

Legal Process Training

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Subpoena

- What is a Subpoena?
 - Court Order/Agency Directive
 - Requires:
 - Witness Testimony
 - Document Production

Subpoenas

- Jurisdiction
- Facial Compliance
- Service
- Additional Document Requirements
- Timing
- Response

Subpoenas - California

- Jurisdiction/Applicable Law
 - California Code of Civil Procedure

Subpoenas - California

- Facial Compliance
 - Signed (by clerk of court or attorney of record)
 - Not signed in pro per (by a party) or by process server
 - Sealed if signed by court clerk
 - Specific Date for Compliance
 - No earlier than 20 days after issuance/15 days after service (whichever is later)

Subpoenas - California

- Facial Compliance (cont'd)
 - Identity of the Deposition Officer
 - Blank if the subpoenaing attorney takes responsibility for copying records
 - Contents
 - Records Subpoena
 - Designate the records to be produced by specifically describing each individual item or reasonably particularizing each category of item (not including account/file numbers)

Subpoenas - California

- Service
 - Personal Service Required
 - To any officer, director, custodian of records, or to any agent or employee authorized by the organization to accept service of a subpoena

Subpoenas - California

- Additional Documents

- Consumer Records – Notice to Consumer

- “Personal records” - Original or copy of documents, writings, or electronically stored information pertaining to a consumer and which are maintained by any ‘witness.’
 - “Witness” - Most health care providers, professionals, financial institutions, and schools

Subpoenas - California

- Additional Documents (cont'd)
 - Consumer Records – Notice to Consumer
 - Prior to production of consumer records
 - Written authorization from consumer to produce records
 - Proof of service that notice was provided to consumer
 - Failure to receive authorization or notice to consumer is sufficient to refuse production
 - Employment Records – Notice to Employee
 - Similar authorization or notice to employee is required for production of employment records

Subpoenas - California

- Timing
 - Subpoena for Records
 - Later of:
 - 20 days after issuance of the subpoena
 - 15 days after service of the subpoena
 - Subpoena for Testimony
 - Reasonable Time to locate documents/Travel to deposition
 - 10 days after service for just testimony
 - Compliance dates can be negotiated

Subpoenas - California

- Response

- Mandatory compliance for facially valid subpoenas

- Delivery of “true, legible, and durable copy of the records”

- Affidavit

- Affiant is duly authorized custodian of the records and has authority to certify the records.
 - The copy is a true copy of all the records described in the subpoena, or that the records were delivered to the deposition officer or subpoenaing attorney, whichever is the case.
 - The records were prepared by the personnel of the business in the ordinary course of business.
 - The identity of the records.
 - A description of the mode of preparation of the records.
 - If some of the subpoenaed records are unavailable, a statement of that fact.

Subpoenas - California

- Response
 - Mandatory compliance for facially valid subpoenas
 - Affidavit
 - Credit Union should have a standard affidavit
 - Sometimes provided with the subpoena

Subpoenas - California

- Response

- Mandatory compliance for facially valid subpoenas

- Testimony – Person Most Knowledgeable

- Witness “must familiarize themselves with any documents they are instructed to produce and be able to testify about information that is readily available to one in the position they hold within the organization.”
 - Depending on scope of subpoena – identifying PMK may be challenging

Subpoenas - Federal

- Jurisdiction/Applicable Law
 - Federal Rules of Civil Procedure

Subpoenas - Federal

- Facial Compliance
 - State the court from which it is issued
 - State the title of the action and its civil-action number
 - Command compliance on a specific time and place
 - Be signed by the clerk or an attorney authorized to practice in the issuing court

Subpoenas - Federal

- Contents
 - State the court from which it is issued
 - State the title of the action and its civil-action number
 - Command compliance on a specific time and place
 - Attend and testify
 - Produce documents, electronically-stored information (ESI) in person's custody
 - Permit inspection of premises
 - Text of FRCP 45(d),(e)

Subpoenas - Federal

- Service
 - Service by any person 18 years old not a party to the case
 - Service by mail/email typically acceptable

Subpoenas - Federal

- Additional Documents
 - Text of FRCP Rule 45(d),(e)
 - No notice to consumer/employee requirement

Subpoenas - Federal

- Timing
 - No set time
 - FRCP: “Reasonable time for compliance”

Subpoenas - Federal

- Response
 - Mandatory Compliance for facially valid subpoena
 - Request for Documents
 - Produced as they are kept in “ordinary course of business”
 - Organized/labeled based on request
 - Request for ESI
 - Produced in form it is ordinarily maintained or a reasonably usable form
 - ESI only needs to be produced in one form

Subpoenas – Compliance Tips

- Check for facial validity
 - Facially valid subpoenas are an acceptable exception to privacy requirements (GLBA, SB-1, CCPA)
- Keep track of compliance dates
 - Generally negotiable within reason
- Notice to Consumer/Employee
 - Typical compliance sticking point – particularly with pro per parties

Right to Financial Privacy Act

- Establishes procedures for the federal government to obtain information from financial institutions
- Applies to federal agencies/law enforcement

Right to Financial Privacy Act

- To obtain information in a customer's financial records, government must obtain:
 - Customer authorization
 - Administrative subpoena or summons
 - Search warrant
 - Judicial subpoena
 - Formal written request by government agency
 - No summons/subpoena available

