

Memorandum 2002-21

Discovery Improvements from Other Jurisdictions (Comments on Background Study)

In late 1996, the Commission decided (as part of its annual review of new topics and priorities) to review developments in other jurisdictions for possible means of improving civil discovery in California. The Commission later hired Professor Gregory Weber of McGeorge School of Law to prepare a background study on the topic. Professor Weber completed his background study in early 2001. It has since been circulated for comment, and published as a law review article. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001) (hereafter “Weber Study”). The Commission has received the following communications relating to this study:

	<i>Exhibit p.</i>
1. Richard Best, Commissioner, San Francisco Superior Court (Nov. 24, 2001)	1
2. Scott Bonagofsky (May 14, 1999)	4
3. Consumer Attorneys of California (Dec. 28, 2001)	5
4. Richard Haeussler (Feb. 26, 1998)	8
5. Joseph Hurley (July 24, 2001)	9
6. Joseph Hurley (Aug. 2001)	11
7. State Bar Committee on Administration of Justice (Feb. 11, 2002)	13
8. Christine Wilson (Oct. 20, 2000)	20

The Commission needs to consider these materials and determine its priorities and process for conducting this study.

(In referring to Prof. Weber’s background study throughout this memorandum, page references are to the published version of the study. The corresponding page reference for the version circulated by the Commission is shown in brackets.)

RECAP OF BACKGROUND STUDY AND OUTLINE OF MEMORANDUM

In preparing his background study, Professor Weber reviewed the discovery laws of the other forty-nine states, as well as the District of Columbia, the Commonwealth of Puerto Rico, and the federal courts. The background study does not attempt to describe all of the differences between California law and the laws in these other jurisdictions. Instead, it focuses on differences that, in Professor Weber's opinion, "represent potentially useful approaches to matters not adequately addressed in [California's] 1986 Discovery Act." Weber Study at 1052 [CLRC version at 3]. According to Professor Weber, these approaches "seem to offer the potential to do some or all of the following: (1) reduce discovery disputes, either by providing different or clearer expectations of permissible conduct, or by providing better mechanisms for managing disputes; (2) reduce discovery costs; (3) reduce the time spent on discovery; (4) respond to technological innovations; or (5) improve the quality of information produced in response to discovery." *Id.* [CLRC version at 3-4]. Professor Weber does not attempt, however, to make specific recommendations regarding specific innovations, or to fully evaluate the possible innovations to determine the extent to which they might further the goals of discovery reform. *Id.* at 1100 [CLRC version at 46]. His background study is intended as "simply a starting point for a much more detailed conversation." *Id.*

The background study is divided into two main parts. The first part discusses potential across-the-board innovations, reforms that would apply to civil discovery generally, not just to specific discovery devices. Examples of such reforms include mandatory pretrial disclosure, narrowed discovery relevance, mandatory discovery planning, certification of compliance, increased judicial control over discovery, and changes relating to presuit discovery. The second part focuses on possible innovations relating to specific discovery devices, such as depositions, interrogatories, inspection demands, medical examinations, admission requests, and exchange of expert witness information.

This memorandum is similarly organized. We begin by discussing some general comments regarding the Commission's study. The remainder of the memorandum tracks the organization of the background study, starting with potential across-the-board innovations and then turning to reforms relating to specific discovery devices.

The memorandum focuses primarily on reforms that have elicited comment, or that Professor Weber specifically recommended pursuing. We also discuss some proposals that are pending in the Legislature. Other reforms might also warrant consideration, but we do not attempt to mention every topic covered in the background study. If you think that the Commission should explore an approach that is not discussed here, please bring that to the Commission's attention.

GENERAL COMMENTS REGARDING THE COMMISSION'S STUDY

Several suggestions relate to the Commission's study generally, offering advice on the scope of the study, the manner in which it should be conducted, or problems that the Commission is likely to encounter.

Weber Recommendation

Professor Weber urges the Commission to "bring into the dialog as many of the different voices on discovery reform as possible." Weber Study at 1100 [CLRC version at 46]. In his view, a "collaborative approach to discovery reform, facilitated by the Commission, among the various stakeholders offers the greatest potential for long-term acceptance by both the general public and the legal community." *Id.*

Professor Weber's advice is consistent with the Commission's usual approach to its studies, in which the Commission seeks involvement of interested parties, solicits input on draft proposals (in written or oral form), refines its proposals in light of the comments received, and attempts to build consensus before finalizing a proposal. But his comments underscore the importance of attempting to obtain broad participation in this study, preferably from the outset. Any suggestions from Commissioners or others regarding persons or groups to contact, or other means of sparking participation, would be welcome.

Warning from Joseph Hurley

California's last major discovery reform, the Civil Discovery Act of 1986 ("Discovery Act"), was enacted following a joint study of the State Bar and the Judicial Council. That study was conducted by forming a Joint Commission on Discovery, which included a broad spectrum of the legal community, among them Joseph Hurley.

Mr. Hurley explains that the Joint Commission conducted an exhaustive investigation and developed a compromise report. When the report was subjected to the “sausage making” process in the Legislature, however, “it was a retching experience.” Exhibit p. 9. “The law never resembled what our commission, good intentions and compromises included, recommended.” *Id.*

Mr. Hurley attributes that result to the undue influence of well-financed interest groups in the Legislature:

The ultimate power to shape discovery lies in the hands of those who watch every vote, pay every lobbyist, or contribute to every campaign. No one really needs help to know what is fair, just and efficacious which is what you will be aiming at. We simply have no practical means to import those sentiments into legislative or executive types *whose controlling agenda* is something else.

Exhibit p. 12 (emphasis in original). He warns that the same forces “will smother Professor Weber and McGeorge, along with the Law Revision Commission.” Exhibit p. 9.

