, personally deliver subpoena to (Govt C §68097.1(b)):

- a. The state employee personally;
- b. The employee's immediate superior (two copies); or
- c. An agent designated by that immediate superior to receive service (two copies).

NOTE

Government Code §68097.6 specifies that Govt C §§68097.1-68097.5 apply to subpoenas for the deposition of certain peace officers, but it does not include all the employees listed in Govt C §68097.1(a)-(b). Nevertheless, because the appearance and compensation provisions of Govt C §68097.1 apply to appearances before any "person ... before whom ... attendance of witnesses may be required by subpoena" (Govt C §68097.1(d)), which logically includes a deposition officer, these provisions appear to apply even to depositions of employees who are not mentioned in Govt C §68097.6.

The attorney representing the local agency (*e.g.*, the office of the City Attorney, County Counsel, or Attorney General) frequently will assist in making arrangements for service on an employee of the agency.

CONCEALED WITNESS

CONCEALED WITNESS DEFINED

A "concealed witness" is one who is deliberately hiding to avoid being served with a subpoena. See CCP §1988.

PREPARE DECLARATION

If you are attempting to serve a witness who is concealed to avoid service, state in declaration that the witness is (CCP §1988):

- a. Concealed; and
- b. Material.

OBTAIN ORDER

If the witness is concealed:

- a. Submit a declaration to the judge or any officer issuing the subpoena (CCP §1988); and
- b. Obtain an ex parte order directing the sheriff to serve the subpoena by breaking into the building or vessel where the witness is concealed. CCP §1988.

JAILED WITNESS

JAILED WITHIN COUNTY

If a witness is jailed in the county where the action or proceeding is pending, production of that witness may be required for deposition, hearing, or trial. CCP §1997.

JAILED ELSEWHERE IN STATE

A witness who is jailed in another county in the state must be examined by deposition. CCP §1997.

PREPARE AFFIDAVIT

Draft an affidavit or declaration that states the (CCP §1996):

- a. Nature of the action or proceeding;
- b. Testimony expected from the jailed witness; and
- c. Materiality of the testimony to the case.

NOTE

Only a party may move for the temporary removal and production of a prisoner at trial. CCP §1996.

OBTAIN ORDER

To obtain the order, make a motion (CCP §1995):

- a. To the court itself in which the action or special proceeding is pending, unless it is a small claims court; or
- b. If the action is pending before a small claims court or before a judge or other person out of court, to a justice of the California Supreme Court or a judge of the superior court of the county where the action or proceeding is pending.

Further Research: See Civ Proc During Trial §§4.21-4.35.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Serving the Deposition or Civil Subpoena/STEP 21.
SERVE THE SUBPOENA

STEP 21. SERVE THE SUBPOENA

WHAT TO SERVE

Attendance/Testimony at Trial or Deposition, With or Without Records

To obtain attendance of a witness at trial or at a deposition, with or without the production of records, serve (CCP §§1987, 2020.220(c)):

- a. A copy of subpoena or subpoena duces tecum;
- b. A copy of affidavit or declaration supporting subpoena duces tecum, if required (CCP §1987.5); and
- c. The deposition notice, if required. See also step 2, above.

Records Only, Deposition

To obtain only records at a deposition, serve a copy of the deposition subpoena. CCP §2020.220(c).

Records Only, Trial

To obtain only records at trial, serve a copy of (CCP §§1985, 1987.5):

- a. The subpoena duces tecum; and
- b. The supporting affidavit or declaration.

Consumer and Employment Records

To obtain consumer records, see steps 24-27, below. To obtain employment records, see steps 28-31, below.

WHEN TO SERVE

Personal Attendance/Testimony

Serve a subpoena for personal attendance at trial in a reasonable time for witness preparation and travel. CCP §1987(a).

Personal Attendance and Production of Records and Things

Serve a subpoena for personal attendance and production of records and things at trial in a reasonable time for witness preparation and travel. CCP §1987(a).

Personal Attendance/Testimony at Deposition

Serve a subpoena for personal attendance/testimony at deposition in a reasonable time for witness to travel to place of deposition. CCP §2020.220(a).

Production of Records and Things at Deposition

Serve a subpoena for production of records and things at deposition in sufficient time to provide a reasonable opportunity to locate and produce any records or things. CCP §2020.220(a).

If Deposition Notice Required

If a deposition notice is required, serve it on the parties at least **10 days** before the deposition. CCP §2025.270(a); see step 5, above.

Records Only, Deposition

Serve a subpoena for production of records only at least **15 days** before date specified for production of records. CCP §2020.410(c).

Consumer and Employment Records

For when to serve subpoena requesting consumer records, see steps 24-27, below. For when to serve subpoena requesting employment records, see steps 28-31, below.

PREPARE PROOF OF SERVICE

Instruct the person serving the subpoena to complete the proof of service on the reverse side of the official subpoena form (see, *e.g.*, Appendix A) by stating:

- a. The name of the person served;
- b. The street address and city where served;
- c. The date and time of service;
- d. Whether fees were demanded;
- e. What fees were paid; and
- f. That the person effecting service declares that service was accomplished.

RETAIN ORIGINAL

Remember to:

- a. Keep the original subpoena, declaration, and proof of service;
- b. File them with the court *only*:
 - (1) On the reasonable request of any party or witness affected by it (CCP §1987.5), *e.g.*, on the request of the witness attacking the subpoena (see step 34, below); or
 - (2) If:
 - (a) You introduce them as relevant to an issue in a law and motion or other proceeding; or
 - (b) The court orders them filed for good cause. Cal Rules of Ct 3.250.

Further Research: See CCP §§1985, 1985.3, 1987, 2020.010-2020.510; Civ Proc During Trial §§4.15-4.19; Civil Discovery §§5.68-5.69, 5.92, 5.121-5.124.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Paying Witness Fees and Costs/STEP 22. PAY NONPARTY WITNESS FEES AND COSTS FOR DEPOSITION

When Paying Witness Fees and Costs

STEP 22. PAY NONPARTY WITNESS FEES AND COSTS FOR DEPOSITION

PERSONAL ATTENDANCE

WITNESS FEES FOR PERSONAL ATTENDANCE/TESTIMONY

For personal attendance at the deposition, pay a *nonparty witness whether or not demanded* (CCP §2020.230(a)):

- a. \$35 witness fee per day (CCP §2020.230(a); Govt C §68093);
- b. \$.20 per mile to and from site (CCP §2020.230(a); Govt C §68093); and
- c. If applicable, reasonable costs incurred in producing the records. See Evid C §1563(b)-(c).

When to Pay

Pay a deposition witness *either* (CCP §2020.230(a)):

- a. When you serve the deposition subpoena; or
- b. At the deposition, if by prior arrangement.

BUSINESS RECORDS ONLY

WITNESS FEES FOR BUSINESS RECORDS ONLY

For nonparty business records *only* if records are delivered to the attorney or the attorney's representative at a nonparty witness's place of business, pay (Evid C §1563(b)(6)):

Witness Fees

\$15 (Evid C §1563(b)(6));

When to Pay

When the deposition subpoena is served, whether or not demanded by the deponent. CCP §2020.220(b).

NOTE

The \$15 fee applies *only* if the witness brings originals to you for copying. Civil Discovery §5.105.

COSTS FOR BUSINESS RECORDS ONLY

Pay reasonable costs incurred by nonparty witness (CCP §2020.430(c)(2)) in preparing and providing business records (Evid C §1563(b)(1)), including:

Reproduction Copies

Reproduction costs:

- a. Costs of \$.10 per page for document pages 8½ by 14 inches or less;

- b. Costs of \$.20 per page for copying documents from microfilm;
- c. Actual costs for oversize documents or documents requiring special processing;

Clerical Costs

Clerical costs of \$24 per hour per person;

Postage

Actual postage charges; and

Retrieval Costs

Costs for services of third persons, including retrieval from microfilm.

WHEN TO PAY COSTS FOR BUSINESS RECORDS ONLY

Pay costs when a nonparty witness delivers:

- a. Copies of business records (Evid C §1563(b)(2)); and
- b. Itemized statement listing costs. Evid C §1563(b)(3).

If Costs Are Excessive

If you consider costs to be excessive, petition court to recover costs paid or to reduce amount. The court will then issue an order to show cause to determine the reasonableness of costs. Evid C §1563(b)(4).

WITNESS FEES FOR CERTAIN PUBLIC EMPLOYEES

WITNESS FEES FOR PEACE OFFICERS AND OTHER PUBLIC EMPLOYEES

Reimburse the employing public entity for salaries and expenses of peace officers and other public employees while they attend as witnesses under a Govt C §68097.1 subpoena, *i.e.* (Govt C §68097.2(a)-(b)):

- a. Peace officers (as defined in Pen C §830);
- b. Firefighters, including volunteer firefighters:
 - (1) Volunteer firefighters are considered employees of the public entity for which they volunteer (Govt C §68097); but
 - (2) If volunteer firefighters will receive regular salary from their regular employer while appearing, the public entity need not pay them, and you need not reimburse the entity (see Govt C §68097.2(f));
- c. Trial court employees; and
- d. Any state or county employees attending under a Govt C §68097.1 subpoena, *i.e.*, any employee listed in Govt C §16097.1(a)-(b). See step 20, above.

Further Research: See Nick v DMV (1993) 12 CA4th 1407, 16 CR2d 305 (party who subpoenas highway patrol officer to appear at DMV administrative hearing must pay \$150 fee under Govt C §68097.2). See also Govt C §68097.6 (subpoenas for deposing peace officers).

NOTE

It is a misdemeanor to offer any fee to peace officers, highway patrol members, or firefighters other than that set out in Govt C §§68097.1-68097.6. Govt C §68097.7.

How to Pay

To pay public employee witness fees, give person accepting subpoena (Govt C §68097.2(b)):

- a. \$150 (at time of printing of this action guide) for each day you require employee to attend under subpoena; and
- b. The subpoena.

NOTE

Proof of witness fee deposit is not a prerequisite to issuing a subpoena under Govt C §68097.2(b).

Fee Refund, If Applicable

If fees deposited exceed *actual* salary and traveling costs of the public entity employee, request a refund. Govt C §68097.2(c).

Additional Fees

- a. You may be asked to pay additional sums if public entity's expenses were greater than your deposit. Govt C §68097.2(d).
- b. No additional witness fee is required if court continues proceeding on its own motion. Govt C §68097.2(e).

WITNESS FEES FOR LOCAL AGENCY EMPLOYEES

Reimburse the local agency for salaries and other expenses of local agency employees you subpoena as witnesses to an event or transaction that they perceived or investigated in the course of duty. Govt C §68096.1(b).

Local Agency Defined

A "local agency" is a (Govt C §68096.1(f)):

- a. City;
- b. County;
- c. City and county;
- d. Special district;
- e. Redevelopment agency; or
- f. Any other political subdivision of the state.

How to Pay

To pay local agency witness fees, give the agency (Govt C §68096.1(b)):

- a. \$150 for each day you require the agency employee to attend under the subpoena; and
- b. The subpoena.

Fee Refund, if Applicable

If fees deposited exceed *actual* salary and traveling costs of the local agency employee, request a refund. Govt C §68096.1(c).

Additional Fees

- a. You may be asked to pay additional sums if the agency's expenses were greater than your deposit. Govt C §68097.1(d).
- b. No additional witness fee is required if the court continues the proceeding on its own motion. Govt C §68096.1(e).

Further Research: See CCP §1986.5; Evid C §1563; Govt C §68093; Civil Discovery §5.71.

NOTE

See note, step 19, above, for discussion of why witness fee provisions apply to both depositions and trial.

PAY EXPERT WITNESS FEES

If you notice an expert's deposition (or subpoena an expert for trial, see [step 23](#), below), pay reasonable and customary hourly fee for time spent at the deposition. [CCP §2034.430\(b\)](#); [Govt C §68092.5](#).

Expert Defined

Pay expert witness fees to expert who ([CCP §2034.430\(a\)](#); [Govt C §68092.5\(a\)](#)):

- a. Was retained by a party for purpose of forming and expressing an opinion in anticipation of litigation or trial;
- b. Is a treating physician, surgeon, or other treating health care practitioner asked to express an opinion during the deposition;
- c. Is an architect, professional engineer, or licensed land surveyor who was involved in the original project and is asked to express an opinion.

When to Pay

Pay fees ([CCP §2034.450](#); [Govt C §68092.5\(a\)](#)):

- a. Based on your estimate of the deposition length at the time the subpoena or deposition notice is served; or
- b. At the beginning of the deposition or tender with the deposition notice; and
- c. If the deposition takes longer than anticipated, within **5 days** after receiving the expert witness's itemized statement.

Amount of Fee

Pay an expert:

- a. Fees consistent with fee schedule in expert witness declaration (see [CCP §2034.260\(c\)\(5\)](#); see also [Govt C §68092.5](#));
- b. Hourly or daily fee that does not exceed fee charged party who retained the expert, unless expert donated his or her services to a charitable or other nonprofit organization. [CCP §2034.430\(d\)](#); [Govt C §68092.5\(a\)](#).

NOTE

An expert should charge a daily fee only if he or she had to attend a full day deposition or be available for the full day and forgo all of that day's business. [CCP §2034.430\(e\)](#); [Govt C §68092.5\(a\)](#).

Further Research: See [True v Shank \(2000\) 81 CA4th 1250, 97 CR2d 462](#) (expert witness fees may be tendered either with the deposition notice or at the commencement of the deposition); [Rancho Bernardo Dev. Co. v Superior Court \(1992\) 2 CA4th 358, 2 CR2d 878](#) (expert may reasonably charge higher amount for testifying than for investigating and reviewing materials). For full discussion of expert witness fees, see [Handling Expert Witnesses](#); see also [Civ Proc During Trial §4.43](#).

