



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on October 28, 2011

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Title	Agenda Item Type
Civil Discovery: Subpoena Forms for the Discovery and Production of Electronically Stored Information	Action Required
	Effective Date
	January 1, 2012
Rules, Forms, Standards, or Statutes Affected	Date of Report
Revise forms SUBP-002, SUBP-010, SUBP-035, and SUBP-045	October 11, 2011
Recommended by	Contact
Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair	Patrick O'Donnell, 415-865-7665 <a href="mailto:patrick.o'donnell@jud.ca.gov">patrick.o'donnell@jud.ca.gov</a>

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### **Executive Summary**

The Civil and Small Claims Advisory Committee recommends that four civil subpoena forms be revised so that they can be used more effectively to request the production of electronically stored information in discovery and at hearings and trials. The revision of the forms implements recent legislation on the discovery of electronically stored information.

### **Recommendation**

The Civil and Small Claims Advisory Committee recommends that the Judicial Council revise the subpoena forms (forms SUBP-002, SUBP-010, SUBP-035, and SUBP-045), effective January 1, 2012, to include statements that if electronically stored information has been requested, the form in which each type of information is to be produced may be specified. The revised subpoena forms are attached at pages 6–14.

## Previous Council Action

The Judicial Council previously sponsored the legislation that resulted in the Electronic Discovery Act.<sup>1</sup> Assembly Bill 5, which was introduced in 2009, was jointly sponsored by the Judicial Council, Consumer Attorneys of California, and California Defense Counsel. Other interested entities supported the legislation. The bill was enacted and signed by the Governor.<sup>2</sup> This legislation was the first major revision in the California discovery law since the mid-1980s. It substantially amended the discovery statutes to apply to the discovery of electronically stored information.

## Rationale for Recommendation

The Electronic Discovery Act, Assembly Bill 5, provides procedures for courts and litigants to use in addressing electronic discovery issues. Specifically, the act includes a new section that was added to the chapter of the Code of Civil Procedure on civil subpoenas. (Code Civ. Proc., § 1985.8.) This section provides that a “subpoena in a civil proceeding may require that electronically stored information . . . be produced . . . .” (Code Civ. Proc., § 1985.8(a).) The new section also provides that a “*party serving a subpoena requiring the production of electronically stored information may specify the forms or forms in which each type of information is to be produced*” (emphasis added). (Code Civ. Proc., § 1985.8(b).)

Most of the civil subpoena forms have not been revised since before AB 5 was enacted in 2009. This proposal would revise four civil subpoena forms so that they can be used more effectively to implement new Code of Civil Procedure section 1985.8.

## Specifying the form or forms of production

To implement AB 5, in the places on the subpoena forms where the respondent is asked to provide documents, the following parenthetical instruction has been added: “*(if electronically stored information has been requested, the form or forms in which each type of information is to be produced may be specified)*”. Other references to “electronically stored information” have been added at various appropriate places on the forms.

## Titles of subpoena forms

To reflect the changes in the law, the title of form SUBP-002 has been changed to expressly recognize the discoverability of electronically stored information. The title of the attached revised form has been changed from *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration to Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents, Electronically Stored*

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<sup>1</sup> A copy of the Judicial Council report recommending the support of the e-discovery legislation is available at [www.courts.ca.gov/jc/documents/reports/042508item4.pdf](http://www.courts.ca.gov/jc/documents/reports/042508item4.pdf).

<sup>2</sup> The text of AB 5, as chaptered, may be viewed at [www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0001-0050/ab\\_5\\_bill\\_20090629\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf).

Information, and Things at Trial or Hearing and Declaration [underlining added to show change].

Similarly, the title of form SUBP-045 has been changed from *Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California* to *Deposition Subpoena for Personal Appearance and Production of Documents, Electronically Stored Information, and Things in Action Pending Outside California* [underlining added to show change].

### **Caption blocks**

The caption blocks on the subpoena forms have been standardized so that they all include places for attorneys to provide e-mail addresses as well as telephone and fax numbers. The parenthetical instruction “(optional):” has been removed throughout. This represents the current preferred format for contact information for attorneys of record.