The Commission should pay close attention to this warning. It might be unduly pessimistic to declare the Commission’s study doomed from the outset, but it is important to be aware that discovery is a contentious subject and proposed reforms may prompt intense lobbying by self-interested stakeholders. In at least some areas of discovery, it might not be worthwhile to expend Commission resources, because the drafting and analytical expertise of the Commission is likely to be wasted in a battle that will ultimately turn on political clout.

Concern of Consumer Attorneys of California

In contrast to Mr. Hurley, Consumer Attorneys of California (“CAOC”) reports that its members “are generally comfortable with the current state of California discovery law and practice.” Exhibit p. 5. CAOC is thus “concerned that a comprehensive rewrite of our discovery statutes would import uncertainty into the law until there is definite judicial construction.” *Id.*

The Commission should keep this concern in mind in determining how to approach this study. CAOC is correct that any dramatic reform poses the possibility of uncertainty and litigation, until the new law is definitively construed. Fine-tuning existing procedures may be more appropriate and more effective than attempting a “comprehensive rewrite” of California discovery law.

Comments of the State Bar Committee on Administration of Justice

Like CAOC, the State Bar Committee on Administration of Justice (“CAJ”) expresses general satisfaction with the current state of discovery law. CAJ is “a diverse group of attorneys concerned with civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in the civil courts.” Exhibit p. 13. The group reports that “the current discovery regime works relatively well in many cases, and works best when counsel act professionally and in good faith.” *Id.* at 14. Although Professor Weber suggests many innovations, “CAJ does not feel that the California discovery system as a whole requires major reconstruction.” *Id.*

CAJ points out, however, that in a significant portion of cases, the discovery regime does not work, and “it can result in considerable hardship, burden, and expense.” *Id.* CAJ urges the Commission to focus on eliminating or alleviating these situations. “If the few areas are targeted where there is the most abuse, waste, and expense, the discovery system as a whole would improve.” *Id.*

CAJ goes on to recommend various specific reforms, which are discussed later in this memorandum. Although CAJ members sometimes disagreed with each other in formulating these proposals, their opinions generally “were not split along traditional plaintiff and defendant lines.” *Id.* Rather, opinions concerning a suitable rule tended to be based on practice areas. *Id.* The Commission should take this unity among traditional opponents into consideration in evaluating CAJ’s proposals.

Commissioner Best’s Suggestions Regarding Study Process

Since 1974, Commissioner Richard Best has “heard civil discovery motions in San Francisco Superior Court: under the new discovery act, the old discovery act, and various permutations along the way; under state rules, local rules and unwritten rules.” Exhibit p. 1. Most likely, he has “heard more discovery motions than any person in the State of California.” *Id.* He offers some preliminary advice regarding the Commission’s study:

Effectiveness of and Need for Discovery Reforms

In Commissioner Best’s experience, “most abuses and unnecessary expenses are attributable to the players — lawyers, judges and parties — rather than the rules.” *Id.* at 2. He believes that the rules “can and should be improved but that will not be a panacea, just as it has not been in the past despite the hopes and

hype that accompanied prior revision and reform.” *Id.* In other words, the Commission should be realistic in its expectations of what can be accomplished.

Reforms Based on Statistical Facts and Consensus

Commissioner Best further advises that any proposed revisions of the Discovery Act “should be based on statistical facts and consensus rather than anecdotes and the limited perspective of a few segments of the litigation community.” *Id.* at 1. Thus, he urges that “some attempt should be made to determine exactly what lawyers conducting litigation need and want.” *Id.* at 2. “Once that is determined, language can be drafted to reflect accurately the consensus of the trial bar.” *Id.* Otherwise, he warns, “any changes will be a gamble.” *Id.*

As part of determining what reforms are needed, “it should be determined whether prior reform has been effective.” *Id.* Commissioner Best suggests asking questions such as:

- Do most lawyers limit themselves to 35 special interrogatories?
- Should the number be increased or decreased ?
- Should the limit be eliminated or retained?
- Does the current rule result in excessive discovery by interrogatory?
- Does the current rule control excessive discovery by interrogatory?
- Should the person seeking to serve more interrogatories be required to make a motion?
- Is the current procedure of attaching a form declaration and requiring the opposing party to make a motion preferable to requiring the party seeking additional discovery to make the motion?
- Are the standards to be applied by the court on a motion for additional discovery meaningful and clear?
- On motion, have courts enforced the limit or ignored the limit?
- On motion, have courts made meaningful and understandable decisions based on the unique needs of the case?
- Should subparts be allowed but counted in the limitation?

- Should definitions be limited?
- What is the effect of prohibiting compound interrogatories or local rules?

Id. at 2-3.

Although such information might be helpful, the Commission does not have the resources or expertise to conduct extensive empirical work. Considerable statistical information should be available, however, from sources such as the Judicial Council and the superior courts. The staff will attempt to gather pertinent data as this study progresses. In particular, empirical work (funded by the Judicial Council) is currently being done for the joint study of civil procedure that the Commission is conducting with the Judicial Council. The focus of that study is on the jurisdictional and procedural distinctions between small claims cases, limited civil cases, and unlimited civil cases. The data collected for purposes of reassessing those jurisdictional and procedural distinctions (e.g., data on the effectiveness of economic litigation procedures and whether those procedures should be extended to other cases) might also be useful in this study.

In addition, the Commission's normal study process encourages participation by a broad range of interested parties. Commission meetings are open to the public and attendees are encouraged to express their views. Interested persons can also submit input by email, fax, regular mail, or telephone, whichever means they find most convenient. Background studies and materials prepared by the Commission staff — such as staff memorandums and draft proposals — are posted on the Commission's website (www.clrc.ca.gov) and are also available to the public in hard copy form.

The Commission begins by exploring the topic and developing a preliminary proposal (tentative recommendation). That process that might involve only one meeting (for a simple and narrow issue), or it might require numerous meetings over a period of years (for a complex and challenging project). The tentative recommendation is then publicized and circulated for comment. After the comment period closes, the Commission considers the comments at one or more additional meetings, revises the proposal as necessary to meet the concerns raised, and eventually approves a final recommendation for submission to the Legislature. Interested persons are welcome to express their views at any stage of this process, not just when the tentative recommendation is being circulated for comment.