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Paying Witness Fees and Costs/STEP 23. PAY NONPARTY WITNESS FEES AND COSTS FOR TRIAL

STEP 23. PAY NONPARTY WITNESS FEES AND COSTS FOR TRIAL

WITNESS FEES FOR PERSONAL ATTENDANCE AT TRIAL

On demand by a witness or custodian of records, pay (CCP §1987(a)):

- a. \$35 a day (Govt C §68093); and
- b. \$.20 per mile to and from site. Govt C §68093.

WITNESS FEES AND COSTS FOR BUSINESS RECORDS AT TRIAL

For business records that you plan to use at trial *without* attendance, pay costs incurred in preparing and providing records (Evid C §1563(b)(1)), if the witness submits itemized statement of costs (Evid C §1563(b)(3)). See step 22, above.

FEES FOR PUBLIC EMPLOYEES

See step 22, above, for how to pay certain public and local agency employee witness fees.

EXPERT WITNESS FEES

See step 22, above, and Govt C §68092.5 for how to pay expert witness fees. See also Handling Expert Witnesses.

RECOVER FEES

If you prevail, recover statutory witness fees and costs from the losing party. CCP §1033.5(a); see Civ Proc During Trial §4.44, chaps 26-27.

Further Research: See Evid C §1563; Govt C §68093; Civ Proc During Trial §§4.40-4.44.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Consumer Records at Deposition or Trial/STEP 24. DETERMINE WHETHER YOU SEEK PERSONAL CONSUMER RECORDS

When Requesting Production of Consumer Records at Deposition or Trial

STEP 24. DETERMINE WHETHER YOU SEEK PERSONAL CONSUMER RECORDS

PERSONAL CONSUMER RECORDS DEFINED

To determine whether a "witness" has possession of records that are "personal records" of a "consumer," see definitions of these terms below. CCP §1985.3(a).

Administrative Cases

The constitutional right to privacy requires a CCP §1985.3-type notice to consumer in an administrative case, even though §1985.3 does not expressly apply to administrative proceedings. See Seblmeyer v Department of Gen. Servs. (1993) 17 CA4th 1072, 21 CR2d 840.

CONSUMER DEFINED

A "consumer" is (CCP §1985.3(a)(2)):

a. Any:

- (1) Individual;
- (2) Partnership of five or fewer persons;
- (3) Association; or
- (4) Trust;

b. That:

- (1) Has transacted business with the *witness*;
- (2) Has used the services of the *witness*; or
- (3) For whom the *witness* has acted as agent or fiduciary.

WITNESS DEFINED

A "witness" is a person or entity that (CCP §1985.3(a)(1)):

Relationship

Has had a business or fiduciary relationship with the consumer;

Possession of Records

Has *possession* of the consumer's records (Sasson v Katash (1983) 146 CA3d 119, 194 CR 46); and

Listed in Statute

Is one of the following individuals or organizations (CCP §1985.3(a)):

- a. Physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, or psychotherapist (Evid C §1010) (includes psychologists, social workers, and marriage and family therapists).

NOTE

Compliance with the Privacy Rule regulations governing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) is mandatory. The Privacy Rule of HIPAA (42 USC §1320d-2; 45 CFR pts 160, 164), which addresses the use and disclosure of a patient's private medical health records, may create more of a challenge in obtaining medical records pursuant to subpoena. The Privacy Rule enhances a patient's rights over her or his own "protected health information" (PHI) and increases the health providers' obligations to protect patients' confidential information. Strict compliance with the requirements of CCP §1985.3 will likely alleviate any concerns under HIPAA.

- b. Veterinarian, veterinary hospital, or veterinary clinic.
- c. State or national bank, state or federal credit union, or state or federal association as defined in Fin C §5102.
- d. Trust company or security brokerage firm.
- e. Insurance company, title insurance company, or underwritten title company.
- f. Attorney.
- g. Accountant.
- h. Institution of the farm credit system (12 USC §2002).
- i. Telephone corporation that is a public utility (Pub Util C §216).
- j. Private or public preschool, elementary school, secondary school, or postsecondary school.
- k. Anyone authorized by the state to make or arrange loans secured by real property.
- l. Escrow agent licensed under Div 6 (Fin C §§17000-17702) or exempt from licensing under Fin C §17006.

PERSONAL RECORDS DEFINED

"Personal records" are originals, copies of records, or electronic data pertaining to a consumer maintained by the above witnesses.

Further Research: See *Sasson v Katawb, supra* (lease was "personal record" held on behalf of landlord (consumer) by subpoenaed bank (witness)).

SUBPOENAING PARTY DEFINED

A "subpoenaing party" is the person who causes a subpoena duces tecum to be issued or served in connection with a civil action or proceeding. CCP §1985.3(a)(3). State and local agencies are specifically excluded from this definition. But see *Lantz v Superior Court* (1994) 28 CA4th 1839, 34 CR2d 358 (county that is defendant in civil action and seeks to subpoena personal medical records of plaintiff/consumer is "subpoenaing party" under §1985.3(a)(3)).

DEPOSITION OFFICER DEFINED

A "deposition officer" is anyone who meets the qualifications specified in CCP §2020.420. CCP §1985.3(a)(4).

NOTE

For a complete list of the documents that should be served when subpoenaing consumer records and on whom, see step 27, below.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Consumer Records at Deposition or Trial/STEP 25. PREPARE SUBPOENA AND NOTICE REGARDING CONSUMER RECORDS

STEP 25. PREPARE SUBPOENA AND NOTICE REGARDING CONSUMER RECORDS

COMPLETE APPROPRIATE SUBPOENA

Complete the appropriate subpoena (see [steps 9-10, 16-17](#), above).

Set Production Date

To set the production date:

- a. Make sure that the date for compliance in the subpoena is before the date called for in the subpoena duces tecum ([CCP §1985.3\(b\)](#)); and
- b. If the subpoena is a *deposition subpoena for production of business records for copying only*, make sure that it commands compliance no earlier than ([CCP §2020.410\(c\)](#)):
 - (1) **20 days** after issuance; or
 - (2) **15 days** after service, whichever is later. See [step 5](#), above.

NOTE

For when to serve a consumer, see [step 26](#), below; for when to serve a witness, see [step 27](#), below.

PREPARE NOTICE

Prepare the notice to consumer, indicating that ([CCP §1985.3\(e\)](#)):

- a. The consumer's records are being sought from the witness named in the subpoena;
- b. The consumer has a right to object by filing moving papers with the court or by serving a written objection on the requesting party and witness before the date specified in the subpoena (see [step 24](#), above, for consumer objections); and
- c. If the consumer does object and the party seeking records will not agree *in writing* to cancel or limit the subpoena, the consumer should consult an attorney about protecting the consumer's privacy.

Sample Form: For sample Notice to Consumer (Judicial Council Form SUBP-025), see [Appendix F](#). See also [Civil Discovery §5.117](#); [Civ Proc During Trial §4.59](#).

NOTE

If consumer is a party to the action, consider preparing one document to include the Notice to Consumer and the Notice of Deposition. *Inabnit v Berkson* (1988) 199 CA3d 1230, 245 CR 525.

If the subpoenaing party is the consumer and the consumer is the only subject of the subpoenaed records, notice and delivery of the subpoena, supporting affidavit, and proof of service are not required. [CCP §1985.3\(l\)](#).

SEEK ORDER SHORTENING TIME

If appropriate, seek an order ([CCP §1985.3\(h\)](#)):

- a. Shortening time for serving subpoena duces tecum; or
- b. Waiving requirements of notice to the consumer under [CCP §1985.3\(b\)](#).

Prepare Declaration

To obtain order, prepare a declaration ([CCP §1985.3\(h\)](#)):

- a. Showing good cause and due diligence; and
- b. Including circumstances showing that the rights of witnesses and consumers will be preserved if the notice period is shortened or waived. CCP §1985.3(h).

Present Declaration

Present the declaration and obtain an ex parte order to shorten time or waive notice requirements. See CCP §1985.3(h). For how to obtain ex parte orders in general, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004), referred to throughout this Action Guide as Civ Proc Before Trial.

CONSIDER EFFECT OF FAILURE TO COMPLY

Be aware that, if you fail to strictly comply with CCP §1985.3, the witness may refuse to produce personal records. CCP §1985.3(k).

Further Research: See CCP §1985.3; Civil Discovery §§5.108-5.128; Civ Proc During Trial §§4.21-4.23.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Consumer Records at Deposition or Trial/STEP 26. SERVE CONSUMER

STEP 26. SERVE CONSUMER

WHAT TO SERVE

Serve on the consumer (CCP §1985.3(b)):

- a. Notice to the consumer as required by CCP §1985.3(e) (see step 25, above);
- b. A copy of the subpoena (see step 25, above); and
- c. For a civil subpoena duces tecum, a copy of declaration or affidavit describing desired documents.

WHEN TO SERVE

Civil Subpoena or Deposition Subpoena for Attendance With Records

Serve the consumer with a civil subpoena or a deposition subpoena for attendance with records before *both* of the following dates:

- a. At least (CCP §§1013, 1985.3(b)(2)):
 - (1) **10 days** before the production date specified in the subpoena if the subpoena is personally served;
 - (2) **15 days** before the production date if the subpoena is mailed to a California address;
 - (3) **20 days** before the production date if mailed to another state;
 - (4) **30 days** before the production date if mailed outside the United States; or
 - (5) **10 days plus 2 court days** before the production date if served by fax, express mail, or other form of overnight delivery (see note below); and
- b. At least (CCP §§1013, 1985.3(b)(3)):
 - (1) **5 days** before service on the witness if notice is personally served on the *consumer*;
 - (2) **10 days** before service on the witness if notice is mailed to the consumer at a California address;
 - (3) **15 days** before service on the witness if mailed to the consumer in another state;
 - (4) **25 days** before service on the witness if mailed to the consumer outside the United States; or
 - (5) **5 days plus 2 court days** before service on the witness if served on the consumer by fax, express mail, or other method of overnight delivery. See note below.

Example: If you intend to subpoena consumer records for the first day of trial (civil subpoena duces tecum):

- Serve the consumer by mail at least 15 days before trial (CCP §1985.3(b)(2)) and at least 10 days before you serve the witness (CCP §1985.3(b)(3)), *i.e.*, you could serve the witness 1 to 5 days before trial; but
- You must also serve the witness in sufficient time to locate and produce the records (CCP §§1985.3(d), 2020.220, 2020.410(c)), and 1-to-5 days' notice to the witness might not be considered sufficient.
- If you serve the witness on the 10th day before trial, serve the consumer by mail in California at least 20 days before trial, *i.e.*:

10 days from service on the witness until trial

10 days before service on the witness, serve the consumer (5 days before the witness plus 5 days for mailing (CCP §1985.3(b)(3)) = 20 days.

NOTE

Caution: Do not serve by fax unless the parties and the intended recipient of the service have agreed in writing to service by fax. CCP §1013(e).

Notice and Deposition Subpoena for Business Records Only

Serve the consumer with notice and deposition subpoena for business records only at least:

- a. **20 days** before the date of production (CCP §2020.410); and
- b. **5 days** before serving the witness. CCP §1985.3(b)(3).

NOTE

Because CCP §2020.410 requires that you serve the deposition subpoena for business records only on the witness at least 15 days before the production date, and CCP §1985.3(b)(3) requires that you serve the consumer at least 5 days before service on the witness, you must serve the consumer at least 20 days before the production date (15 + 5 = 20). See step 27, below.

HOW TO SERVE

Party Consumer

If the consumer is a party:

- a. Serve the attorney of record personally or by mail (CCP §§1985.3(b)(1), 1011, 1015); or
- b. Serve the clerk or judge if the party is not a resident and is not represented by counsel. CCP §1015.

Nonparty Consumer

If not a party, serve the consumer (CCP §1985.3(b)(1)):

- a. Personally; or
- b. At the consumer's last known address:
 - (1) By first-class mail (see CCP §§1012, 1013(a)-(b));
 - (2) By express mail or other form of overnight delivery (see CCP §1013(c)-(d));
 - (3) By telegram (see CCP §1017); or
 - (4) By registered mail (see CCP §1020).

NOTE

Caution: Do not serve by fax unless the parties and the intended recipient of the service have agreed in writing to service by fax. CCP §1013(e). Section 1013(e) does not define the "parties" who must agree to service by fax, but it should be presumed that agreement between the sending and receiving parties is necessary to comply with the statute.

Minor

If the consumer is a minor:

- a. Serve the minor's (CCP §1985.3(b)(1)):
 - (1) Parent;
 - (2) Guardian;

- (3) Conservator or similar fiduciary; or
- b. If you cannot, with reasonable diligence, locate any of the above, serve any person:
 - (1) Having the care or control of the minor;
 - (2) With whom the minor resides; or
 - (3) By whom the minor is employed; and
- c. If the minor is *at least 12 years old*, also serve the minor personally.

NOTE

If the minor is under the jurisdiction of the court under Welf & I C §300, §601, or §602, and is not in the custody of a parent or guardian, then also serve the designated agent for service of process at the department under whose jurisdiction the minor has been placed (*e.g.*, county child welfare office or probation department). CCP §1987(a).

CONSUMER OBJECTIONS

Be aware that:

- a. A motion to quash or modify the subpoena or a written objection must be filed or served **5 days** before the date specified for production (CCP §1985.3(e), (g));
- b. Filing the motion to quash or the written objection relieves the witness or the deposition officer of the duty to produce, except when ordered by the court or agreed on by the parties, the witness, and the consumer. CCP §1985.3(g).

If Party

A consumer who is a party to the action and objects to production of records should file with the court moving papers to quash or modify the subpoena **5 days** before the date specified for production. CCP §1985.3(g).