### **Comments, Alternatives Considered, and Policy Implications**

#### **Comments received and committee responses**

This proposal was circulated for public comment from April 21 to June 20, 2011. Seven comments were received.<sup>3</sup> The commentators included two superior courts, the State Bar’s Committee on Administration of Justice, the Process Server Institute, a legal publisher, a public defender, and a corporate litigation support manager. All the commentators supported the revision of the subpoena forms to specify the form or forms of production of electronically stored information, but some suggested additional modifications.<sup>4</sup>

**Titles of the forms.** For the purpose of circulation, the title of form SUBP-002 was proposed to be changed from *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration* to *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Records at Trial or Hearing and Declaration*. After reviewing the comments on the title discussed below, the committee instead recommends changing the title of this subpoena form to *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and Declaration*. This last version of the title is a little longer, but also clearer.

Similarly, for the purpose of circulation, the proposed title of form SUBP-045 was changed from *Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California* to *Deposition Subpoena for Personal Appearance and Production of Records in Action Pending Outside California*. Again, after reviewing the comments, the committee recommends changing the title of this subpoena form to *Deposition*

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<sup>3</sup> One additional court indicated that it had reviewed the proposal but had no comments to submit.

<sup>4</sup> A chart summarizing the comments and the responses is attached at pages 15–18.

*Subpoena for Personal Appearance and Production of Documents, Electronically Stored Information, and Things in Action Pending Outside California.*

The purpose of changing the titles of the two forms is to clarify that electronically stored information may be requested as well as just paper documents. The comments expressed different views about the best new title for forms SUBP-002 and SUBP-045. The circulated versions substituted “records” for “documents and things.” However, a commentator disagreed with referring to “records” instead of “documents and things.” She noted that the term “records” is not defined; moreover, “records” is unlikely to encompass “things.” The commentator also noted that Code of Civil Procedure section 2016.020 provides that “documents” means “writings” as defined in Evidence Code section 250, which is broad enough to include electronically stored information. (See comment 2.) Thus, this commentator suggested several alternatives: (1) leave the titles of the forms as they were, (2) go with the longer alternative suggested, or (3) shorten the titles to refer to “production” without specifying what is produced.

On this issue of the titles, the State Bar’s Committee on Administration of Justice believed that there was no particular need to change any of the titles. (See comment 5.) On the other hand, one court preferred the proposed new titles that were circulated. (See comment 7.)

After consideration of all the options regarding the titles of forms SUBP-002 and SUBP-045, the committee concluded that the titles of the two subpoena forms should be changed to reflect that they may be used to request electronically stored information. This will clarify the scope of the subpoenas. Also, the committee concluded that the clearest way to clarify this is to add “electronically stored information” after the word “document” in the titles. Although a little long, the revised titles will be complete and accurate.

***Adding requests for metadata.*** A litigation support manager noted that the revised subpoena forms are silent on the topic of metadata. He recommended adding, after each time that the new language about specifying the form or forms of production of electronically stored information is used on the subpoena forms, an instruction specifying “if metadata is demanded, the exact elements of metadata to be produced.” (See comment 4.)

The committee discussed this suggestion and recommends against the proposed addition. Including the language about metadata opens up a much broader range of issues than the simple clarification on the subpoenas about the form or forms of electronically stored information to be produced, which is directly provided for in the applicable statute. (See Code Civ. Proc., § 1985.8(b) (“a party serving a subpoena requiring the production of electronically stored information may specify the form or forms in which each type of information is to be produced.”) Metadata will be needed and requested in far fewer cases than electronically stored information generally. If a party wants and needs such metadata in a particular case, it may indicate in the appropriate places on the subpoena forms the specific metadata that is sought, why there is good cause for its production, and why it is material to the issues in the case. But the

committee disagreed that metadata should be listed as a routine item to be identified and requested on all the subpoena forms.

**Captions.** No comments were received on captions of the forms, including the removal of the parenthetical instruction “(optional):” after the e-mail addresses.

**Other suggestions.** Tony Klein of the Processer Servers Institute proposed some changes to the proofs of service on not only the forms that were circulated, but to the proofs on all of the subpoena forms for the production of records. (See comment 1.) This suggestion was beyond the scope of the proposal that was circulated. The committee will consider it in the future.

### **Alternatives considered**

The four subpoena forms might be left entirely unchanged, but this would be inconsistent with the recent legislation on electronic discovery. To implement that legislation, the forms have been changed throughout so that in their titles and elsewhere they make it clear that electronically stored information may be subpoenaed. The forms have also been modified to include the specific statutory provisions that will enable a party serving a subpoena requiring the production of electronically stored information to specify the forms or forms in which each type of information is to be produced. (See Code Civ. Proc., § 1985.8(b).)

### **Implementation Requirements, Costs, and Operational Impacts**

The subpoena forms are principally prepared and used by attorneys rather than the courts; hence, the main impact of the revisions should be on the public. However, courts also issue subpoenas, so they will need to substitute the revised forms for existing versions. This will require some implementation and impose some minor costs, but because the changes are simply to the text of the forms, no significant changes in court operations should be required.