Through this thorough study process, the Commission is often able to build consensus, eliminate concerns before legislation is introduced, and craft a proposal that appropriately addresses the interests at stake. The high enactment rate for Commission recommendations (over 90%) attests to the effectiveness of the Commission's process. While the process might not be as empirically-oriented as Commissioner Best suggests, it is a proven means of gathering pertinent information, evaluating alternative approaches, and developing sound legislation.

Justification of Proposed Reforms

Commissioner Best recommends that any proposed reforms of the Discovery Act should:

- Identify the specific problem or need.
- Propose a specific statute or rule to address that problem or need.
- Show how the proposal will achieve its purpose.
- Show how the issue has been addressed in the past, including case law and rules, and explain why that rule or approach has not worked.
- Consider the adverse effects and consequences from the perspective of different types of litigants and litigation, recognizing that one rule will apply to all.
- Provide the factual basis and statistics that support the proposal.

Id. at 1.

This advice comports with standard Commission procedure, in which a Commission recommendation consists of (1) a narrative explanation of the proposal (commonly referred to as the “preliminary part” of the recommendation), (2) proposed legislation (showing proposed statutory revisions in ~~strikeout~~ and underscore), and (3) a proposed Comment for each statutory provision (briefly describing the revisions and providing cross-references or other pertinent information). Typically, the preliminary part is where the Commission describes existing law, explains the need for reform, discusses the pros and cons of alternative approaches, and justifies the chosen approach. The remainder of the recommendation shows precisely how the

proposal would be implemented. Examples of Commission recommendations are posted on the Commission’s website or available on request.

Nonstatutory Alternatives

Commissioner Best suggests considering both statutory and nonstatutory solutions to perceived problems with civil discovery. Exhibit p. 3. He mentions, for example, the rulemaking power of the Judicial Council, and its authority to prepare form interrogatories and admissions. *Id.* He also points out that California Rule of Court 981.1 could be revised to authorize local rules that allow a degree of experimentation with regard to civil discovery. *Id.*

The Commission’s duty is to make “recommendations as to revision of the laws” to the Governor and the Legislature. Gov’t Code § 8291. The Commission does not have authority to prepare, promulgate, or recommend Rules of Court, form discovery, or local rules. The Commission should consider such alternatives as this study proceeds, but the focus of its work should be on statutory reforms to improve civil discovery. Such statutory reforms could include, however, reforms relating to the use of Rules of Court, form discovery, local rules, or similar options.

POTENTIAL ACROSS-THE-BOARD INNOVATIONS

Potential across-the-board innovations are discussed below, generally in the same order as in the background study. These are merely introductory discussions, intended to help the Commission identify approaches that warrant further exploration.

Mandatory or Optional Pretrial Disclosure

As Professor Weber explains, the “most significant conceptual change in discovery practice has come from the mandatory pretrial disclosure provisions of Rule 26(a) of the Federal Rules of Civil Procedure.” Weber Study at 1053 [CLRC version at 4]. Under that rule, originally promulgated in 1993, a party must provide certain information to an opponent *without a prior request*.

Several states have adopted provisions similar to the federal rule, but the concept of mandatory disclosure “has remained controversial, and its adoption by both state and federal courts has been slow.” *Id.* There have been three main criticisms of mandatory pretrial disclosure: (1) it is unfair, because one party’s failure to disclose does not excuse the other party from disclosing, (2) uncertainty

over the scope of the required disclosure may increase the paperwork necessary to obtain information, instead of decreasing it as intended, and (3) mandatory disclosure subverts the adversary system by requiring an attorney to help build the other side's case. *Id.* at 1054-55 [CLRC version at 5-6]. The federal rule has recently been amended to address these concerns to some extent.

The concept of mandatory pretrial disclosure is somewhat similar to the use of a case questionnaire in a limited civil case. Under Code of Civil Procedure Section 93, the plaintiff in a limited civil case has the option of completing and serving a case questionnaire that includes information such as "names and addresses of all witnesses with knowledge of any relevant facts, a list of all documents relevant to the case, a statement of the nature and amount of damages, and information covering insurance coverages, injuries and treating physicians." On receiving a completed case questionnaire from the plaintiff, the defendant must also complete a case questionnaire. Data regarding the effectiveness of this process is being gathered in the joint study of civil procedure being conducted by the Commission and the Judicial Council. That data might be useful if the Commission decides to explore the concept of pretrial disclosure in this study.

CAJ asks the Commission to undertake such analysis. Exhibit pp. 13, 16-17. CAJ members were not, however, universally enthusiastic regarding pretrial disclosure. Members who litigate in federal court "have generally found the required initial disclosures to be very useful." *Id.* at 16. "On the other hand, some CAJ members are concerned that overbroad disclosure requirements would be detrimental to the adversarial process, and could intrude upon the attorney-client privilege and protected work product." *Id.* Some members "also expressed concern that early in some cases parties may not be fully informed of issues about which disclosure is required or know of all the documents or facts to be disclosed." *Id.*

Thus, CAJ concluded that "it would be beneficial to take the first steps towards requiring initial disclosures, [but] initial steps in that regard should be carefully tailored and limited." *Id.* "Moreover, initial disclosures should not preclude parties from supplementing their disclosures as the issues become clearer, as long as this is done in a timely manner as the documents or facts become available." *Id.* at 16-17. CAJ suggests using the current federal disclosure requirements as a starting point. *Id.* at 17. CAJ also recognizes that "requiring initial disclosures might not be appropriate in all cases." *Id.* CAJ therefore urges

the Commission to consider “whether initial disclosures should be made either mandatory or optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.” *Id.* CAJ speculates that using an opt-out system might help overcome resistance to pretrial disclosure. *Id.* at 17 n.4.