If Not a Party

A consumer who is not a party and objects to production of records should serve on the subpoenaing party and the witness a written objection specifying the grounds on which production should be prohibited. CCP §1985.3(g).

MOTION TO ENFORCE

The party who subpoenaed the consumer's records may move to enforce the subpoena under CCP §1987.1 by:

- a. Making the motion within **20 days** after service of the written objection; and
- b. Including a declaration that shows a reasonable and good faith attempt to informally resolve the dispute with the consumer. CCP §1985.3(g).

Sample Form: For sample Notice of Motion and Motion for Order Directing Compliance with Subpoena Duces Tecum, see Appendix H.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Consumer Records at Deposition or Trial/STEP 27. SERVE WITNESS

STEP 27. SERVE WITNESS

WHAT TO SERVE

Serve the witness with a subpoena *plur* either a (CCP §§1985.3(c), 2020.410(d), 2020.510(c)):

- a. Proof of service of the notice to consumer (CCP §1985.3(e)); or
- b. Consumer's or consumer's attorney's written authorization to release personal records. CCP §1985.3(c)(2).

NOTE

Be aware that the witness may presume that the consumer's attorney acted with the consent of the consumer and that any objection to release of records is thus waived. CCP §1985.3(c)(2).

Telephone Public Utility

Serve a telephone corporation that is a public utility (Pub Util C §216) with (CCP §1985.3(f)):

- a. The subpoena; and
- b. A consent to release records signed by consumer. Pub Util C §2891.

Example: If serving a subpoena for telephone records on a cell phone number, written authorization, including the cell phone number, should be served with the subpoena.

WHEN TO SERVE

On a nonparty witness:

Deposition Subpoena for Business Records Only

Serve at least **15 days** before the date specified for production, if the deposition subpoena is for business records only. CCP §2020.410(c).

Civil (Trial) Subpoena

If using a civil subpoena, serve in reasonable time to locate and produce the records or copies (CCP §§1985.3(d), 2020.410).

Deposition Subpoena for Attendance and Records

If the subpoena requires production of consumer records at an oral deposition (CCP §2025.270(a)):

- a. Serve *all parties* with notice of the deposition at least **10 days** before the deposition; and
- b. Set the deposition date at least **20 days** after the subpoena is issued.

PROOF OF SERVICE

Keep the original subpoena and proof of service for filing if, *e.g.*, the witness fails to appear and you must ask court to order witness's compliance. See Cal Rules of Ct 3.250.

When Requesting Production of Employment Records at Deposition or Trial

STEP 28. DETERMINE WHETHER YOU SEEK EMPLOYMENT RECORDS

EMPLOYMENT RECORDS DEFINED

"Employment records" are originals or copies of records pertaining to the employment of any employee, maintained by the employee's current or former employer or by a labor organization that has represented or that currently represents the employee. CCP §1985.6(a)(3).

EMPLOYEE DEFINED

An "employee" is anyone who is or who has been employed by a witness subject to a subpoena duces tecum or who has been represented by a labor organization that is a witness subject to a subpoena duces tecum. CCP §1985.6(a)(2).

SUBPOENAING PARTY DEFINED

A "subpoenaing party" is anyone who causes a subpoena duces tecum to be issued or served in connection with a civil action or proceeding. CCP §1985.6(a)(5).

NOTE

State and local agencies are specifically excluded from this definition. But see Lantz v Superior Court (1994) 28 CA4th 1839, 34 CR2d 358 (county that is a defendant in a civil action and seeks to subpoena personal records of a consumer is "subpoenaing party" under CCP §1985.3(a)(3)).

DEPOSITION OFFICER DEFINED

A "deposition officer" is anyone who meets the qualifications specified in CCP §2020.420. CCP §1985.6(a)(1).

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Employment Records at Deposition or Trial/STEP 29. PREPARE SUBPOENA AND NOTICE REGARDING EMPLOYMENT RECORDS

STEP 29. PREPARE SUBPOENA AND NOTICE REGARDING EMPLOYMENT RECORDS

COMPLETE APPROPRIATE SUBPOENA

Complete the appropriate subpoena (see [steps 9](#) and [16](#), above).

SET PRODUCTION DATE

Make sure that the date in the subpoena complies with the requirements of [CCP §1985.6\(b\)](#).

Cross-Reference: For when to serve an employee, see [step 30](#), below; for when to serve a witness, see [step 31](#), below.

NOTE

If wage loss is an issue, subpoena the complete employment and payroll records early in the case to avoid scrambling to get them on the eve of trial. If necessary, as trial nears, you can simply subpoena any supplemental records created after the date of the initial subpoena.

PREPARE NOTICE

Prepare the notice to employee, indicating that ([CCP §1985.6\(e\)](#)):

- a. The employee's employment records are being sought from the witness named in the subpoena;
- b. These records may be protected by a right of privacy;
- c. If the employee objects to the witness's furnishing the records to the subpoenaing party, the employee should file papers with the court or serve a written objection on the witness and the requesting party before the production date (see [step 30](#), below, for employee objections); and
- d. If the subpoenaing party does not agree in writing to cancel or limit the subpoena, the employee should consult an attorney about protecting his or her privacy rights.

Sample Form: For sample Notice to Employee, see [Appendix F](#).

NOTE

If the subpoenaing party is the employee and the employee is the only subject of the subpoenaed records, notice to the employee and delivery of the subpoena, supporting affidavit, and proof of service are not required. [CCP §1985.6\(k\)](#).

SEEK ORDER SHORTENING TIME

If appropriate, seek an order ([CCP §1985.6\(g\)](#)):

- a. Shortening time for serving the subpoena duces tecum; or
- b. Waiving the requirements of notice to an employee under [CCP §1985.6\(b\)](#).

Prepare Declaration

To obtain an order, prepare a declaration ([CCP §1985.6\(g\)](#)):

- a. Showing good cause and due diligence; and
- b. Including circumstances showing that witness's and employee's rights will be preserved if the notice period is shortened or waived. [CCP §1985.6\(g\)](#).

Present Declaration

Present the declaration and obtain an ex parte order to shorten time or waive notice requirements. See CCP §1985.6(g). On obtaining ex parte orders in general, see Civ Proc Before Trial, chap 13.

CONSIDER EFFECT OF FAILURE TO COMPLY

Be aware that, if you fail to strictly comply with CCP §1985.6, the witness may refuse to produce the personal records. CCP §1985.6(j).

Further Research: See CCP §1985.6.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Employment Records at Deposition or Trial/STEP 30. SERVE EMPLOYEE

STEP 30. SERVE EMPLOYEE

WHAT TO SERVE

Serve on the employee (CCP §1985.6(b)):

- a. Notice to employee required by CCP §1985.6(e) (see step 29, above);
- b. A copy of the subpoena (see step 29, above);
- c. For a civil subpoena duces tecum, a copy of declaration or affidavit describing documents; and
- d. Proof of service as provided in CCP §1985.6(c)(1).

WHEN TO SERVE

Civil Subpoena or Deposition Subpoena for Attendance With Records

Serve the employee with a civil subpoena or a deposition subpoena for attendance with records before *both* of the following dates:

- a. At least (CCP §§1013, 1985.6(b)(2)):
 - (1) **10 days** before the production date specified in the subpoena, if personally served;
 - (2) **15 days** before the production date if subpoena is mailed to a California address;
 - (3) **20 days** before the production date if mailed to another state;
 - (4) **30 days** before the production date if mailed outside the United States; or
 - (5) **10 days plus 2 court days** before the production date if served by fax, express mail, or other form of overnight delivery (see note below); and
- b. At least (CCP §§1013, 1985.6(b)(3)):
 - (1) **5 days** before service on the *witness* if notice is personally served on *employee*;
 - (2) **10 days** before service on the *witness* if notice is mailed to the *employee* at a California address;
 - (3) **15 days** before service on the *witness* if mailed to the *employee* in another state;
 - (4) **25 days** before service on the *witness* if mailed to the *employee* outside the United States; or
 - (5) **5 days plus 2 court days** before service on the *witness* if served on the *employee* by fax, express mail, or other method of overnight delivery (see note, below).

Example: If you intend to subpoena employment records for the first day of trial (civil subpoena duces tecum):

- Serve the employee by mail at least 15 days before trial (CCP §1985.6(b)(2)) and at least 10 days before you serve the witness (CCP §1985.6(b)(3)), *i.e.*, you could serve the witness 1 to 5 days before trial; but
- You must also serve the witness in sufficient time for him or her to locate and produce the records (CCP §§1985.6(d), 2020.220, 2020.410), and 1-to-5 days' notice to the witness might not be considered sufficient.
- If you serve the witness on the tenth day before trial, serve the employee by mail in California at least 20 days before trial, *i.e.*:

10 days from service on the witness until trial

+

10 days before service on the witness, serve the employee (5 days before the witness plus 5 days for mailing (CCP §1985.3(b)(3)) = 20 days.

NOTE

Caution: Do not serve by fax unless the parties and the intended recipient of the service have agreed in writing to service by fax. CCP §1013(e). Section 1013(e) does not define the "parties" who must agree to service by fax, but it should be presumed that agreement between the sending and receiving parties is necessary to comply with the statute.

Notice and Deposition Subpoena for Business Records Only

Serve the employee with notice and deposition subpoena for business records only at least:

- a. **20 days** before the date of production (CCP §2020.410); and
- b. **5 days** before serving the witness. CCP §1985.6(b)(3).

Caution: Because CCP §2020.410 requires that you serve the deposition subpoena for business records only on the witness at least 15 days before the production date, and CCP §1985.6(b)(3) requires that you serve the employee at least 5 days before service on the witness, you must serve the employee at least 20 days before production date (15 + 5 = 20). See step 31, below.

HOW TO SERVE

Party Employee

If the employee is a party:

- a. Serve the attorney of record personally or by mail (CCP §§1011, 1015, 1985.6(b)(1));
- b. Serve the clerk or judge if the party is not a resident and is not represented by counsel. CCP §1015.

Nonparty Employee

If not a party, serve the employee (CCP §1985.6(b)(1)):

- a. Personally;
- b. At the employee's last known address by:
 - (1) First-class mail (see CCP §§1012, 1013(a)-(b));
 - (2) Express mail or other form of overnight delivery (see CCP §1013(c)-(d));
 - (3) Telegram (see CCP §1017); or
 - (4) Registered mail (see CCP §1020).

NOTE

Caution: Do not serve by fax unless the parties and the intended recipient of the service have agreed in writing to service by fax. CCP §1013(e). Section 1013(e) does not define the "parties" who must agree to service by fax, but it should be presumed that agreement between the sending and receiving parties is necessary to comply with the statute.

Minor

If the employee is a minor:

- a. Serve minor's (CCP §1985.6(b)(1)):
 - (1) Parent;

- (2) Guardian;
 - (3) Conservator or similar fiduciary; or
- b. If you cannot, with reasonable diligence, locate any of the above, serve any person:
- (1) Having the care or control of the minor;
 - (2) With whom the minor resides; or
 - (3) By whom the minor is employed; and
- c. If the minor is *at least 12 years old*, also serve the minor personally.

EMPLOYEE OBJECTIONS

Be aware of the following requirements (CCP §1985.6(f)):

- a. A motion to quash or modify the subpoena or a written objection must be filed or served before the date specified for production (CCP §1985.6(e)-(f));
- b. Filing the motion to quash or serving the written objection relieves the witness of the duty to produce, unless ordered by the court or agreed on by the parties, the witness, and the employee (CCP §1985.6(f)); and,
- c. Notice of the motion must be given to the witness and the deposition officer at least **5 days** before production. CCP §1985.6(f).

NOTE

Be aware that failure to provide 5-day notice to the deposition officer does not invalidate a motion to quash or modify a subpoena duces tecum, but may be raised by the deposition officer as an affirmative defense in an action for improper release of records. CCP §1985.6(f).

If Party

An employee who is a party to the action and objects to producing his or her records should file with the court moving papers to quash or modify the subpoena before the date specified for production. CCP §1985.6(f).

If Not a Party

An employee who is not a party and objects to production of his or her records should serve on the subpoenaing party, the deposition officer, and the witness, a written objection specifying grounds on which production should be prohibited. CCP §1985.6(f).

MOTION TO ENFORCE

The party who subpoenaed the employee's records may move to enforce the subpoena under CCP §1987.1 by (CCP §1985.6(f)):

- a. Making the motion within **20 days** after service of the written objection; and
- b. Including a declaration that shows a reasonable and good faith attempt to informally resolve the dispute with the employee. CCP §1985.6(f).

Sample Form: See sample Notice of Motion and Motion for Order Directing Compliance With Subpoena Duces Tecum in Appendix H.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/When Requesting Production of Employment Records at Deposition or Trial/STEP 31. SERVE WITNESS

STEP 31. SERVE WITNESS

WHAT TO SERVE

Serve the witness with a subpoena *plw* either (CCP §§1985.6(c), 2020.410(d), 2020.510(d)):

- a. Proof of service of the notice to the employee (CCP §1985.6(e)); or
- b. The employee's written authorization to release personal records. CCP §1985.6(c)(2).

WHEN TO SERVE

Serve the nonparty witness:

Deposition Subpoena for Business Records Only

At least **15 days** before the date specified for production, if the deposition subpoena is for business records only. CCP §2020.410(c).

Civil Subpoena

If serving a civil subpoena, in reasonable time to locate and produce the records or copies (CCP §1985.6(d)).

Deposition Subpoena for Attendance and Records

If the subpoena requires production of employee records at oral deposition (CCP §2025.270(a)), perform the following tasks:

- a. Serve *all parties* with the notice of deposition at least **10 days** before the deposition; and
- b. Set a deposition date at least **20 days** after the subpoena is issued.

PROOF OF SERVICE

Keep the original subpoena and proof of service for filing if, *e.g.*, the witness fails to appear and you must ask court to order the witness's compliance. See Cal Rules of Ct 3.250.