### **Attachments**

1. Revised forms SUBP-002, SUBP-010, SUBP-035, and SUBP-045, at pages 6–14
2. Chart of comments and the committee’s responses, at pages 15–18



ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name, State Bar number, and address</i> ):  TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR ( <i>Name</i> ): _____	<b>FOR COURT USE ONLY</b>
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER:  DEFENDANT/ RESPONDENT:	
<b>CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION</b>	CASE NUMBER: _____

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

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:	Time:	<input type="checkbox"/>	Dept.:	<input type="checkbox"/>	Div.:	<input type="checkbox"/>	Room:
b. Address:							

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
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: \_\_\_\_\_ b. Telephone number: \_\_\_\_\_
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:

\_\_\_\_\_ (TYPE OR PRINT NAME)



\_\_\_\_\_ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(Declaration in support of subpoena on reverse)

(TITLE)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

The production of the documents, electronically stored information, or other things sought by the subpoena on page one is supported by (check one):

the attached affidavit or  the following declaration:

**DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS AT TRIAL OR HEARING  
(Code Civ. Proc., §§ 1985,1987.5)**

1. I, the undersigned, declare I am the  plaintiff  defendant  petitioner  respondent  
 attorney for (specify):  other (specify):  
in the above-entitled action.
2. The witness has possession or control of the documents, electronically stored information, or other things listed below, and shall produce them at the time and place specified in the Civil Subpoena for Personal Appearance and Production of Records at Trial or Hearing on page one of this form (specify the exact documents or other things to be produce; if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):
- Continued on Attachment 2.
3. Good cause exists for the production of the documents, electronically stored information, or other things described in paragraph 2 for the following reasons:
- Continued on Attachment 3.
4. The documents, electronically stored information, or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:
- Continued on Attachment 4.

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)

\_\_\_\_\_  
(SIGNATURE OF  SUBPOENAING PARTY  ATTORNEY FOR SUBPOENAING PARTY)

### Request for Accommodations

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



(Proof of service on page 3)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

**PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION**

1. I served this *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents, Electronically Stored Information, 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)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR (Name): _____	<b>FOR COURT USE ONLY</b>  <b>DRAFT</b> Not approved by the Judicial Council
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
<b>DEPOSITION SUBPOENA                  FOR PRODUCTION OF BUSINESS RECORDS</b>	CASE NUMBER:

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

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

To (name of deposition officer): On (date) : _____ At (time): _____ Location (address): _____	
<b>Do not release the requested records to the deposition officer prior to the date and time stated above.</b>	

- 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 (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):

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:

\_\_\_\_\_  
 (TYPE OR PRINT NAME)



\_\_\_\_\_  
 (SIGNATURE OF PERSON ISSUING SUBPOENA)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

**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.

Date:

\_\_\_\_\_

(SIGNATURE)

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

Date:

\_\_\_\_\_

(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name, State Bar number, and address</i> ):  TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR ( <i>Name</i> ): _____	FOR COURT USE ONLY  <p style="text-align: center;"><b>DRAFT</b></p> <p style="text-align: center;">Not approved by the Judicial Council</p>
<i>Court for county in which discovery is to be conducted:</i> <b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY, STATE, AND ZIP CODE: BRANCH NAME:	
<i>Court in which action is pending:</i> <b>Name of Court:</b> STREET ADDRESS: MAILING ADDRESS: CITY, STATE, AND ZIP CODE: COUNTRY:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CALIFORNIA CASE NUMBER (if any assigned by court):
<b>SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS IN ACTION PENDING OUTSIDE CALIFORNIA</b>	CASE NUMBER (of action pending outside California):

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

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

To ( <i>name of deposition officer</i> ): On ( <i>date</i> ): _____ At ( <i>time</i> ): _____ Location ( <i>address</i> ): _____
<b>Do not release the requested records to the deposition officer prior to the date and time stated above.</b>

- 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 must 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 (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):*

Continued on Attachment 3 (*use form MC-025*).

4. Attorneys of record in this action or parties without attorneys are (*name, address, telephone number, and name of party represented*):

Continued on Attachment 4 (*use form MC-025*).

PLAINTIFF/PETITIONER:  DEFENDANT/RESPONDENT:	CASE NUMBER (of action pending outside California):
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5. **If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedure section 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.  Other terms or provisions from out-of-state subpoena, if any (*specify*):

Continued on Attachment 6 (*use form MC-025*).