CAOC makes clear that there would be such resistance. The group acknowledges that mandatory pretrial disclosure “is a good theory,” but explains that the approach entails problems:

[T]he experience of our attorneys is that the plaintiff often faces the risk of having to prove his case on the evidence he presents at the outset of the case. Moreover, the plaintiff’s burden to disclose is independent from the opposing party’s compliance. The party failing to disclose may have an immediate advantage over the disclosing party. Furthermore, the scope of the disclosure requirements is not always clear. It is a great burden on the plaintiff to litigate the scope of disclosure requirements, as prolonged litigation over disclosure requirements may keep a potential plaintiff’s attorney from accepting a case. Also, there is the chance that the plaintiff’s attorney, in disclosing information he considers relevant, educates the opposing party as to the relevancy of certain evidence. Finally, there appears to be more work for the judge in determining what evidence was produced according to the rule, what evidence should have been produced, and what sanctions to apply for noncompliance with the rule, if any. From the plaintiff’s perspective, there is the increased chance that the litigation may be weighed down with dilatory motions.

Exhibit p. 5. CAOC does not express an opinion on optional pretrial disclosure or the use of an opt-in or opt-out system.

From the comments of both CAOC and CAJ, as well as the controversial history of the federal pretrial disclosure requirement, it seems likely that any study regarding use of pretrial disclosure in California would generate extensive debate. The Commission should not lightly dismiss CAJ’s recommendation to explore this area. But the Commission definitely should **proceed with caution if it decides to proceed with regard to pretrial disclosure at all**. A reasonable option would be to delay consideration of the topic until there has been experience with the newly amended version of Rule 26(a), as well as greater experience with the variants of pretrial disclosure being used in other states.

Narrowed Discovery Relevance

Code of Civil Procedure Section 2017(a) permits discovery regarding “any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” Until recently, the federal rule was essentially the same. It was recently amended, however, to limit discovery to “any matter, not privileged, that is relevant to the claim or defense of any party” Fed. R. Civ. Proc. 26(b). A few states also have narrower standards than California. Weber Study at 1061 [CLRC version at 10-12].

The Commission has not received any comments advocating the use of a narrower standard for determining discoverability. CAOC has made clear, however, that it would oppose any narrowing of the “relevant to the subject matter” standard. Exhibit p. 5. According to CAOC, such a step could “dangerously hinder the ability of plaintiffs to obtain discovery from defendants in product liability suits and environmental hazards cases.” *Id.* CAOC also warns of a potential for “increased judicial involvement and dilatory motions practice to discourage plaintiffs from maintaining the case against the defendant.” *Id.*

In light of these objections, and the apparent lack of any support, **it probably would not be fruitful to consider narrowing the scope of discovery.**

Discovery Planning and Judicial Control Over Discovery

“No California statute or rule requires mandatory discovery planning by the parties or discovery supervision by the courts.” Weber Study at 1062 [CLRC version at 12]. The only provision that addresses discovery planning at all is California Rule of Court 212, which pertains to *optional* case management conferences in general. *Id.* at 1065 [CLRC version at 15]. Professor Weber comments that “California’s optional, nonstatutory, vague discovery planning rule deserves closer review.” *Id.*

CAJ concurs in this assessment. Exhibit pp. 14-16. CAJ urges the Commission to consider the possibility of holding “an early meeting of counsel to discuss discovery, limitations on discovery, and stipulations in lieu of discovery, as appropriate to the issues and facts in the case.” *Id.* at 13. The early meeting of counsel may be “made either mandatory or optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.” *Id.* at 15-16. CAJ sees clear benefits to holding such a meeting:

A major advantage to such a meeting is that it provides counsel the opportunity to meet and talk face-to-face before disputes arise and temperatures rise. It also can allow counsel to better plan their schedules over the coming months, and provide greater predictability. It can lead to stipulations on factual issues in lieu of discovery, and to agreement on the appropriate limitations (or lack of limitations) on written discovery or depositions, as appropriate to the case and resources of the parties. Finally, it is an opportunity to discuss settlement before many litigation costs are incurred. The main — and perhaps only — drawback to requiring an early meeting of counsel is that it may take an hour or more of counsel's time. In our opinion, this may be a case of an ounce of prevention being better than a pound of cure, given that the hour spent may save many more hours further down the road.

Id. at 14-15.

CAJ further recommends that the early meeting of counsel “be followed by a joint report and an early meeting with a judge or judicial officer, who would make appropriate orders governing discovery on matters on which the parties disagree.” *Id.* at 13. Preferably, the same judge or judicial officer should manage all pretrial proceedings in the case. *Id.* at 16. Such judicial involvement would be consistent with the modern trend, in which courts increasingly “have taken a more active role in discovery management.” Weber Study at 1067 [CLRC version at 16].

But CAOC has strong reservations about that approach. In CAOC's view, “[i]ncreasing the role of the judiciary and adding provisions invoking judicial control of discovery are not economically efficient or timely.” Exhibit p. 6. “Making the judge the referee for discovery is potentially costly, and discovery is often the most expensive part of a plaintiff's litigation.” *Id.*

CAOC also opposes mandatory discovery planning. “In practice, members of Consumer Attorneys have found that this requirement is often a procedural morass.” *Id.* According to CAOC, the optional case management conference authorized by California Rule of Court 212 is sufficient, and the law does not need to be changed. *Id.*

This appears to be another example of a potentially controversial area. As with pretrial disclosure, **the Commission should be cautious about committing resources to mandatory discovery planning or increased judicial control over discovery.** With respect to either of these approaches, the Commission could

expend a lot of effort developing a proposal, only to encounter insurmountable opposition in the Legislature.