When Seeking Electronically Stored Information

STEP 32. DETERMINE WHETHER YOU ARE SEEKING ELECTRONICALLY STORED INFORMATION.

CAVEAT

The following information is derived from the proposed Electronic Discovery Act (AB 5 (2008)). At the time this Action Guide went to print, AB 5 had not been signed into law. However, because of the 2-year updating cycle of this Action Guide, we have included this material in this edition so that it can be utilized when, as anticipated, the bill is signed into law. Assembly Bill 5 is urgency legislation, which would become effective immediately when passed by the legislature and signed by the Governor. Please do not rely on this information without confirming that the legislation has been enacted.

References to the proposed Electronic Discovery Act throughout this book are to proposed Code of Civil Procedure sections rather than to bill sections.

DEFINITION OF ELECTRICALLY STORED INFORMATION

"Electronically stored information" is information that is stored in an electronic medium. Proposed CCP §§1985.8(a), 2016.020 (e).

SPECIFY FORM OF PRODUCTION

You may specify the form(s) in which each type of electronically stored information is to be produced. Proposed CCP §1985.8(c).

If the Form of Production Is Not Specified

- a. If you do not specify the form(s) of production, the producing party must produce it in the form(s) in which it is ordinarily maintained or in a form reasonably usable. Proposed CCP §1985.8(c)(1).
- b. If necessary, the subpoenaing party bears the reasonable costs of translating the data into reasonably usable form through the use of electronic devices. Proposed CCP §1985.8(g).

AVOID IMPOSING UNDUE BURDEN OR EXPENSE ON SUBPOENAED PARTY

You must take "reasonable steps" to avoid imposing undue burden or expense on the subpoenaed party. Proposed CCP §1985.8(j).

COMPLY WITH THE REQUIREMENTS OF CCP §§1985-1997

A subpoena for electronically stored information must comply with the service, notice, and other requirements of CCP §§1985-1997. Proposed CCP §1985.8(a). See steps 24-31, above.

Anticipating Objections to Subpoenas

STEP 33. DETERMINE WHETHER OBJECTOR HAS STANDING TO OBJECT

WHO MAY OBJECT

An objector has standing to object to a subpoena if the objector is a (CCP §§1987(c), 1987.1):

- a. Party;
- b. Witness;
- c. Consumer (as described in CCP §1985.3; see steps 23-26, above);
- d. Employee (as described in CCP §1985.6(a)(2); see steps 27-30, above); or
- e. Person whose personally identifying information (defined in CC §1798.79.8) is sought in connection with an underlying action involving that person's exercise of free speech rights. CCP §1987.1(b)(5).

NOTE

For purposes of CCP §1987.1(b)(5), "personally identifying information" includes a person's name, address, e-mail address, social security number, Internet protocol address, and/or any identifying information that in combination with other nonpersonally identifying information would serve to identify any individual. CC §1798.79.8.

Further Research: See *Southern Pac. Co. v Superior Court* (1940) 15 C2d 206, 100 P2d 302 (subpoena issued without court order; witness challenged validity by motion to quash); *California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 64 CR2d 797 (court quashed deposition subpoena issued to nonparty witness before only named defendant served with summons and complaint).

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Anticipating Objections to Subpoenas/STEP 34. ANALYZE WHETHER OBJECTOR HAS GROUNDS TO OBJECT

STEP 34. ANALYZE WHETHER OBJECTOR HAS GROUNDS TO OBJECT

OBJECTIONS TO SUBPOENA GENERALLY

A deposition or civil subpoena may be attacked on the grounds that:

Witness

The witness:

a. Cannot offer testimony (see *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 84 CR 718) that is:

(1) Relevant to *subject matter* for deposition; or

(2) Relevant to *issues* for trial;

b. Has no control over or does not possess subpoenaed items (CCP §1985);

Declaration

The declaration or affidavit supporting a subpoena duces tecum does not comply with CCP §1985, *i.e.*, the declaration or affidavit:

a. Fails to provide good cause for the production of the matters and things described;

b. Does not show the materiality to the issues of the matters and things requested;

c. Does not provide sufficient description of desired material;

Service

The subpoena was not served as required by statute (*California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 64 CR2d 797; *Chapman v Superior Court* (1968) 261 CA2d 194, 67 CR 842); or

Scope of Subpoena

The subpoena seeks:

a. Personal consumer records (CCP §1985.3) or employment records (CCP §1985.6):

(1) The objector may move to quash or modify the subpoena (CCP §1987.1);

(2) There is no express requirement that the objector "meet and confer" in attempt to resolve scope of the subpoena, although if the objector is a party, the court might require such an attempt;

b. Information beyond the scope of discovery and/or the subpoena is unduly burdensome (CCP §2017.020(a); see *Stony Brook I Homeowners' Ass'n v Superior Court* (2000) 84 CA4th 691, 101 CR2d 67):

(1) The witness may move to limit the scope of the subpoena through, *e.g.*, a protective order (CCP §§1987.1, 2017.020(a)); but

(2) The witness must first make a good faith "meet and confer" effort to seek a stipulation limiting the subpoena's scope. CCP §§2017.020(a), 2023.010(i).

NOTE

Opposing counsel may contact you to request the opportunity to review the subpoenaed records for privilege before their production. If you agree to this procedure, set a time limit and require the other party to produce a privilege log, if it withholds or redacts documents. This procedure may save time and attorney fees. It may also be useful as evidence of an attempt to meet and confer prior to filing a motion to quash.

OBJECTION TO SUBPOENA FOR ELECTRONICALLY STORED INFORMATION

The subpoena may be attacked on the grounds that it seeks information from a source that is not reasonably accessible because of undue burden and expense. Proposed CCP §1985.8(d). For background information concerning proposed CCP §1985.8, see Caveat at step 32, above.

OBJECTIONS TO DEPOSITION SUBPOENA

An objector (see step 33, above) may attack a deposition subpoena on grounds that:

Improper Information Sought

The deposition seeks:

- a. Information on sexual conduct without complying with CCP §2017.220(a);
- b. Privileged information (see Schnabel v Superior Court (1993) 5 C4th 704, 21 CR2d 200) (CCP §2017.010);
- c. Disclosure of a trade secret (CCP §2019.210);
- d. Information beyond the scope of discovery (Schnabel v Superior Court, supra) (CCP §2017.010);
- e. Information protected as a personal consumer record (CCP §1985.3); or

Deposition Notice Irregular

The deposition notice (see step 2, above) was irregular, *e.g.*, not served in time. CCP §2025.410(a).

OBJECTIONS TO CIVIL SUBPOENA

A civil subpoena may be attacked during trial.

Evidentiary Objections

An opposing party may object to the admission of subpoenaed evidence on grounds that the evidence:

- a. Lacks relevance (Spencer v Hibernia Bank (1960) 186 CA2d 702, 9 CR 867);
- b. Violates a privilege (see Roberts v Superior Court (1973) 9 C3d 330, 107 CR 309 (psychotherapist-patient privilege));
- c. Was produced under a subpoena duces tecum without affidavit (CCP §1987.5).

Consumer Objections

The consumer may object that records were produced without consent or notice (CCP §1985.3), but the court may waive notice requirements if due diligence is shown. CCP §1985.3(h). See step 26, above, for procedures a nonparty consumer should follow to object to production of his or her records.

Employee Objections

Employees may object that records were produced without consent or notice (CCP §1985.6), but the court may waive notice requirements if due diligence is shown. CCP §1985.6(g). See step 30, above, for procedures a nonparty employee should follow to object to production of his or her records.

Self-Incrimination

The witness may object at trial to questions that may be self-incriminating (see Cal Const art I, §15), but:

- a. Corporations and their officers and agents are *not* protected from subpoena on the basis of self-incrimination; and
- b. The privilege against self-incrimination is reserved to natural persons acting in their private capacities; corporations may not avail themselves of the privilege. Brovelli v Superior Court (1961) 56 C2d 524, 15 CR 630; Avant! Corp. v Superior Court (2000) 79 CA4th 876, 94 CR2d 505.

Objections Apply to Production and to Testimony

A witness may refuse to answer questions or refuse to produce materials requested based on any ground listed in this step.

Further Research: See CCP §§1987.1, 2017.010-2017.320, 2025.410; Civil Discovery §§5.132-5.136; Civ Proc During Trial §§4.45-4.49.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Anticipating Objections to Subpoenas/STEP 35.
ANTICIPATE OPPONENT'S METHODS OF ATTACKING YOUR DEPOSITION SUBPOENA AND/OR DEPOSITION NOTICE

STEP 35. ANTICIPATE OPPONENT'S METHODS OF ATTACKING YOUR DEPOSITION SUBPOENA AND/OR DEPOSITION NOTICE

OBJECTION TO DEPOSITION NOTICE

ANTICIPATE OBJECTION

If you serve a deposition notice that does not comply with CCP §§2025.210-2025.280, any party may (CCP §2025.410):

- a. Serve a written objection specifying error; and
- b. File a motion to stay the deposition and quash the deposition notice with a declaration stating:
 - (1) That the party made a reasonable and good faith attempt at informal resolution of any issue presented by the motion; and
 - (2) The facts supporting grounds for motion.

OBJECTION DEADLINE

The opposing party must serve its written objection at least **3 calendar days** before the deposition date. CCP §2025.410(a).

METHOD OF SERVICE

If a party objects only *3 calendar days* before the deposition, that party must *personally serve* the objection on the party who noticed the deposition. CCP §2025.410(b).

Further Research: See Civil Discovery §5.135; Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as *Motions to Compel*.

MOTION FOR PROTECTIVE ORDER

WHO MAY MOVE

A motion for a protective order may be made by any (CCP §2025.420(a)):

- a. Party;
- b. Deponent; or
- c. Other affected person or organization.

Sample Form: For sample Motion for Protective Order and Supporting Declaration, see Civil Discovery §§6.142-6.144.

WHEN TO MOVE

Promptly move for a protective order (CCP §2025.420(a)):

- a. Before a deposition;
- b. During a deposition; or
- c. After a deposition; and
- d. After an attempt at an informal resolution of each issue presented by the motion.

Further Research: See Civil Discovery §§15.30-15.58; Motions to Compel.

COURT RULES ON MOTION

The court may protect any party, deponent, or affected party from, *e.g.*, (CCP §2025.420(b)):

- a. Unwarranted annoyance, embarrassment, or oppression; or
- b. Undue burden and expense. See also proposed CCP §1985.8(e) pertaining to electronically stored information.

NOTE

See CCP §2025.420(b) for a list of protective directions the court may include in the order. See proposed CCP §1985.8(f)-(h) for a list of protective directions the court may include in an order compelling production of electronically stored information. For background information concerning proposed CCP §1985.8, see Caveat at step 32, above.

MOTION TO QUASH OR MODIFY

ANTICIPATE MOTION

The party, witness, consumer, employee, or person whose personally identifying information is sought (for definition, see step 33, above) may also move to quash or modify any deposition subpoena under CCP §1987.1. See step 36, below. See also Motions to Compel, step 27.

REFUSAL TO ATTEND OR BE SWORN

ANTICIPATE NONCOOPERATION

The deponent may (see CCP §§1991, 2020.220(c), 2020.240):

- a. Fail or refuse to attend the deposition;
- b. Refuse to be sworn; or
- c. Refuse to answer questions. See steps 37-38, below, for remedies.

Further Research: See CCP §§1987.1, 1991, 2020.010-2020.510, 2025.410-2025.480; Civil Discovery §§5.135-5.136, 15.30-15.58; Motions to Compel.

STEP 36. ANTICIPATE OPPONENT'S METHODS OF ATTACKING YOUR NOTICE TO PRODUCE OR CIVIL SUBPOENA

WRITTEN OBJECTIONS TO NOTICE TO PRODUCE

ANTICIPATE OBJECTIONS

Within **5 days** after the Notice to Produce is served, the opponent may file written objections, including a statement of grounds, to any part of notice. See CCP §1987(c).

FILE MOTION TO COMPEL

You must then file a noticed motion to compel, *plus* a supporting declaration stating (CCP §1987(c)):

- a. Good cause for production;
- b. That the items requested are material to the issues.

COURT RULES ON MOTION

The court may order items to be produced, unless the *objecting party* establishes good cause for:

- a. Nonproduction; or
- b. Production under limitations or conditions. CCP §1987(c).

Further Research: See Civ Proc During Trial §§4.50-4.51. See also Motions to Compel.

MOTION TO QUASH OR MODIFY

ANTICIPATE MOTION

A party, witness, consumer (see steps 24-27, above), employee (see steps 28-31, above), person whose personally identifying information is sought (see step 33, above) or the court on its own motion may seek to (CCP §1987.1):

- a. Quash the subpoena entirely;
- b. Modify the subpoena;
- c. Direct compliance with the subpoena on terms or conditions that the court will declare; or
- d. Obtain any other order, including protective orders, appropriate to protect the parties, the witness, the consumer, or the employee from:
 - (1) Unreasonable or oppressive demands; or
 - (2) Unreasonable violations of a witness's or consumer's right of privacy.

ELECTRONICALLY STORED INFORMATION

If electronically stored information is sought:

Burden of Proof

The subpoenaed party has the burden of showing that the source is not reasonably accessible because of undue burden or

expense.

Court's Discretion

On a showing of good cause, the court may:

- a. Permit discovery;
- b. Set conditions;
- c. Allocate expenses; and
- d. Impose limitations on the discovery. Proposed CCP §1985.8(d)-(f), (h). For background information concerning proposed CCP §1985.8, see Caveat in [step 32](#), above.

DEADLINE

The moving party must give at least **16 court days'** written notice of the hearing on the motion, unless moving party obtains an order shortening time. [CCP §1005\(b\)](#).