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

(TYPE OR PRINT NAME)	▶	(SIGNATURE OF PERSON ISSUING SUBPOENA)
(TITLE)		(TITLE)

**PROOF OF SERVICE OF SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**

1. I served this *Subpoena for Production of Business Records In Action Pending Outside California* 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.  I also served a completed *Proof of Service of Notice to Consumer or Employee and Objection* (form SUBP-025) by personally delivering a copy to the person served as described in 1 above.

4. 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)

ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name, State Bar number, and address</i> ):  <hr/> <p style="text-align: center;">TELEPHONE NO.: <span style="margin-left: 200px;">FAX NO.:</span>                  E-MAIL ADDRESS:                  ATTORNEY FOR (<i>Name</i>):</p>	<b>FOR COURT USE ONLY</b>   <p style="font-size: 1.2em; font-weight: bold;">DRAFT</p> <p style="font-size: 1.2em;">Not approved by the Judicial Council</p>
Court for county in which discovery is to be conducted: <b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Court in which action is pending: <b>Name of Court:</b> STREET ADDRESS: MAILING ADDRESS: CITY, STATE, AND ZIP CODE: COUNTRY:	
PLAINTIFF/PETITIONER:  DEFENDANT/RESPONDENT:	CALIFORNIA CASE NUMBER (if any assigned by court):
<b>DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS IN ACTION PENDING OUTSIDE CALIFORNIA</b>	CASE NUMBER (of action pending outside California):

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

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

Date:	Time:	Address:
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- 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., § 2025.230.)
  - b.  You are ordered to produce the documents, electronically stored information, and things described in item 3.
  - c. This deposition will be recorded stenographically  through the instant visual display of testimony and by  audiotape  videotape.
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, electronically stored information, and things to be produced and any testing or sampling being sought are described as follows (*if electronically stored information is required, the form or forms in which each type of information is to be produced may be specified*) :
- Continued on Attachment 3 (*use form MC-025*).
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:
- Continued on Attachment 4 (*use form MC-025*).
5. Attorneys for the parties to this action or parties without attorneys are (*name, address, telephone number, and name of party represented*):
- Continued on Attachment 5 (*use form MC-025*).

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
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6.  Other terms or provisions from out-of-state subpoena, if any (*specify*):

Continued on Attachment 6 (*use form MC-025*).

7. **If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedures 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.**

8. *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. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

\_\_\_\_\_  
(SIGNATURE OF PERSON ISSUING SUBPOENA)

\_\_\_\_\_  
(TYPE OR PRINT NAME) (TITLE)

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS**

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents, Electronically Stored Information, and Things in Action Pending Outside California* 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.  I also served a completed *Proof of Service of Notice to Consumer or Employee and Objection* (form SUBP-025) by personally delivering a copy to the person served as described in 1 above.

4 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. 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.

Date:

\_\_\_\_\_  
(SIGNATURE)

**(For California sheriff or marshal use only)**

**I certify** that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(SIGNATURE)

## SPR11-26

### Civil Law: Subpoena Forms for the Discovery and Production of Electronically Stored Information (revise forms SUBP-002, SUBP-010, SUBP-035, and SUBP-045)

All comments are verbatim unless indicated by an asterisk (\*).

	Commentator	Position	Comment	Committee Response
1.	Tony Klein Process Server Institute San Francisco, California	A	<p>All subpoenas for records are being changed to reflect the change in the law allowing for the production of electronically stored information.</p> <p>In general, I am in favor of the changes.</p> <p>The change I am proposing is to the proof of service. The proof of service on the newly minted subpoena for deposition for use outside California referenced the service of a proof of service of the notice to consumer.</p> <p>I suggest that the box include the phrase “<b>or authorization</b>”, which may also be served in compliance with CCP § 1985.3.</p> <p>Furthermore, this should be included in all of the other proofs of service for subpoena forms for production of records.</p>	<p>The commentator’s general support is noted.</p> <p>This specific proposed change is beyond the scope of the present proposal. It will be considered in the future.</p>
2.	Lawdable Press Sherman Oaks, California By Julie Goren, Author/Publisher	AM	<p>SUBP-002 - (1) I disagree with changing the title to [production of] "records" instead of "documents and things." I don't believe the term "records" is defined anywhere. Moreover, "records" is unlikely to encompass "things." On the other hand, CCP 2016.020 provides that "documents" means "writings" as defined in Evidence Code Sec. 250, which is broad enough to include ESI. I would suggest either: (1) leaving the title as it was, (2) going with the long title alternative suggested, or (3) perhaps the best solution is to shorten it to "production" without specifying what is produced, i.e., "for</p>	<p>The committee agreed with the commentator that the use of “records” instead of “documents and things” was not a good idea. It recommends using titles for the subpoenas that would add “electronically stored information,” after “documents.” Though this title is longer, it is also clear and accurate.</p>