Certification of Compliance and Other Reforms Relating to Sanctions

Under Rule 11 of the Federal Rules of Civil Procedure, every pleading or other paper presented in a case must be signed by the attorney or party, who thereby certifies essentially that it is presented in good faith. Rule 11 does not apply to papers prepared in connection with discovery requests, but Rule 26(g) is a similar requirement applicable to disclosure and discovery. Under Rule 26(g)(1), the signature of an attorney or a party on a disclosure “constitutes a certification that to the best of the signer’s knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.” Similarly, the signature of an attorney or a party on a discovery request, response, or objection certifies that

to the best of the signer’s knowledge, information and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Rule 26(g)(2). Sanctions are mandatory for violation of the rule without substantial justification. Rule 26(g)(3).

California has adopted a provision like Rule 11 (Code Civ. Proc. § 128.7), but it has no equivalent of Rule 26(g). Prof. Weber explains this situation in his background study, but does not express a view on whether California should follow the federal approach regarding certification of papers relating to discovery. Weber Study at 1065-67 [CLRC version at 15-16].

CAOC would oppose such a step. Exhibit p. 6. CAOC cautions that in many cases a certification requirement for discovery would be used by defense counsel “to intimidate plaintiff’s attorney during the discovery process.” *Id.* In CAOC’s view, the rule would add “yet another available measure by which defense

counsel may make the plaintiff justify discovery requests, or otherwise be subject to sanctions.” *Id.*

Joseph Hurley expresses similar sentiments regarding the prospect of tightening existing provisions relating to sanctions in connection with discovery. He explains that in working on the Civil Discovery Act of 1986, he and United States Magistrate Judge Wayne Brazil engaged in a “titanic battle” over the use of sanctions. Exhibit p. 10. Judge Brazil advocated liberal use of sanctions, punishment and penalties, but Joseph Hurley “won the debates and [the resultant] report was far less hazardous to practitioners than Brazil desired.” *Id.* Mr. Hurley warns that the “mania for sanctions proceeds today with vigor.” *Id.* He is convinced that strengthening the existing sanctions would not solve anything. As he puts it, “[i]f you haven’t been able to solve the problem with the ‘judicial’ control you have had and all the mandatory stuff you have imposed, it is unlikely that the further application of this good medicine will do anything other than what burning his feet and bleeding his veins did for ailing George III.” *Id.*; see also Exhibit p. 11.

In contrast, CAJ recommends that the Commission “pursue a stronger sanctions regime.” Exhibit p. 13. According to CAJ, “the current sanctions regime does not generally sanction what has become routine gamesmanship, but only sanctions conduct in the most egregious cases and only after the non-offending party has incurred great costs.” *Id.* at 19. CAJ urges increased use of evidentiary and issue sanctions. *Id.* “These two punitive remedies would certainly encourage counsel to avoid discovery disputes.” *Id.* Where a court is reluctant to impose such sanctions, CAJ advocates the use of monetary sanctions that are “set to punish,” not limited to the cost of moving for appropriate relief. *Id.* “CAJ also believes that discovery sanctions over a certain monetary threshold should be referred to the State Bar for further investigation to determine counsel’s ethical and professional conduct in the matter.” *Id.* CAJ does not express an opinion regarding adoption of a certification requirement like Rule 26(g).

Again, it is clear that the use of sanctions is a contentious topic. It might be very difficult for the Commission to make any revisions in this area. The Commission should not ignore CAJ’s suggestions, but should **realistically assess whether it makes sense to devote resources to analyzing sanctions and certification requirements further.**

Presuit Discovery

Under specified conditions, Code of Civil Procedure Section 2035 permits a person who expects to be a party to a California lawsuit to preserve testimony via deposition, inspection demand, or medical examination. Prof. Weber points out that the text of this provision on pre-lawsuit preservation of testimony “is ambiguous and could be improved.” Weber Study at 1071 [CLRC version at 20]. For example, Section 2035(g) states that a deposition to perpetuate testimony may be used if the deposition was taken pursuant to Section 2035, “or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation.” The provision “does not clarify whether the deposition must have been taken under the laws of the state in which it was taken, or just ‘another state.’” Weber Study at 1071 [CLRC version at 20]. Prof. Weber also points out other possible clarifications of the statute. *Id.* at 1071-72 [CLRC version at 20-21].

The Commission has not received any comments regarding the possibility of clarifying Section 2035. **This may be an area in which the Commission could productively achieve a modest reform.**

Work Product Privilege

In its study of *Electronic Communications and Evidentiary Privileges*, the Commission considered studying whether to revise the work product privilege (Code Civ. Proc. § 2018) to accommodate electronic communications. Memorandum 2001-29, pp. 17-18 & Exhibit pp. 5-7. The Commission decided to address that matter in its study of civil discovery. Minutes (May 2001), p. 15.

Prof. Weber has also identified a number of possible innovations relating to the work product privilege. Weber Study at 1073 [CLRC version at 22]. The Commission has not received any comments regarding these approaches.

A recent bill clarified the extent to which a court may require disclosure of material for the purpose of evaluating whether the material is protected by the work product privilege. AB 223 (Frommer), 2001 Cal. Stat. ch. 812, § 13 (amending Evid. Code § 915). That reform was relatively noncontroversial, suggesting that **it might be worthwhile to examine possible reforms of the work product privilege, on a low priority basis.**

Regulating Discovery Through Judicial Council Rules: AB 1767 (Papan)

A pending bill would repeal existing provisions governing civil discovery (Code Civ. Proc. §§ 2016-2036). The repeal would be operative only upon

adoption by the Judicial Council “of rules governing discovery in civil actions for inclusion in the California Rules of Court.” AB 1767 (Papan). The bill is set for hearing in the Assembly Judiciary Committee on April 14. The Judicial Council has not taken a position on the bill.

By email, Commissioner Best inquired whether the Law Revision Commission had a position on this bill. Email from R. Best to B. Gaal (Feb. 18, 2002). The Commission is, however, forbidden by statute from taking positions on proposed legislation. Gov't Code § 8288. The Commission does not even lobby for its own proposals, only explain those proposals as needed. Thus, the Commission cannot take a position on AB 1767.