NOTE

Because of the 16-day notice requirement, the subpoenaed party must often decide *immediately* after service whether to move to quash the subpoena.

OPPOSE MOTION TO QUASH

After a motion to quash is filed, the *burden of proving* the requirements of [CCP §1985](#) shifts to the party seeking to compel production. *Flora Crane Serv., Inc. v Superior Court* (1965) 234 CA2d 767, 45 CR 79. See also *Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 93 CR2d 619.

DEADLINE

File and serve opposing papers at least **9 court days** before the hearing date. [CCP §1005\(b\)](#). You must serve all opposing and reply papers by a method that is reasonably calculated to ensure delivery to the other party or parties no later than **the close of the next business day** after the opposing papers or reply papers are filed. [CCP §1005\(c\)](#).

Further Research: See [Civ Proc During Trial §§4.45-4.48](#).

REFUSAL TO PRODUCE AT TRIAL

TRIAL CHALLENGE

A witness may wait until trial to challenge your subpoena duces tecum. See [step 34](#), above, for grounds of objection. See also [Civ Proc During Trial §4.49](#).

MOTION FOR PROTECTIVE ORDER

WITNESS MAY MOVE

The witness may move for a protective order to prevent subpoena's unreasonable and oppressive demands. [CCP §1987.1](#); see [Civ Proc During Trial §4.47](#); *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v Superior Court* (2006) 137 CA4th 579, 40 CR3d 446 (plaintiff served deposition subpoena for production of business records on nonparty witness, seeking financial and insurance information; trial court issued protective order on privacy grounds).

MOTION TO RECOVER EXPENSES

PREVAILING PARTY MAY MOVE FOR EXPENSES

General Rule

Move for reasonable expenses and attorney fees, if you are the prevailing party in a motion brought under CCP §1987(c) or §1987.1(a), (b)(1)-(4). The court may award reasonable expenses, including attorney fees, if the court finds that (CCP §1987.2):

- a. A motion under CCP §1987(c) or §1987.1 was made or opposed in bad faith; or
- b. One or more requirements of the subpoena were oppressive.

If Personally Identifying Information Was Sought

If the person whose personally identifying information was sought moves for reasonable expenses and attorneys fees under CCP §1987.1(b)(5), the court *must* award them if (CCP §1987.2(b)):

- a. The underlying action is in another state and pertains to the exercise of free speech rights on the Internet;
- b. The subpoena was served on an Internet service provider or any other interactive computer service (as defined in 47 USC §2389(f)(2));
- c. The moving party prevailed; and
- d. The respondent failed to make a prima facie showing of the cause of action.

Further Research: See Civ Proc During Trial §4.47.

© The Regents of the University of California

Handling the Witness Who Disobeys a Subpoena

STEP 37. SEEK REMEDIES IF DEPONENT DISOBEYS THE DEPOSITION SUBPOENA

REMEDIES AVAILABLE AGAINST NONPARTY DEPONENT

ORDER COMPELLING COMPLIANCE

If a nonparty witness disobeys a deposition subpoena, consider a motion to compel compliance under CCP §2025.480. For discussion of motions to compel, see this step, below.

CONTEMPT AND OTHER SANCTIONS

If a nonparty witness disobeys a deposition subpoena, consider contempt and the other remedies listed in step 38, below.

Further Research: For full discussion of contempt procedures, see California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual), referred to throughout this Action Guide as Crim Law.

MONETARY SANCTIONS

Consider requesting monetary sanctions under CCP §1992 (\$500), CCP §2020.240 (referring to CCP §1992) (\$500), or CCP §2023.030(a). See discussion below on how to obtain sanctions from party deponent.

HOW TO OBTAIN REMEDIES AGAINST NONPARTY DEPONENT

ORDER COMPELLING COMPLIANCE

To obtain the compliance of a nonparty deponent, move to compel. See discussion below.

CONTEMPT

To pursue a contempt sanction under CCP §§2020.240 and 2023.010-2023.040, you need *not* first obtain a court order directing compliance, although you would usually do so by moving to compel compliance. See step 38, below.

MONETARY SANCTIONS

To obtain monetary sanctions, file:

- a. A civil action to recover \$500 sanctions, plus damages (CCP §1992); or
- b. A motion for sanctions to recover under CCP §2023.030(a). See below.

REMEDIES AVAILABLE AGAINST PARTY DEPONENT

ORDER COMPELLING COMPLIANCE

To compel compliance by party deponent, bring motion to compel (CCP §2025.450(a)), discussed below.

MONETARY SANCTIONS

Request your reasonable expenses, including attorney fees or other authorized monetary sanctions. CCP §2023.030(a); see Sears,

Roebuck & Co. v National Union Fire Ins. Co. (2005) 131 CA4th 1342, 32 CR3d 717 (court properly ordered monetary sanctions against counsel for repeatedly failing to produce documents).

NOTE

Attorney fees cannot be recovered as sanctions by a prevailing pro se litigant, but reasonable expenses, including the cost of computer-assisted legal research, can be included as components of monetary sanctions. Kravitz v Superior Court (2001) 91 CA4th 1015, 111 CR2d 385. Attorney fees, however, can be recovered by an attorney who is working on the case pro bono. Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855. See Civil Discovery §15.96.

ISSUE SANCTIONS

Request that issues be considered established and that the sanctioned party be prohibited from further litigating those issues. CCP §2023.030(b).

EVIDENCE SANCTIONS

Request that the sanctioned party be prohibited from introducing designated evidence. CCP §2023.030(c).

TERMINATING SANCTIONS

Request that the court impose a sanction that (CCP §2023.030(d)):

- a. Strikes out pleadings or parts of pleadings of the sanctioned party;
- b. Stays further proceedings by the sanctioned party until that party obeys discovery order;
- c. Dismisses the entire action or part of it brought by the sanctioned party; or
- d. Renders a default judgment against the sanctioned party.

HOW TO COMPEL COMPLIANCE OF PARTY OR NONPARTY DEPONENT

MOVE TO COMPEL

To have the court compel compliance by a party or nonparty deponent:

Give Notice to Deponent

Either (CCP §2025.480(c)):

- a. Have the deposition officer, usually the court reporter at an oral deposition, direct the deponent to attend a hearing in court at a specific date and time; or
- b. Serve written notice on the deponent of the date and time of hearing.

File Motion

No later than **60 days** after the deposition transcript is completed, prepare and file with the court (CCP §2025.480(b)):

- a. A motion for an order compelling the discovery; and
- b. A declaration setting out:
 - (1) The circumstances of the disobedience (see also CCP §1991); and
 - (2) That you made a good faith attempt to resolve the issues, if disobedience was at a deposition.

NOTE

Objections that are served in response to a deposition subpoena for production of business records only constitute a record of deposition, triggering the 60-day deadline for filing a motion to compel. A motion brought after 60 days have expired is untimely.

Lodge Transcript With Court

No later than **5 days** before the hearing, lodge with the court a certified copy of the relevant portions of the deposition transcript. CCP §2025.480(d).

NOTE

If the deponent failed to attend the deposition and produce documents requested in the deposition notice, then the declaration should state that the moving party has contacted deponent to inquire about the nonappearance. CCP §2025.450(b)(2); see Sears, Roebuck & Co. v National Union Fire Ins. Co. (2005) 131 CA4th 1342, 32 CR3d 717 (plaintiff's counsel "diligently" tried to contact nonparty's attorney about nonparty's failure to appear at deposition and produce documents).

Sample Form: See Motions to Compel and Civil Discovery §§6.146, 7.147 for sample forms for motion to compel.

Set Hearing

Follow local rules and practice to set hearing.

Court Rules

If the court finds that the refused answer or production is subject to discovery, the court must (CCP §2025.480(e), (f)):

- a. Order the answer or production to be given on resumption of the deposition; and
- b. Impose a monetary sanction against any party, person, or attorney who unsuccessfully opposed the motion. See also Civil Discovery §6.150.

HOW TO OBTAIN SANCTIONS AGAINST PARTY OR NONPARTY DEPONENT

IF PARTY, FIRST MOVE TO COMPEL

When seeking sanctions against a party, either (CCP §2025.450):

- a. Move to compel compliance by a party witness before requesting sanctions; or
- b. Move for sanctions as part of your motion to compel.

MOVE FOR SANCTIONS

When seeking sanctions against a party or a nonparty, to move for sanctions, prepare (CCP §2023.040):

Notice of Motion

A notice of motion that:

- a. Identifies every person, party, and attorney against whom you seek sanctions; and
- b. Specifies the type of sanctions;

Points and Authorities

A memorandum of points and authorities; and

Declaration

A declaration stating:

- a. The facts supporting amount of any monetary sanctions you seek;
- b. The facts about disobedience; and

c. That you made a reasonable good faith attempt at informal resolution of each issue presented by the motion. CCP §2023.010(i).

WHEN TO SERVE NOTICE OF MOTION

Unless you obtain an order shortening time, serve all motion papers (CCP §1005(b)):

- a. **16 court days** before the hearing if the notice is personally served;
- b. **16 court days plus 5 calendar days** before the hearing if served by mail to and from a California address;
- c. **16 court days plus 10 calendar days** before the hearing if served by mail to or from an address in another state;
- d. **16 court days plus 20 calendar days** before the hearing if served by mail to or from an address outside the United States; and
- e. **16 court days plus two calendar days** before the hearing if served by fax, express mail, or another method for overnight delivery.

NOTE

Further Research: See CCP §§2020.010-2020.510, 2023.010-2023.040; Civil Discovery §§6.73-6.74; Motions to Compel.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Handling the Witness Who Disobeys a Subpoena/STEP 38.
SEEK REMEDIES IF WITNESS DISOBEYS DEPOSITION OR CIVIL SUBPOENA

STEP 38. SEEK REMEDIES IF WITNESS DISOBEYS DEPOSITION *OR* CIVIL SUBPOENA

WHEN TO SEEK REMEDIES

Seek remedies if the *witness*:

- a. Ignores a subpoena by failing to appear at a deposition, trial, or other matter (see *Parris v Zolin* (1996) 12 C4th 839, 50 CR2d 109) (CCP §§1991, 2020.240, 2023.010(d));
- b. Refuses to be sworn as a witness at a deposition, trial, or other matter (CCP §§1991, 2020.240);
- c. Refuses to sign an affidavit or deposition when required (CCP §§1991, 2020.240);
- d. Fails to appear under an agreement modifying the terms of a subpoena at a deposition, trial, or other proceeding (CCP §1985.1); or
- e. Is a party-related witness who is unqualified or lacks knowledge concerning the issues to be covered in the deposition or fails to produce relevant documents pursuant to deposition notice. *Maldonado v Superior Court* (2002) 94 CA4th 1390, 115 CR2d 137.

REMEDIES AVAILABLE

Seek the following remedies for disobeying subpoenas:

COURT ORDER TO COMPEL COMPLIANCE

WHEN TO SEEK COURT ORDER

If the witness disobeyed a CCP §1986 civil subpoena that required attendance *out of court*, seek a court order to compel compliance *before* seeking an order of contempt. CCP §1991.

REPORT DISOBEDIENCE

Report the witness's disobedience:

- a. In an out-of-court appearance (*e.g.*, an arbitration), the officer or commissioner before whom appearance was ordered *must* report any disobedience to the court issuing the subpoena (see *Parris v Zolin* (1996) 12 C4th 839, 50 CR2d 109);
- b. In other appearances under CCP §1986(c), the judge, justice, or other officer before whom appearance was ordered *may* report any disobedience to the court of the county in which attendance was required. CCP §1991.

FILE TRANSCRIPT

Make sure the officer or commissioner files a (CCP §1991):

- a. Transcript of notice to witness; and
- b. Report of witness's refusal to obey the subpoena.

FILE MOTION

Prepare and file with the court a motion, including declaration, setting forth circumstances of the disobedience. CCP §1991.

SET HEARING

Set a date for hearing under CCP §1991:

- a. Not less than **5 days** after date of disobedience; and
- b. Not more than **20 days** after date of disobedience.

PROVIDE NOTICE TO WITNESS OF HEARING

If the officer or commissioner did not notify the witness of the specific hearing date, serve notice of hearing date on the witness. CCP §§1991, 2025.480(c).

COURT RULES

The court may order that the witness on a specific date (CCP §1991):

- a. Be sworn;
- b. Answer as a witness; or
- c. Subscribe the deposition or affidavit.

NOTE

If you used a deposition subpoena under CCP §§2020.210-2020.510, you may obtain sanctions without a prior court order. CCP §§1991.1, 2020.240; see step 36, above.

CONTEMPT PROCEEDINGS

UNDERSTAND CONTEMPT

Remember that:

- a. The witness in a contempt proceeding is entitled to all the rights and protection given criminal defendants, except the right to a jury trial. Pacific Tel. & Tel. Co. v Superior Court (1968) 265 CA2d 370, 72 CR 177.
- b. Contempt can result in a witness's incarceration until he or she complies with the court order. McCrone v U.S. (1939) 307 US 61, 83 L Ed 1108, 59 S Ct 685.

NOTE

California newspeople have absolute immunity from contempt for refusal to comply with subpoena in certain circumstances, *e.g.*, refusal to produce unpublished accident photos. New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98.

WHEN AVAILABLE

The contempt remedy is available when:

- a. You had the subpoena *personally* served on the witness (In re Abrams (1980) 108 CA3d 685, 166 CR 749); and
- b. The witness refuses to comply with the:
 - (1) Court order you obtained under CCP §1991;
 - (2) Deposition subpoena under CCP §§2020.210-2020.510; or
 - (3) Civil subpoena to appear at trial under CCP §§1985-1986.