**SPR11-26****Civil Law: Subpoena Forms for the Discovery and Production of Electronically Stored Information** (revise forms SUBP-002, SUBP-010, SUBP-035, and SUBP-045)

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>personal appearance and production at trial ..."</p> <p>(2) On page 2, insert a comma between "documents" and "electronically stored information" right below the title of the action.</p> <p>SUBP-045 - (1) same comments as above for title change. (2) Make sure that the title of the Proof of Service portion of the form matches the title of the form ultimately chosen.</p>	<p>This correction has been made.</p> <p>For the reasons discussed above, the subcommittee recommends the longer but clearer titles.</p>
3.	Orange County Public Defender' s Office By Deborah A. Kwast Public Defender	A	No specific comment.	No specific response required.
4.	Mike Rossander Corporate Litigation Support Manager Westfield Group Westfield Center OH	AM	<p>If the intent is to proactively reduce disputes between parties when requesting and collecting electronically stored information, then the form should guide requestors to proactively define the all relevant information that they need. The forms already require the requestor to "specify the exact documents or other things to be produced" and comment on electronically stored information generally but the forms are silent on the topic of metadata, a concept about which I see great and continuing confusion. I recommend the addition of the following after each time that the comment about the form of ESI was added:</p> <p>" ; if metadata is demanded, specify the exact elements of metadata to be produced"</p>	<p>The committee does not support including the additional proposed language about metadata (i.e., " if metadata is demanded, specify the exact elements of metadata to be produced"). Including such language opens up a much broader range of issues than the simple clarification on the subpoenas the form or forms of production of electronically stored information (ESI), which is directly contemplated in the applicable statute. (See Code Civ. Proc., § 1985.8(b)( "a party serving a subpoena requiring the production of electronically stored information may specify the form or forms in which each type of information is to be produced."))</p> <p>Metadata will be needed and requested in far fewer cases than ESI. If a party wants and needs</p>

**SPR11-26**

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	Commentator	Position	Comment	Committee Response
			<p>This will hopefully remind the users of the form to think about metadata in their request and should reduce the impossibly vague calls for "all" metadata. Like requests for "all documents", requests for "all metadata" (or the undifferentiated "including metadata") are unduly broad and ambiguous. Metadata means all data about the data. Metadata includes obvious elements like document creation date (generally embedded in the document itself) but the term "metadata" also includes transitory, ephemeral or irrelevant data like the temperature profile of the fileserver holding the document or the date that a particular font used in the document was last updated.</p> <p>To attempt a physical analogy, the metadata about a paper document could include the facts that it was collected from the CEO's desk, that it was in a stack on the desk oriented 5 degrees off true, that it was printed on 15# bond paper using a soy-based ink and that it has slight wear on one edge. Only the first (collected from the CEO's desk) is likely to be relevant. The rest are also metadata but irrelevant and routinely lost during the collection, review and photocopying that are normal for paper documents. "All" metadata is self-evidently ridiculous for paper documents and the profession automatically screens for only the relevant aspects.</p> <p>"All" metadata is equally impossible for</p>	<p>such metadata in a particular case, it may indicate in the appropriate places on the subpoena forms the specific metadata that is sought, why there is good cause for its production, and why it is material to the issues in the case. But it seems unnecessary and problematic to list metadata as a routine item to be identified and requested on all the subpoena forms.</p>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			electronically stored information but the relevant elements of metadata for electronically stored information are not as self-evident. They require specification in order to avoid confusion and wasted legal resources later. Like the requested documents themselves, the requested metadata should be material to the issues involved in the case. The form should encourage requestors to make that distinction.	
5.	The State Bar of California Committee on Administration of Justice San Francisco, California	A	CAJ supports this proposal, and also believes there is no particular need to change the titles of the various forms.	On the titles, see discussion in the report and in the response to comment 2.
6.	Superior Court of Monterey County	A	No specific comments.	No specific response required.
7.	Superior Court of San Diego County By Mike Roddy, Executive Officer	A	Our court prefers the new titles of forms SUBP-002 and SUBP-045.	See discussion in the report and in the response to comment 2.