But the Commission has previously been asked to study the concept of transferring the power to prescribe rules governing judicial procedure from the Legislature to the Judicial Council. See Memorandum 98-56, pp. 15-17; First Supplement to Memorandum 98-56, p. 2. The Commission decided not to undertake such a study. The staff's recollection is that the project did not seem to be a good use of the Commission's resources, because it appeared unlikely that the Legislature would be interested in ceding rulemaking power to the Judicial Council.

Commissioner Best also asked whether the Commission intended to defer action on this study pending the fate of AB 1767. Email from R. Best to B. Gaal (March 20, 2002). The staff would not take such a step at this time, because enactment of the bill seems unlikely. If the situation changes and enactment of AB 1767 appears more probable, we will alert the Commission. For now, **the staff recommends that the Commission proceed with its study while Prof. Weber's background study is current.**

The Commission should be aware, however, that in many states civil discovery is governed by court rules, not by legislation. The staff could prepare background material on this, if the Commission determines that such research would be useful.

Establishing a Permanent Body to Study and Revise Discovery Procedures

Commissioner Best proposes an approach similar to AB 1767. He suggests that the Commission consider “establishing a standing committee or commission with specific, expedited, discovery rule making authority including the power and procedure to adopt form discovery over a 3 to 6 month period.” Exhibit p. 1. This body “would be charged with the continual review and refinement of rules,

authorized to adopt and amend rules subject to legislative veto, and obligated to hold periodic public meetings throughout the state where lawyers would be encouraged to propose new rules or improvements to existing rules.” *Id.* In Commissioner Best’s opinion, such a commission “should represent all segments of the litigation community.” *Id.* That would be somewhat different than the Judicial Council, which is dominated by the judiciary. Cal. Const. art. VI, § 6.

Commissioner Best does not explain why such a system would be preferable to the existing division of responsibility regarding civil discovery, in which the basic framework is established by statute and the details are governed by Rules of Court and Judicial Council forms. As with AB 1767, the staff suspects that there may be considerable resistance to divesting or diminishing the Legislature’s control over civil discovery. Making the actions of the rulemaking body subject to legislative veto, as Commissioner Best suggests, may mitigate these concerns to some extent. But any effort to establish such a body would require a compelling explanation of the advantages and a clear expression of interest by the litigation community. **We are reluctant to pursue this concept until such support is evident.**

Access to Information Regarding a Defective Product or Environmental Hazard, or Regarding the Conduct of Governmental Business

A number of pending legislative proposals are intended to enhance access to information pertaining to a defective product or environmental hazard. SB 11 (Escutia), AB 36 (Steinberg); see also AB 1981 (Simitian). Similarly, SCA 7 (Burton) would establish that access to information concerning the conduct of governmental business “is a fundamental and necessary right” of every Californian.

These “sunshine” proposals are politically volatile, as evidenced by the lists of opposition and support in the analyses of SB 11, AB 36, and the predecessor of AB 1981 (AB 881 (Simitian)). In late 1998, the Commission sought guidance from the Legislature regarding whether to study a related “sunshine” topic: the use of confidential settlements. As chair of the Assembly Judiciary Committee, Sheila James Kuehl (now a state senator) warned the Commission to be cautious about undertaking such work:

The Commission has established a well-deserved reputation over the years of providing the Legislature with objective analyses on relatively non-controversial but important legal issues. I have seen the presumption by my colleagues that if it is a “Commission” bill

or study, it is not only meticulously researched and developed, but is also not an issue that is considered to be very controversial. I would be concerned that a study of this conflicted issue might inadvertently threaten this perception of the Commission's generally non-controversial work in other areas, or at least make the non-political nature of the Commission's work, and its traditional mandate, less clear to policy-makers.

I therefore would urge the Commission to consider carefully the potential political dynamics that might arise in the study of this difficult but important subject in weighing whether, and where, this issue should fall in the Commission's purview.

Memorandum 99-23, Exhibit pp. 1-2.

In light of these concerns, the Commission **probably should not attempt to address any "sunshine" issues, unless the Legislature specifically requests assistance in that regard.**

Deadline for Motion to Compel

In an email message sent before Prof. Weber completed his background study, attorney Scott Bonagofsky pointed out that California's deadlines for motions to compel (Code Civ. Proc. §§ 2025(o), 2030(l), 2031(m), 2033(l)) are relatively short. Exhibit p. 2. He urged the Commission to consider replacing those deadlines with longer deadlines such as those used in the United States District Court for the Northern District of California. *Id.*

He explained the advantages of that approach:

Under the state rule, a party may make a determination at the beginning of a case not to file a motion to obtain a further response on a discovery request that seems only marginally important at the time. Later, when facts are fleshed out and the need for the particular information becomes more apparent to the propounding part, it is usually too late to ask for more information on the same topic, using the same discovery device. ...

Under the N.D. Cal. local rules, which provide a much longer deadline for moving to compel information, this problem almost never arises (unless a litigant truly waits until the last minute to compel further discovery), and even then, I do not believe that the deadline is "quasi-jurisdictional," as it is under the state rule. The federal rule is the much better rule, since it prevents parties from hiding behind an arbitrary deadline in the hope that an unwary opponent will not realize that they really do need a better answer than they were given.

The federal rule also avoids the constant barrage of telephone calls and letters seeking extensions of deadlines for motions to compel, which results in lower fees for the litigants. The federal rule also results in smaller motions, since the moving party does not need to attach the writing extending the deadline to a declaration to prove to the Court that he hasn't blown the deadline.

Id.

This idea regarding the deadlines for motions to compel seems worth investigating further. It might also be appropriate to attempt to eliminate an ambiguity regarding the deadline for a motion to compel answers to deposition questions (i.e., whether the motion is “made” when notice of the motion is given, or not until the motion is heard). See R. Weil & I. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial, Discovery* § 8:801.1, at 8E-94 to 8E-95 (2001).