SUBMIT DECLARATION

Submit a declaration or affidavit stating (CCP §1211):

- a. The factual background of the disobedience (see In re Ny (1962) 201 CA2d 728, 20 CR 114);
- b. That witness's testimony is material (In re McLain (1950) 99 CA2d 274, 221 P2d 323);

- c. The witness's residence (*Hall v Superior Court* (1932) 124 CA 603, 12 P2d 1057); and
- d. When appropriate, the precise questions witness refused to answer.

File Form

In family law cases, filing Judicial Council Form 1285.60: Order To Show Cause and Affidavit for Contempt (Family Law) constitutes compliance with CCP §1211.

NOTE

If a witness disobeys civil subpoena to appear in court, consider arguing that failure to appear is direct contempt of court, and a warrant or order to show cause can issue on proof of service of a subpoena alone, without an accompanying affidavit. See *Parri v Zolin* (1996) 12 C4th 839, 50 CR2d 109; *People v Palmer* (1989) 207 CA3d 663, 255 CR 55. No affidavit is required if contempt was committed in the presence of the court. See CCP §1211. See also Crim Law §§58.28, 58.31.

OBTAIN WARRANT OR OSC

The court will direct that the witness be arrested and brought to court to testify by issuing (CCP §1212):

- a. A warrant of attachment; or
- b. An order to show cause (OSC) for a warrant of commitment.

Further Research: See Crim Law, chap 58, for contempt proceedings. See also Civ Proc During Trial §§4.52, 16.116.

BENCH WARRANT

WHEN TO SEEK BENCH WARRANT

Seek a bench warrant when a witness disobeys a CCP §1986 civil subpoena requiring attendance *in court*.

REQUEST A BENCH WARRANT

When requesting a bench warrant (CCP §1993(a)(1)):

- a. File proof of service of the subpoena;
- b. Notify the court orally or in writing of the witness's failure to attend; and
- c. Pay \$50 for service and execution of the bench warrant (Govt C §26744).

COURT ISSUES WARRANT

A court or officer issuing subpoena may issue a warrant directing the sheriff to (CCP §1993(a)(1)):

- a. Arrest the witness; and
- b. Bring the witness before the court.

Further Research: See Civ Proc During Trial §16.116.

INSTITUTE CIVIL ACTION

FILE COMPLAINT

File a separate action against witness to recover \$500 and all damages attorney and/or client sustained because of witness's failure to appear under subpoena. CCP §1992. See Civ Proc During Trial §4.53.

Source: Civil Litigation/Handling Subpoenas (Action Guide)/Handling the Witness Who Disobeys a Subpoena/STEP 39.
SEEK SANCTIONS FOR OTHER DISOBEDIENCE

STEP 39. SEEK SANCTIONS FOR OTHER DISOBEDIENCE

SEEK OTHER AVAILABLE SANCTIONS

Seek sanctions against *anyone* (witness, party, attorney, or third person) for (CCP §1209(a)(7)-(8); Pen C §§132-138):

- a. Interference with a subpoenaed witness;
- b. Deceiving a witness with intent to affect witness's testimony;
- c. Preparing false documents with intent to use them at trial; or
- d. Knowingly destroying or concealing documentary evidence.

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX A Sample Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015)

APPENDIX A
Sample Deposition Subpoena for Personal Appearance
(Judicial Council Form SUBP-015)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Maximillian Jones 01111 ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO. (Optional): (510) 000-0001 E-MAIL ADDRESS (Optional): Jones@RJM.com ATTORNEY FOR (Name): Plaintiff KATHY SMITH	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse	
PLAINTIFF/ PETITIONER: KATHY SMITH DEFENDANT/ RESPONDENT: JACK JACKSON	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE	CASE NUMBER: 111-222

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Joseph Martin, 20 Franklin Street, Oakland, CA 94112 (510) 555-2222

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: March 19, 2009 Time: 9:30 a.m. Address:

56888 Broadway, Suite 300, Oakland, CA 93122

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.220(a)(6).)
- b. This deposition will be recorded stenographically through the instant visual display of testimony, and by audiotape videotape.
- c. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 17, 2009

Maximillian Jones

(TYPE OR PRINT NAME)



(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for plaintiff, KATHY SMITH

(TITLE)

(Proof of service on reverse)

Page 1 of 2

PLAINTIFF/PETITIONER: KATIY SMITH	CASE NUMBER:
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this Deposition Subpoena for Personal Appearance by personally delivering a copy to the person served as follows:

- a. Person served (name):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees and mileage both ways (check one):
 - (1) were paid. Amount: \$ _____
 - (2) were not paid.
 - (3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (specify): \$ _____
- f. Fee for service: \$ _____

2. I received this subpoena for service on (date):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:

▶ _____
(SIGNATURE)

▶ _____
(SIGNATURE)

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX B Sample Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020)

APPENDIX B
Sample Deposition Subpoena for Personal Appearance and Production of Documents and Things
(Judicial Council Form SUBP-020)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Maximillian Jones 01111 ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO. (Optional): (510) 000-0001 E-MAIL ADDRESS (Optional): Jones @RJM.com ATTORNEY FOR (Name): Plaintiff KATHY SMITH	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse	
PETITIONER: KATHY SMITH RESPONDENT: JACK JACKSON	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS	CASE NUMBER: 111-222

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Joe Johnson, Custodian of Records of ACE Corp., 3001 Business Road, Oakland, CA 94112 (510) 555-0404

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: March 19, 2009 Time: 10:00 a.m. Address: 56888 Broadway, Suite 300, Oakland, CA 93122

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.220(a)(6)).
- b. You are ordered to produce the documents and things described in item 3.
- c. This deposition will be recorded stenographically through the instant visual display of testimony, and by audiotape videotape
- d. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:
 revenue and expense records for 6/1/2006 through 9/30/2008
 Continued on Attachment 3.
4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:
 revenue and expense of ACE Corp.
 Continued on Attachment 4.
5. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.
6. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 17, 2009

Maximillian Jones

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for plaintiff, KATHY SMITH

(Proof of service on reverse)

(TITLE)

Page 1 of 2

PLAINTIFF/PETITIONER: KATHY SMITH	CASE NUMBER:
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:

a. Person served (*name*):

b. Address where served:

c. Date of delivery:

d. Time of delivery:

e. Witness fees and mileage both ways (*check one*):

(1) were paid. Amount: \$ _____

(2) were not paid.

(3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): \$ _____

f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

3. Person serving:

a. Not a registered California process server.

b. California sheriff or marshal.

c. Registered California process server.

d. Employee or independent contractor of a registered California process server.

e. Exempt from registration under Business and Professions Code section 22350(b).

f. Registered professional photocopier.

g. Exempt from registration under Business and Professions Code section 22451.

h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX C Sample Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010)

APPENDIX C
Sample Deposition Subpoena for Production of Business Records
(Judicial Council Form SUBP-010)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Maximillian Jones ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO. (Optional): (510) 000-0001 E-MAIL ADDRESS (Optional): Jones @RJM.com ATTORNEY FOR (Name): Plaintiff KATHY SMITH	01111 FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse	
PLAINTIFF/PETITIONER: KATHY SMITH DEFENDANT/RESPONDENT: JACK JACKSON	
DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS	CASE NUMBER: 111-222

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

First Title Insurance Company of America, 5000 Money Blvd., Oakland, CA (510) 555-0303

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

To (name of deposition officer): A.B.C. Depositions

On (date): March 19, 2009

At (time): 10:00 a.m.

Location (address): 1234 Main Street, Oakland, CA 94133

Do not release the requested records to the deposition officer prior to the date and time stated above.

- a. by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
- b. by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
- c. by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows:
 All records concerning #88-677, real property located at 1230 Hill St, Oakland, CA, which opened 5/31/07.

Continued on Attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 17, 2009

Maximillian Jones

(TYPE OR PRINT NAME)



(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for plaintiff, KATHY SMITH

(Proof of service on reverse)

(TITLE)

Page 1 of 2

PLAINTIFF/PETITIONER: KATHY SMITH	CASE NUMBER:
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:

a. Person served (*name*):

b. Address where served:

c. Date of delivery:

d. Time of delivery:

e. (1) Witness fees were paid.
Amount: \$ _____

(2) Copying fees were paid.
Amount: \$ _____

f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX D Sample Civil Subpoena for Personal Appearance at Trial or Hearing (Judicial Council Form SUBP-001)

APPENDIX D
Sample Civil Subpoena for Personal Appearance at Trial or Hearing
(Judicial Council Form SUBP-001)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Maximillian Jones 01111 ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO.: (510) 000-0001 ATTORNEY FOR (Name): Plaintiff KATHY SMITH	FOR COURT USE ONLY
NAME OF COURT: ALAMEDA COUNTY SUPERIOR COURT STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse	
PLAINTIFF/PETITIONER: KATHY SMITH DEFENDANT/RESPONDENT: JACK JACKSON	
CIVIL SUBPOENA For Personal Appearance at Trial or Hearing	CASE NUMBER: 111-222

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of witness, if known):
 Dr. Jane Doe, 1001 Hospital Lane, Oakland, CA (510) 555-0202

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS you make an agreement with the person named in item 2:

a. Date: March 19, 2009	Time: 10:00 a.m.	<input checked="" type="checkbox"/> Dept.: 104	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:
b. Address: 661 Washington Street, Oakland, CA 94607				

2. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name of subpoenaing party or attorney: Maximillian Jones
 b. Telephone number: (510) 000-0000

3. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 2.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 17, 2009

Maximillian Jones

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for plaintiff, KATHY SMITH

(TITLE)

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the date on which you are to appear. Contact the clerk's office or go to www.courtinfo.ca.gov/forms for Request for Accommodations by Persons With Disabilities and Order (form MC-410). (Civil Code, § 54.8.)



(Proof of service on reverse)

Page 1 of 2

PLAINTIFF/PETITIONER: KATHY SMITH	CASE NUMBER
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

**PROOF OF SERVICE OF CIVIL SUBPOENA
FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

1. I served this *Civil Subpoena for Personal Appearance at Trial or Hearing* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees (*check one*):
 - (1) were offered or demanded and paid. Amount: \$ _____
 - (2) were not demanded or paid.
- f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

{For California sheriff or marshal use only}
I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX E Sample Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration (Judicial Council Form SUBP-002)

APPENDIX E

Sample Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration
(Judicial Council Form SUBP-002)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Maximillian Jones ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO.: (510) 000-0001 ATTORNEY FOR (Name): Plaintiff KATHY SMITH	01111	FOR COURT USE ONLY
NAME OF COURT: ALAMEDA COUNTY SUPERIOR COURT STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse		
PLAINTIFF/ PETITIONER: KATHY SMITH DEFENDANT/ RESPONDENT: JACK JACKSON		
CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents and Things at Trial or Hearing AND DECLARATION		CASE NUMBER: 111-222

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of witness, if known):
 Custodian of Records, Good Samaritan Hospital, 1000 Hospital Lane, Oakland, CA (510) 555-0101

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.

a. Date: March 19, 2009 Time: 10:00 a.m. Dept.: 104 Div.: Room:
 b. Address: 661 Washington Street, Oakland, CA 94607

2. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.
3. YOU ARE (item a or b must be checked):
- a. Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
- b. Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.
4. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:
- a. Name of subpoenaing party or attorney: Maximillian Jones b. Telephone number: (510) 000-0000
5. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: February 17, 2009

Maximillian Jones

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

(Declaration in support of subpoena on reverse)

(TITLE)

PLAINTIFF/PETITIONER: KATHY SMITH	CASE NUMBER:
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

**PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM)
FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS
AND THINGS AT TRIAL OR HEARING AND DECLARATION**

1. I served this *Civil Subpoena (Duces Tecum)* for *Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:

- c. Date of delivery:
- d. Time of delivery:

- e. Witness fees (*check one*):
 - (1) were offered or demanded and paid. Amount: \$ _____
 - (2) were not demanded or paid.

- f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:

▶ _____
(SIGNATURE)

▶ _____
(SIGNATURE)

**PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) FOR
PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS
AND THINGS AT TRIAL OR HEARING AND DECLARATION**

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX F Sample Notice to Consumer or Employee and Objection (CCP §§1985.3, 1985.6) (Judicial Council Form SUBP-025)

APPENDIX F

Sample Notice to Consumer or Employee and Objection (CCP §§1985.3, 1985.6)
(Judicial Council Form SUBP-025)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Maximillian Jones 01111 ROCK, JONES & MARTIN 56888 Broadway, Suite 300 Oakland, CA 93122 TELEPHONE NO.: (510) 000-0000 FAX NO. (Optional): (510) 000-0001 E-MAIL ADDRESS (Optional): Jones @RJM.com ATTORNEY FOR (Name): Plaintiff KATHY SMITH	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 661 Washington Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94607 BRANCH NAME: Wiley W. Manuel Courthouse	
PLAINTIFF/ PETITIONER: KATHY SMITH DEFENDANT/ RESPONDENT: JACK JACKSON	CASE NUMBER: 111-222
NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION (Code Civ. Proc., §§ 1985.3, 1985.6)	

NOTICE TO CONSUMER OR EMPLOYEE

TO (name): Jack Jackson

1. PLEASE TAKE NOTICE THAT **REQUESTING PARTY (name):** Plaintiff Kathy Smith
 SEEKS YOUR RECORDS FOR EXAMINATION by the parties to this action on (specify date): March 19, 2009

The records are described in the subpoena directed to **witness (specify name and address of person or entity from whom records are sought):** Anytown Bank, Custodian of Records

A copy of the subpoena is attached.