Right to Financial Privacy Act

- Government must provide written certification that it has complied with Act
- Notable Exceptions
 - Supervisory authority
 - IRS requests
 - Mandatory reporting by statute (ex. BSA)
 - Grand jury subpoena

Right to Financial Privacy Act

- Financial institution can rely on written certification without checking validity of underlying legal process document
- Informal requests from law enforcement typically not acceptable

Right to Financial Privacy Act - California

- Establishes procedures for the state and local government agencies and departments to obtain information from financial institutions
- Applies to state and local agencies/law enforcement
- Civil or criminal investigation of a customer
 - Does not have to be a formal court proceeding

Right to Financial Privacy Act - California

- To obtain information in a customer's financial records, government must obtain:
 - Customer authorization
 - Administrative subpoena or summons
 - Search warrant
 - Judicial subpoena
- Financial institution can rely on facially valid document
 - No government certification like federal law

Right to Financial Privacy Act – California

- Informal requests from law enforcement typically not acceptable
- Notable Exceptions
 - Specific requests upon certification of law enforcement that a crime report has been filed involving fraudulent checks
 - Specific requests from APS
 - These are limited in scope
 - Supervisory authority

Right to Financial Privacy Act – California

- Notable Exceptions (cont'd)
 - Written request from local child support agencies
 - Interstate child support enforcement
 - PERS/STRS certified requests regarding death of beneficiary
- Exceptions are often limited in scope and require further review

Levies

- Tool used by:
 - Creditors to satisfy/enforce judgments
 - Government to collect debts

Levies

- Jurisdiction
 - Federal? State? Out of state?
- Scope/Facial Validity
- Exemptions

Levies – California

- Exemptions – Most complicated
 - California
 - General Rule: Debtor must make claim of exemption to the levying officer/government agency
 - “Without Claim” exemptions
 - Deposit accounts that receive public benefits
 - Minimum Basic standard of adequate care
 - FEMA payments

Levies - California

- Exemptions
 - California
 - Retirement Accounts
 - Mostly Exempt – Debtor must make claim

Levies - California

- Exemptions

- Lookback Law: Federal benefits deposited in two month period prior to date of account review are protected
 - Applies to state (not federal) court/agency levies
- Protected benefits
 - Social Security
 - Supplementary Security Income
 - Veterans benefits
 - Federal railroad retirement, unemployment and sickness benefits
 - Civil Service Retirement System benefits
 - Federal Employee Retirement System Benefits

Levies - California

- Exemptions – Most complicated
 - Higher exemption amount between state and federal law must be applied
 - Tracing
 - Exemption applies to amounts directly deposited into an account
 - Debtor must claim funds that have left the account are exempt

Levies – California

- Review for inclusion of following:
 - It is addressed to the FI.
 - Name of the person or entity being levied.
 - SSN or TIN of the levied person or entity.
 - Name and contact information of the attorney (where applicable).
 - County of Levying Officer (where applicable).
 - Court case number (where applicable).
 - Debtor name and information.
 - Description of property to be levied (the amount of the levy is on the Notice of Levy).

Levies – California

- Scope/Facial Validity

- Levy Packet

- Writ of Execution (EJ-130), which must have a seal stamp and be served no more than 180 days after it was issued.
 - Notice of Levy (EJ-150), which must be dated and signed by the Levying Officer or registered process server.
 - A blank Memorandum of Garnishee (EJ-152).

Levies – California

- Response
 - Place hold on non-protected/exempt funds
 - Complete Memorandum of Garnishee and deliver funds within 10 days
 - Notice to Accountholder
 - Required for accounts with federally exempt funds
 - Model form available

Levies – Federal

- Federal – Notable Exemptions
 - Federal Benefit Payments
 - Unemployment compensation
 - Certain annuity and pension payments
 - Worker’s compensation
 - Court-ordered child support
 - Wages (post-levy)
 - Disability benefits
- Exemptions typically must be asserted by debtor

Levies –Scope/Facial Validity

- Federal – IRS (Form 668-A)
 - Review for inclusion of following:
 - It is addressed to the FI
 - Name of the person or entity being levied.
 - SSN or TIN of the levied person or entity.
 - Name and contact information of the IRS agent responsible for the levy
 - Debtor name and information.
 - Description of property to be levied (the amount of the levy is on the Notice of Levy).

Levies – Response

- Federal - IRS
 - Place hold on funds in account at the time of the levy
 - Deliver funds after 21 day hold period

Out of State Legal Process

- Out of state court orders
 - Sister state court subpoenas/levies
 - Conservatorships
 - Appointment of Personal Representative/Executor

Out of State Legal Process

- Full Faith and Credit Clause
 - States must honor public acts, records and judicial proceedings of other states
- California Civil Code
 - “(a) ... the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced in this state by an action or special proceeding.

Out of State Legal Process

- Out of state court orders presented to an FI are generally not enforceable
- Attorneys should take their orders to California court for authentication, registration, etc.

Out of State Legal Process

- Subpoenas
 - Interstate and International Depositions and Discovery Act
- Levies
 - CCP 1710.10 – Sister State Money Judgments
- Conservatorship/Guardianship
 - California Conservatorship Jurisdiction Act
- Personal Administrator/Executor of Estate
 - Ancillary Administration/Small Estate Affidavit

Out of State Legal Process

- Bank of America Enforcement Action
 - Unlawful garnishments
 - Incorrect application of exemptions
 - Refund garnishment fees/\$10mil fine

THANK YOU!



QUESTIONS?

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