DEPOSITIONS

The Commission received a number of comments relating specifically to depositions. The possible reforms addressed in these comments are discussed in the same order as in the background study.

Presumptive Limits on the Number of Depositions

The number of depositions that may be taken in a case differs depending on whether the case is an unlimited civil case or a limited civil case.

Unlimited civil cases

California places no limit on the number of depositions that may be taken in an unlimited civil case, but each witness who is a natural person may be deposed only once. Code Civ. Proc. § 2025(t). In contrast, under federal procedure the number of depositions is presumptively limited to ten per side. Fed. R. Civ. Proc. 30(a)(2)(A). Some states have stricter limits. Weber Study at 1075 [CLRC version at 23-24].

The Commission has received no comments urging adoption of a presumptive limit on the number of depositions in an unlimited civil case. CAOC explains that such limits “are not necessary.” Exhibit p. 7. “While current California law places no presumptive limits on the number of depositions or the number of hours of deposition each side can take, any duplicative or unreasonable requests may be reviewed and decided on by the court.” *Id.*

Because there appears to be no perceived need for a presumptive limit on the number of depositions in an unlimited civil case, **we recommend against pursuing such a reform.**

Limited civil cases

Before Prof. Weber completed his background study, attorney Christine Wilson contacted the Commission regarding Code of Civil Procedure Section 94(b), under which a party in a limited civil case can take only one oral or written deposition as to each adverse party. A case may be withdrawn from this restriction and the other limitations of economic litigation procedures only on noticed motion and a showing “that it is impractical to prosecute or defend the action within the limitations of these provisions.” Code Civ. Proc. § 91(c). Ms. Wilson seeks clarification of how the “one deposition” rule in limited civil cases applies where there is a deposition of a “person most knowledgeable” on a particular subject. Exhibit p. 20.

“Specifically, the question is, under the ‘one deposition’ rule, if a deposition of an entity is set to testify on a number of subjects, must the entity produce several individuals if no one person is knowledgeable in all areas?” *Id.* “Or, are they required only to produce one person even if that individual knows nothing about some of the subject areas?” *Id.* Ms. Wilson reports that this issue “has come up in more than one case in our office, but because these are small cases and are limited civil, the issue will never make it to the Court of Appeal.” *Id.* She urges the Commission to draft legislation eliminating this ambiguity.

This seems like an issue that the Commission could effectively address. Providing guidance on how the “one deposition” rule applies in this situation may be very helpful, because the issue is recurring but litigating it is prohibitively expensive in the cases in which it arises.

Presumptive Limits on the Length of Depositions

In California, there is no limit on the length of a deposition. Under federal law as recently amended, however, a deposition is presumptively limited to “one day of seven hours.” Fed. R. Civ. Proc. 30(d)(2). Some states have different limits. Weber Study at 1075-56 [CLRC version at 24].

CAOC states that a presumptive limit on the length of a deposition would be “an advantage to all parties.” Exhibit p. 7. CAOC explains that the limit should be “rebuttable in cases in which more time is justified.” *Id.*

Given CAOC's support for the idea, and the lack of any opposition expressed thus far, we suggest that the Commission **further explore the concept of a presumptive limit on the length of a deposition.**

Deposition Scheduling

Under Code of Civil Procedure Section 2025(b), a defendant "may serve a deposition notice without leave of court *at any time* after that defendant has been served or has appeared in the action, whichever occurs first." (Emphasis added.) But a plaintiff may not take a deposition without leave of court until "20 days after the service of the summons on, or appearance by, any defendant."

CAOC suggests reconsidering the present hold placed on plaintiffs before they may take depositions. According to CAOC, a "twenty-day hold in which the defendant may schedule and take depositions removes the parity from the deposition practice." Exhibit p. 7.

The staff suspects that any proposal to revise the current twenty-day hold may encounter fierce resistance from defense groups, who would argue that the hold is necessary to prevent a plaintiff from deposing witnesses before the defendant has had time to obtain counsel and investigate the plaintiff's allegations. It does seem unfair, however, for a defendant to take depositions when the plaintiff cannot.

Perhaps the twenty-day hold should be modified to become inapplicable if the defendant serves a deposition notice. Such an approach might present complications in cases involving multiple defendants, but these may not be insurmountable. Another possibility would be to impose the twenty-day hold on both defendants and plaintiffs.

It might be worthwhile to investigate these options further, although the staff is concerned that a reform along these lines would prove controversial.

Depositions By "Remote Electronic Means" or Other New Technology

CAOC "supports the availability of depositions by remote electronic means, including teleconferencing." Exhibit p. 7. As CAOC points out, however, recently enacted legislation (AB 223 (Frommer), 2001 Cal. Stat. ch. 812, § 9.6) addresses this point. See Code Civ. Proc. § 20259(h)(3). It may not be necessary to take any further action in this area. The Commission should **not devote resources to the area unless a need appears.**

Audio and Video Recording of Depositions

CAOC supports “the use of a video recording by a member of the staff of either attorney, should the deposition also be stenographically recorded.” Exhibit p. 7. CAOC explains that “[a]llowing either party to produce and reproduce the videotape would be an economic advantage for both parties.” *Id.*

The staff would like to hear more about this proposal from CAOC and other interested parties. In particular, we would like to know more about how the proposed approach would work, why it would be advantageous, whether it would entail any disadvantages, and what impact it would have on court reporters.

A pending bill authored by the Commission’s Assembly member Howard Wayne (AB 421) appears to involve similar issues. The bill would amend the portion of Code of Civil Procedure Section 2025 that governs audiotaping or videotaping a deposition. Under the existing provision, the operator of equipment used to audiotape or videotape a deposition must be competent to use the equipment. That requirement would remain intact. Existing law further provides, however, that

The operator may be an employee of the attorney taking the deposition unless the operator is also the deposition officer. However, if a videotape of deposition testimony is to be used under paragraph (4) of subdivision (u), the operator of the recording equipment shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions.