2. IF YOU OBJECT to the production of these records, YOU MUST DO ONE OF THE FOLLOWING BEFORE THE DATE SPECIFIED IN ITEM a. OR b. BELOW:
- If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena and give notice of that motion to the **witness** and the **deposition officer** named in the subpoena at least five days before the date set for production of the records.
 - If you are not a party to this action, you must serve on the **requesting party** and on the **witness**, before the date set for production of the records, a written objection that states the specific grounds on which production of such records should be prohibited. You may use the form below to object and state the grounds for your objection. You must complete the Proof of Service on the reverse side indicating whether you personally served or mailed the objection. The objection should **not** be filed with the court. **WARNING: IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED IN ITEM 1, YOUR RECORDS MAY BE PRODUCED AND MAY BE AVAILABLE TO ALL PARTIES.**
3. YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED to determine whether an agreement can be reached in writing to cancel or limit the scope of the subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY TO ADVISE YOU OF YOUR RIGHTS OF PRIVACY.

Date: February 17, 2009

Maximillian Jones, Attorney for Plaintiff

(TYPE OR PRINT NAME)

(SIGNATURE OF REQUESTING PARTY ATTORNEY)

OBJECTION BY NON-PARTY TO PRODUCTION OF RECORDS

1. I object to the production of all of my records specified in the subpoena.
2. I object only to the production of the following specified records:

3. The specific grounds for my objection are as follows:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

(Proof of service on reverse)

Page 1 of 2

NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION



PLAINTIFF/PETITIONER: KATHY SMITH	CASE NUMBER:
DEFENDANT/RESPONDENT: JACK JACKSON	111-222

PROOF OF SERVICE OF NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION
(Code Civ. Proc., §§ 1985.3, 1985.6)

Personal Service Mail

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. I served a copy of the *Notice to Consumer or Employee and Objection* as follows (check either a or b):
 - a. **Personal service.** I personally delivered the *Notice to Consumer or Employee and Objection* as follows:

(1) Name of person served:	(3) Date served:
(2) Address where served:	(4) Time served:
 - b. **Mail.** I deposited the *Notice to Consumer or Employee and Objection* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(1) Name of person served:	(3) Date of mailing:
(2) Address:	(4) Place of mailing (city and state):
- (5) I am a resident of or employed in the county where the *Notice to Consumer or Employee and Objection* was mailed.
- c. My residence or business address is (specify):
- d. My phone number is (specify):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF PERSON WHO SERVED)

(SIGNATURE OF PERSON WHO SERVED)

PROOF OF SERVICE OF OBJECTION TO PRODUCTION OF RECORDS
(Code Civ. Proc., §§ 1985.3, 1985.6)

Personal Service Mail

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. I served a copy of the *Objection to Production of Records* as follows (complete either a or b):
 - a. ON THE REQUESTING PARTY
 - (1) **Personal service.** I personally delivered the *Objection to Production of Records* as follows:

(i) Name of person served:	(iii) Date served:
(ii) Address where served:	(iv) Time served:
 - (2) **Mail.** I deposited the *Objection to Production of Records* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(i) Name of person served:	(iii) Date of mailing:
(ii) Address:	(iv) Place of mailing (city and state):
 - (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
 - b. ON THE WITNESS
 - (1) **Personal service.** I personally delivered the *Objection to Production of Records* as follows:

(i) Name of person served:	(iii) Date served:
(ii) Address where served:	(iv) Time served:
 - (2) **Mail.** I deposited the *Objection to Production of Records* in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(i) Name of person served:	(iii) Date of mailing:
(ii) Address:	(iv) Place of mailing (city and state):
 - (v) I am a resident of or employed in the county where the *Objection to Production of Records* was mailed.
3. My residence or business address is (specify):
4. My phone number is (specify):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF PERSON WHO SERVED)

(SIGNATURE OF PERSON WHO SERVED)

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX G Sample Letter for Voluntary Agreement to Accept Service of Process

APPENDIX G

Sample Letter for Voluntary Agreement to Accept Service of Process

March 26, 2009

Mr. Fred Jones

223 Bay Street

San Francisco CA 11111 0000

Re: Smith v. McCarthy

San Francisco Superior Court Case No. CGC 08-99999

Our Client: Bill McCarthy

Dear Mr. Jones:

This confirms your agreement to accept service of the attached deposition subpoena via U.S. Mail. We confirmed your deposition for __[*date*]__ at __:__ a.m. at __[*insert location*]__. We estimate your deposition will last no longer than __[*insert time estimate*]__.

Please be advised that your agreement to accept service of this subpoena means that you are under Court Order as if this subpoena were personally served upon you. This subpoena remains in full force and effect until after your appearance on __[*date*]__.

As we explained, the California Code of Civil Procedure requires payment of a \$35.00 witness fee. Mileage will be reimbursed at the statutory rate of \$.20 per mile both ways. We will have a check for you at the time of your deposition.

We appreciate your cooperation in scheduling this matter. Please call me or __[*insert attorney's name*]__ with any questions. Thank you.

Very truly yours,

__[*Signature*]__

__[*Your name*]__

Paralegal to

__[*name of attorney*]__

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX H Sample Notice of Motion and Motion for Order Directing Compliance With Subpoena Duces Tecum

APPENDIX H

Sample Notice of Motion and Motion for Order Directing Compliance With Subpoena Duces Tecum

Note: You must accompany this pleading form with a memorandum of points and authorities and a declaration showing a reasonable and good faith attempt at informal resolution of the dispute. This pleading should also include the order requested from the court.

George T. Moe, Esq., State Bar #00000

MOE, MOE & MOE

123 Main Street, Suite 4

Anytown, CA 12345

Telephone: (000)-000-0000

Email: Moe@MMM.com

Attorneys for Plaintiff

NANCY C. SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PROVINCE

Nancy C. Smith,	)	NO. 123456
Plaintiff(s))	
	)	NOTICE OF MOTION AND
v	)	MOTION FOR ORDER
	)	DIRECTING COMPLIANCE WITH
	)	SUBPOENA DUCES TECUM (<u>CCP</u>
	)	<u>§1987.1</u>)
Richard R. Roe; and Does 1-10, inclusive,)	
Defendants.	)	Date: Dec. 12, 2008
	)	Time: 10:00 a.m.
	)	Dep't: 37
	)	Trial Date: Jan. 16, 2009
_____)	

TO: ALL PARTIES AND NORMAN S. ROE AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 12, 2008, at 10:00 a.m. or as soon thereafter as the matter may be heard, in Department 37 of the above-titled court, located at 555 West Main Street, Anytown, CA, 12345, plaintiff will and hereby does move for an order directing compliance with the subpoena duces tecum served on Anytown Bank on October 3, 2008, requiring Anytown Bank to produce the documents and records of Norman S. Roe, a nonparty to the present lawsuit.

This motion is and will be made on the grounds that the records sought are directly relevant to the plaintiff's case, essential to a

fair resolution of the lawsuit, and cannot be obtained by less intrusive means; and plaintiff has offered and agreed to redact or keep under seal all entries and records dealing with personal as opposed to business or commercial transactions.

This motion is and will be based on this Notice of Motion and Motion, the Declaration of George T. Moe and the Memorandum of Points and Authorities served herewith, on the papers and records on file herein, and on such further oral and documentary evidence and argument as may be presented at or before the hearing on the motion.

Date: October 12, 2008

MOE, MOE & MOE

By: George T. Moe, Esq.

Attorneys for Plaintiff

Nancy C. Smith

© The Regents of the University of California

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX I Certificate of Custodian of Records

APPENDIX I
Certificate of Custodian of Records



CERTIFICATE OF CUSTODIAN OF RECORDS
[Calif Evid. Code 1561 and Bus. and Prof Code 22462]

Regarding _____ Aka: _____

DOB (or other TD) _____ Our Ref. No.: _____

I am duly authorized as Custodian of Records (or other qualified witness) for

_____ with authority to certify the records.

CERTIFICATION OF RECORDS COPIED

Including this declaration, all documents, records and other things called for in the Subpoena Duces Tecum or Authorization which are in my custody have been photocopied at my office, in my presence, under my direction and control; and the copy submitted with this declaration is a true copy thereof.

To the best of my knowledge all records referred to above were prepared or compiled by the personnel of the above-named business, in the ordinary course of business, at or near the time of the acts, conditions, or events recorded.

No documents, records, or other things have been withheld in order to avoid their being photocopied.

Certain records were omitted because _____

There are no records PRIOR TO PERTAINING TO AFTER

Date of Loss: ___/___/___

CERTIFICATION OF NO RECORDS

A thorough search has been made for the documents, records or other things called for in the Subpoena Duces Tecum or Authorization and, based upon the information provided, no such items were found.

No copies or records are transmitted because we do not have said records.

*Please give explanation or reason why you have NO RECORDS: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____, 20__

Signed _____

Witnessed _____

City _____ State _____

Source: Civil Litigation/Handling Subpoenas (Action Guide)/APPENDIX J Sample Letter to Witness Containing 'On-Call' Agreement

APPENDIX J
Sample Letter to Witness Containing "On-Call" Agreement

January 16, 2009

Via Personal Service

Mr. Harry C. Smith

1778 Oak Street

Irvine, CA 92614

Re: *Apple Food Market v Elliott & Campbell LLP*

Orange County Superior Court Case No. 02 CC 10994

Dear Mr. Smith:

The attached civil subpoena, which has been served on you, requires you to appear in court and testify at Orange County Superior Court, Department C-10, located at 700 Civic Center Drive West, Santa Ana, California, on January 30, at 9:00 a.m.

Although trial is set to begin on that date, your testimony may not be needed until sometime after trial is underway. To prevent your waiting in court for long periods of time, you may acknowledge that you have been served with a subpoena and agree to be "on call" to appear in court within 24 hours after our informing you that your testimony is required. *You are required to appear at the date and time specified in the subpoena if you do not agree to be "on call."*

Please read the Agreement to Appear "On Call" below, fill in the blanks with regard to your work and home telephone numbers, sign the enclosed copy of this letter, and return the copy with your original signature in the pre-addressed, stamped envelope. Do not hesitate to telephone me if you have any questions.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,

James Jones

Enclosures

Mr. Smith

January 16, 2009

Page Two

AGREEMENT TO APPEAR "ON CALL"

I acknowledge that I have been served with a subpoena issued in the case of *Apple Food Market v. Elliott & Campbell LLP*, O.C.S.C. Case No. 02 CC 10994. I understand that, unless I agree to appear on call, it may be necessary for me to wait for extensive periods in court. I wish to avoid this inconvenience. I also understand that cases often are postponed or settled before the trial date, and I do not wish to appear in court unnecessarily. I therefore agree to appear at such time as may be designated by further oral or written notice from the Law Offices of James Jones, notwithstanding the date specified in the subpoena. I understand that Mr. Jones, who has control over my appearance, will try to give me as much notice as possible, and will notify me at least 24 hours before the assigned time for my testimony.

My business telephone number is () _____.

My home telephone number is () _____.

I agree to notify Mr. Jones promptly of any changes in my address or the telephone numbers listed above.

Dated: _____, 2009 _____
Harry C. Smith

Source: Civil Litigation/Handling Subpoenas (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

CALIFORNIA

Constitution

Art I, §15: [Step 34](#)

Statutes

BUSINESS AND PROFESSIONS CODE

22450-22451: [Step 3](#)

22450-22463: [Step 3](#)

CIVIL CODE

1798.79.8: [Step 33](#)

CODE OF CIVIL PROCEDURE

414.10: [Step 19](#)

1005(b): [Steps 36-37](#)

1005(c): [Step 36](#)

1011: [Steps 26, 30](#)

1012: [Steps 26, 30](#)

1013: [Steps 6, 26, 30](#)

1013(a)-(b): [Steps 26, 30](#)

1013(c)-(d): [Steps 26, 30](#)

1013(e): [Steps 6, 26, 30](#)

1015: [Steps 26, 30](#)

1017: [Steps 26, 30](#)

1020: [Steps 26, 30](#)

1033.5(a): [Step 23](#)

1209(a)(7)-(8): [Step 39](#)

1211: [Step 38](#)

1212: [Step 38](#)

1985: [Steps 1, 9-13, 18, 21, 34, 36](#)

1985-1985.2: [Step 8](#)

1985-1986: [Step 38](#)

1985-1987: [Step 1](#)

1985-1997: Step 32

1985(a): Step 1

1985(a)-(b): Step 1

1985(c): Steps 8, 15

1985.1: Steps 1, 12, 38

1985.1-1985.2: Steps 16-17

1985.2: Step 1

1985.3: Steps 21, 24-25, 33-34, App F

1985.3(a): Step 24

1985.3(a)(1): Step 24

1985.3(a)(2): Step 24

1985.3(a)(3): Steps 24, 28

1985.3(a)(4): Step 24

1985.3(b): Steps 25-26

1985.3(b)(1): Step 26

1985.3(b)(2): Step 26

1985.3(b)(3): Steps 26, 30

1985.3(c): Step 27

1985.3(c)(2): Step 27

1985.3(d): Steps 26-27

1985.3(e): Steps 25-27

1985.3(f): Step 27

1985.3(g): Step 26

1985.3(h): Steps 25, 34

1985.3(k): Step 25

1985.3(l): Step 25

1985.6: Steps 29, 34, App F

1985.6(a)(1): Step 28

1985.6(a)(2): Steps 28, 33

1985.6(a)(3): Step 28

1985.6(a)(5): Step 28

1985.6(b): Steps 29-30

1985.6(b)(1): Step 30

1985.6(b)(2): Step 30

1985.6(b)(3): Step 30

1985.6(c): Step 31

1985.6(c)(1): Step 30

1985.6(c)(2): Step 31

1985.6(d): Steps 30-31

1985.6(e): Steps 29-31

1985.6(e)-(f): Step 30

1985.6(f): Step 30

1985.6(g): Steps 29, 34

1985.6(j): Step 29

1985.6(k): Step 29

1985.8 (proposed): Steps 34-35

1985.8(a) (proposed): Step 32

1985.8(c) (proposed): Step 32

1985.8(c)(1) (proposed): Step 32

1985.8(d) (proposed) : Step 34

1985.8(d)-(f) (proposed): Step 36

1985.8(d)-(h) (proposed) : Step 36

1985.8(e) (proposed): Step 35

1985.8(f)-(h) (proposed): Step 35

1985.8(g) (proposed): Step 32

1985.8(j) (proposed): Step 32

1986: Step 38

1986-1987: Step 12

1986.5: Step 22

1986(a): Steps 8, 12, 15

1986(b): Steps 12, 15

1986(c): Steps 12, 15, 38

1987: Steps 13, 20-21

1987.1: Steps 26, 30, 33-36, App H

1987.1(a): Step 36

1987.1(b)(1)-(4): [Step 36](#)

