

**Deposition Subpoena Is Valid Even Though Not Accompanied  
by an Executed Affidavit or Declaration**

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In a short and easily-overlooked decision, the Court of Appeal for the First Appellate District ruled not long ago that a deposition subpoena was valid, and thus a witness could be sanctioned for failing to appear at the deposition, even though the subpoena was not accompanied by an executed affidavit or declaration as required by Code of Civil Procedure section 1985.7.

In *Terry v. Slico* (2009) 175 Cal.App.4th 352, the Defendant served a percipient non-party witness with a deposition subpoena compelling him to give testimony and produce documents at a deposition on a scheduled date. The witness did not object to the subpoena, and failed to appear at the deposition after being properly served. The Defendant attempted to reschedule the deposition, but when the witness failed to respond to its request for an alternate date, Defendant filed a motion to compel the witness' attendance with a request for sanctions. The witness opposed the motion on the grounds that the subpoena served upon him was invalid because it was not accompanied by an affidavit or declaration of good cause executed under penalty of perjury. The trial court agreed with the Defendant, granted the motion to compel the deposition, and ordered the witness to pay monetary sanctions for the cost of the motion. The witness then appealed.

The issue before the Court was whether a subpoena for attendance and the production of documents at a deposition (as distinguished from a subpoena compelling attendance and production at trial), could be compelled in the absence of an affidavit or declaration showing good cause. The Court's analysis began with an overview of the Discovery Act of 1986, which was enacted to resolve deficiencies in former discovery statutes, as well as to resolve "perceived abuses in the discovery process." The Court noted that contrary provisions in C.C.P. §'s 1985 & 1987.5 pertaining to subpoenas were inconsistent with and therefore superceded by C.C.P. § 2020.510. The Court determined that the inclusion of those inconsistent provisions in the same legislation "strongly suggests that the Legislature simply failed to focus on the issue."

The Court then examined the supporting affidavit requirement under C.C.P. § 2020.310 (requiring only attendance and testimony), with C.C.P. § 2020.410 (requiring only the production of business records), and noted that there was no reason why an affidavit should be required when a deposition subpoena calls for both the attendance and testimony of the witness together with the production of documents.

The Court also looked at the Judicial Council form used for a records and testimony subpoena, and noted that there was no requirement for the attachment of a supporting affidavit or declaration of counsel which would establish good cause. The Court held that since the service of the deposition subpoena upon the witness was effective in spite of the absence of a supporting affidavit or declaration, the trial Court did not abuse its discretion in granting the motion to

compel and in imposing reasonable sanctions for the witness' failure to comply with the subpoena.

This decision is significant because it affirms the effectiveness of a properly-served records and testimony deposition subpoena in the absence of a supporting affidavit or declaration, and streamlines the subpoena process.