1987.1(b)(5): [Steps 33, 36](#)

1987.2: [Step 36](#)

1987.2(b): [Step 36](#)

1987.3: [Step 1](#)

1987.5: [Steps 11, 18, 21, 34](#)

1987(a): [Steps 6, 14, 19-21, 23, 26](#)

1987(b): [Steps 2, 12-13](#)

1987(c): [Steps 13, 33, 36](#)

1988: [Step 20](#)

1989: [Steps 4-5, 14](#)

1991: [Steps 35, 37-38](#)

1991.1: [Step 38](#)

1992: [Steps 37-38](#)

1993(a)(1): [Step 38](#)

1995: [Step 20](#)

1996: [Step 20](#)

1997: [Step 20](#)

2016.020(e) (proposed): [Step 32](#)

2016.050: [Step 6](#)

2017.010: [Step 34](#)

2017.010-2017.320: [Step 34](#)

2017.020(a): [Step 34](#)

2017.220(a): [Step 34](#)

2017.730(a): [Step 3](#)

2019.210: [Step 34](#)

2020(d) (former): [Step 3](#)

2020.010: [Step 2](#)

2020.010-2020.510: [Steps 1-3, 5-6, 21, 35, 37-38](#)

2020.210(a): [Step 8](#)

2020.210(b): [Steps 8-11](#)

2020.220: [Steps 6, 26, 30](#)

2020.220(a): [Steps 6, 21](#)

2020.220(b): Steps 19-20, 22

2020.220(c): Steps 21, 35

2020.229(c): Step 4

2020.230(a): Step 22

2020.240: Steps 35, 37-38

2020.310: Steps 1-3, 6-7, 9-10

2020.410: Steps 1-3, 7, 26-27, 30

2020.410(a): Step 11

2020.410(c): Steps 5-6, 11, 21, 25-27, 31

2020.410(d): Steps 27, 31

2020.420: Steps 3, 24, 28

2020.430: Steps 3, 6, 11

2020.430(c)(2): Step 22

2020.440: Step 3

2020.510: Steps 1-3, 6-7, 9-10

2020.510(a): Step 2

2020.510(a)(2)-(3): Step 10

2020.510(b): Step 10

2020.510(c): Step 27

2020.510(d): Step 31

2023.010-2023.040: Step 37

2023.010(d): Step 38

2023.010(i): Steps 34, 37

2023.030(a): Step 37

2023.030(b): Step 37

2023.030(c): Step 37

2023.030(d): Step 37

2023.040: Step 37

2024.020(a): Step 6

2024.040(b)(1): Step 6

2025.010-2025.620: Steps 2, 6

2025.210-2025.240: Steps 2-3

2025.210-2025.280: Step 35

2025.220(a)(6): Steps 9-10

2025.240(a): Step 2

2025.250: Step 5

2025.250(a): Step 5

2025.250(b): Step 5

2025.250(c)-(d): Step 5

2025.260(a): Step 5

2025.260(b): Step 5

2025.270: Step 6

2025.270-2025.280: Step 6

2025.270(a): Steps 21, 27, 31

2025.270(b): Step 6

2025.280(a): Steps 2-3

2025.280(b): Steps 2, 6

2025.310(a): Step 3

2025.310(b): Step 3

2025.410: Steps 34-35

2025.410-2025.480: Step 35

2025.410(a): Steps 34-35

2025.410(b): Step 35

2025.420(a): Step 35

2025.420(b): Step 35

2025.440: Step 2

2025.450: Step 37

2025.450(a): Step 37

2025.450(b)(2): Step 37

2025.480: Step 37

2025.480(b): Step 37

2025.480(c): Steps 37-38

2025.480(d): Step 37

2025.480(e): Step 37

2025.480(f): Step 37

2025.570: Step 3

2025.620(c): Step 14

2025.620(d): Steps 9-10

2026.010: Step 4

2027.010: Step 4

2031.010-2031.060: Step 3

2034.260(c)(5): Step 22

2034.420: Step 5

2034.430(a): Step 22

2034.430(b): Step 22

2034.430(d): Step 22

2034.430(e): Step 22

2034.450: Step 22

2034.460: Step 2

2093(b): Step 3

EDUCATION CODE

48918: Step 8

EVIDENCE CODE

240: Step 14

1010: Step 24

1271: Steps 1, 17

1560: Step 1

1560-1562: Step 17

1560-1563: Step 3

1560-1566: Step 1

1560(b): Step 10

1560(e): Step 3

1561: Steps 1, 3, 10

1561(a)(1): Step 3

1561(a)(2): Step 3

1561(a)(3): Step 3

1561(a)(4): Step 3

1561(a)(5): [Step 3](#)

1561(b): [Step 3](#)

1561(c): [Step 3](#)

1562: [Steps 1, 10](#)

1563: [Steps 22-23](#)

1563(b): [Steps 3, 11](#)

1563(b)-(c): [Step 22](#)

1563(b)(1): [Steps 22-23](#)

1563(b)(2): [Step 22](#)

1563(b)(3): [Steps 2-23](#)

1563(b)(4): [Step 22](#)

1563(b)(6): [Steps 3, 22](#)

1563(c): [Step 3](#)

FINANCIAL CODE

5102: [Step 24](#)

17000-17702: [Step 24](#)

17006: [Step 24](#)

GOVERNMENT CODE

16097.1(a)-(b): [Step 22](#)

26743: [Step 19](#)

26744: [Step 38](#)

68092.5: [Steps 22-23](#)

68092.5(a): [Step 22](#)

68093: [Steps 3, 22-23](#)

68096.1(b): [Step 22](#)

68096.1(c): [Step 22](#)

68096.1(e): [Step 22](#)

68096.1(f): [Step 22](#)

68097: [Step 22](#)

68097.1: [Steps 8, 20, 22](#)

68097.1-68097.4: [Steps 9-10](#)

68097.1-68097.5: [Step 20](#)

68097.1-68097.6: [Step 22](#)

68097.1(a): [Step 20](#)

68097.1(a)-(b): [Step 20](#)

68097.1(b): [Step 20](#)

68097.1(d): [Steps 20, 22](#)

68097.2: [Step 22](#)

68097.2(a)-(b): [Step 22](#)

68097.2(b): [Step 22](#)

68097.2(c): [Step 22](#)

68097.2(d): [Step 22](#)

68097.2(e): [Step 22](#)

68097.2(f): [Step 22](#)

68097.3: [Step 6](#)

68097.6: [Steps 20, 22](#)

68097.7: [Step 22](#)

68600-68620: [Step 3](#)

PENAL CODE

132-138: [Step 39](#)

830: [Step 22](#)

1328(c): [Step 20](#)

PUBLIC UTILITIES CODE

216: [Steps 24, 27](#)

2891: [Step 27](#)

WELFARE AND INSTITUTIONS CODE

300: [Steps 20, 26](#)

601: [Steps 20, 26](#)

602: [Steps 20, 26](#)

PROPOSED LEGISLATION

AB 5 (2008): [Step 32](#)

ACTS BY POPULAR NAME

Electronic Discovery Act (proposed): [Step 32](#)

Trial Court Delay Reduction Act: [Step 3](#)

Rules

CALIFORNIA RULES OF COURT

3.250: [Steps 21, 27, 31](#)

3.823(c): [Step 12](#)

3.1010: [Step 3](#)

UNITED STATES

Statutes

UNITED STATES CODE

Title 12

2002: [Step 24](#)

Title 42

1320d-2: [Step 24](#)

Title 47

2389(f)(2): [Step 36](#)

ACTS BY POPULAR NAME

Health Insurance Portability and Accountability Act of 1996 (HIPAA): [Step 24](#)

SESSION LAWS

Pub L 104-191, 110 Stat 1936: [Step 24](#)

Regulations

CODE OF FEDERAL REGULATIONS

Title 45

pt 160: [Step 24](#)

pt 164: [Step 24](#)

© **The Regents of the University of California**

Source: Civil Litigation/Handling Subpoenas (Action Guide)/TABLE OF CASES

TABLE OF CASES

A

Abrams, In re (1980) 108 CA3d 685, 166 CR 749: [Step 38](#)

Associated Brewers Distrib. Co. v Superior Court (1967) 65 C2d 583, 55 CR 772: [Step 18](#)

Avant! Corp. v Superior Court (2000) 79 CA4th 876, 94 CR2d 505: [Step 34](#)

B

Brovelli v Superior Court (1961) 56 C2d 524, 15 CR 630: [Step 34](#)

C

California Shellfish, Inc. v United Shellfish Co. (1997) 56 CA4th 16, 64 CR2d 797: [Steps 33-34](#)

Cedars-Sinai Imaging Med. Group v Superior Court (2000) 83 CA4th 1281, 100 CR2d 320: [Steps 4, 14](#)

Chapman v Superior Court (1968) 261 CA2d 194, 67 CR 842: [Step 34](#)

D

Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: [Step 37](#)

F

Flora Crane Serv., Inc. v Superior Court (1965) 234 CA2d 767, 45 CR 79: [Step 36](#)

H

Hall v Superior Court (1932) 124 CA 603, 12 P2d 1057: [Step 38](#)

Hecht, Solberg, Robinson, Goldberg & Bagley LLP v Superior Court (2006) 137 CA4th 579, 40 CR3d 446: [Steps 3, 36](#)

I

In re Abrams (1980) 108 CA3d 685, 166 CR 749: [Step 38](#)

In re McLain (1950) 99 CA2d 274, 221 P2d 323: [Step 38](#)

In re Morelli (1970) 11 CA3d 819, 91 CR 72: [Steps 4, 14](#)

In re Ny (1962) 201 CA2d 728, 20 CR 114: [Step 38](#)

Inabnit v Berkson (1988) 199 CA3d 1230, 245 CR 525: [Step 25](#)

K

Kravitz v Superior Court (2001) 91 CA4th 1015, 111 CR2d 385: [Step 37](#)

L

Lantz v Superior Court (1994) 28 CA4th 1839, 34 CR2d 358: [Steps 24, 28](#)

Lockyer, People ex rel v Superior Court (Cole Nat'l Corp.) (2004) 122 CA4th 1060, 19 CR3d 324: [Step 6](#)

M

Maldonado v Superior Court (2002) 94 CA4th 1390, 115 CR2d 137: [Step 38](#)

McCrone v U.S. (1939) 307 US 61, 83 L Ed 1108, 59 S Ct 685: [Step 38](#)

McLain, In re (1950) 99 CA2d 274, 221 P2d 323: [Step 38](#)

Monarch Healthcare v Superior Court (2000) 78 CA4th 1282, 93 CR2d 619: [Step 36](#)

Morelli, In re (1970) 11 CA3d 819, 91 CR 72: [Steps 4, 14](#)

N

New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98: [Step 38](#)

Nick v DMV (1993) 12 CA4th 1407, 16 CR2d 305: [Step 22](#)

Ny, In re (1962) 201 CA2d 728, 20 CR 114: [Step 38](#)

P

Pacific Auto. Ins. Co. v Superior Court (1969) 273 CA2d 61, 77 CR 836: [Step 18](#)

Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 84 CR 718: [Step 34](#)

Pacific Tel. & Tel. Co. v Superior Court (1968) 265 CA2d 370, 72 CR 177: [Step 38](#)

Palmer, People v (1989) 207 CA3d 663, 255 CR 55: [Step 38](#)

Parris v Zolin (1996) 12 C4th 839, 50 CR2d 109: [Step 38](#)

People ex rel Lockyer v Superior Court (Cole Nat'l Corp.) (2004) 122 CA4th 1060, 19 CR3d 324: [Step 6](#)

People v Palmer (1989) 207 CA3d 663, 255 CR 55: [Step 38](#)

R

Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878: [Step 22](#)

Roberts v Superior Court (1973) 9 C3d 330, 107 CR 309: [Step 34](#)

S

Sasson v Katash (1983) 146 CA3d 119, 194 CR 46: [Step 24](#)

Schnabel v Superior Court (1993) 5 C4th 704, 21 CR2d 200: [Step 34](#)

Sears, Roebuck & Co. v National Union Fire Ins. Co. (2005) 131 CA4th 1342, 32 CR3d 717: [Step 37](#)

Sehlmeyer v Department of Gen. Servs. (1993) 17 CA4th 1072, 21 CR2d 840: [Step 24](#)

Southern Cal. Edison Co. v Superior Court (1972) 7 C3d 832, 103 CR 709: [Step 2](#)

Southern Pac. Co. v Superior Court (1940) 15 C2d 206, 100 P2d 302: [Step 33](#)

Spencer v Hibernia Bank (1960) 186 CA2d 702, 9 CR 867: [Step 34](#)

Stony Brook I Homeowners' Ass'n v Superior Court (2000) 101 CR2d 67, 84 CA4th 691: [Step 34](#)

T

True v Shank (2000) 81 CA4th 1250, 97 CR2d 462: [Step 22](#)

U

Unzipped Apparel, LLC v Bader (2007) 156 CA4th 123, 67 CR 111: [Step 37](#)

Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 69 CR2d 635: [Step 3](#)

© The Regents of the University of California