Code Civ. Proc. § 2025(l)(2)(B). Assemblyman Wayne’s bill would revise that portion of the statute as follows:

~~The operator may be an employee or independent contractor of the attorney taking the deposition unless the operator is also the deposition officer. However, if a videotape of deposition testimony is to be used under paragraph (4) of subdivision (u), the operator of the recording equipment shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions~~ The attorney who selects the operator of the recording equipment shall make a

copy of the audiotape or videotape at the actual and reasonable cost of reproduction for all parties that request and pay for a copy.

The bill is pending in the Senate Judiciary Committee.

Because he is carrying this bill involving similar issues, Assemblyman Wayne may have insight into the merits and viability of the approach that CAOC proposes in its letter to the Commission. **Input from him or from other sources would be helpful in evaluating CAOC's proposal.** We might also gain pertinent information by tracking another pending bill, AB 2841 (Harman), which would make various minor reforms relating to audio and video recording of depositions.

INTERROGATORIES

Only a few suggestions pertain to the use of interrogatories:

Presumptive Limits on Number of Interrogatories

Under Code of Civil Procedure Section 2030(c), a party may propound 35 specially prepared interrogatories and any number of official form interrogatories. A party may, however, propound more than 35 specially prepared interrogatories without court approval, if the party attaches a "Declaration for Additional Discovery" to the additional interrogatories. The content of the "Declaration for Additional Discovery" is specified in the statute. If the responding party believes that the additional interrogatories are improper, it is up to that party to seek a protective order but at the hearing on the protective order the propounding party bears the burden of justifying the number of interrogatories.

"At the time of its enactment, section 2030(c) of the California Code of Civil Procedure was on the leading edge of attempts to rein in abusive interrogatory practice." Weber Study at 1090 [CLRC version at 38]. Prof. Weber reports, however, that now "the provision is easily the weakest of the efforts to end interrogatory abuse." *Id.* at 1090-91 [CLRC version at 38].

CAJ echoes that assessment and urges the Commission to "pursue changes to the CCP to strengthen presumptive limits on the number of interrogatories." Exhibit p. 13. CAJ reports that many, if not all, CAJ members have found that the "Declaration for Additional Discovery" has "essentially become meaningless and is often abused by some counsel to propound huge numbers of interrogatories largely for the purpose of harassing opposing counsel." *Id.* at 18. A majority of

CAJ members favor refinements of the existing rule, such as requiring the propounding party to certify “*specific reasons why there is good cause to exceed 35 interrogatories*” and allowing the responding party to object to the additional interrogatories instead of seeking a protective order. *Id.* (emphasis in original). A minority of members suggest more radical reforms, such as permitting additional interrogatories “only on a motion, after a meet and confer, or by stipulation.” *Id.* at 18 n. 5.

Based on the information currently available, **the staff believes that these suggestions warrant further exploration.** Answering interrogatories is costly, because it requires considerable attorney time. The attorney cannot simply forward the interrogatories to the client to answer, because the client generally does not understand the legal ramifications of the response and the need for extreme care in preparing a response that is accurate yet protects the client’s interests within the bounds of law. But the attorney must learn the facts from the client before drafting a response. It takes time to ensure that the client provides the proper information and that the attorney properly understands that information. These efforts and the concomitant expense are warranted if the opponent needs the information sought. But parties should not be able to force their adversaries to engage in expensive busywork by propounding excessive interrogatories.

Duty to Automatically Supplement Information in Initial Response

Under federal law, a party “is under a duty seasonably to amend a prior response to an interrogatory ... if it learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. Proc. 26(e)(2). A number of other states have adopted this requirement, but California has not. Weber Study at 1072 [CLRC version at 21]. Instead, California requires a party to send a supplemental interrogatory if the party wants to be sure that it has the most current answer. Code Civ. Proc. § 2030(c)(8). “This provision was evidently adopted in 1986 with some thought, as it was contrary to the then-longstanding federal practice.” Weber Study at 1072 [CLRC version at 21]. Prof. Weber believes that “California should revisit this provision” as part of any reevaluation of the state’s discovery law. *Id.*

The Commission has received no comments regarding this point. **We would investigate it further, as Prof. Weber recommends.**

Supplemental Interrogatory After Continuance of Trial Date

Before Prof. Weber completed his background study, the Commission received a suggestion from attorney Richard Haeussler regarding supplemental interrogatories. Mr. Haeussler urged that Code of Civil Procedure Section 2030(c)(8) “be amended to provide that if the trial date in a matter is continued for more than 120 days, that ... party may send as a matter of right a supplemental interrogatory to update the information.” Exhibit p. 8. According to Mr. Haeussler, this “would get away from the requirement that a party would have to make a motion as provided for now.” *Id.* Mr. Haeussler also suggests a restriction on the timing of the supplemental interrogatory. *Id.*

If the Commission decides to study Prof. Weber’s suggestion regarding automatic supplementation of interrogatory responses, **it should consider the pros and cons of alternative approaches, such as Mr. Haeussler’s proposal.** In doing so, however, the Commission should be aware that CAJ and the State Bar Litigation Section already analyzed the proposal in 1997-98. CAJ members had split views: CAJ North opposed the proposal and CAJ South approved it. The Litigation Section concluded that the Board of Governors should take no action regarding the proposal but should oppose the proposal if it did take action. The Litigation Section prepared a detailed explanation of its position, which the Commission should examine if it gets into this area. CAJ’s comments are less extensive but might also be helpful.

INSPECTION DEMANDS

Two points are worth mentioning regarding inspection demands:

CAOC’s Position on Limiting Document Inspection

The Commission has received only one comment pertaining specifically to inspection demands: A short but clear statement of CAOC’s position. “Consumer Attorneys would object to any limitation upon the right to inspection of documents.” Exhibit p. 7.

No such limitation has been proposed to the Commission. Given CAOC’s position, and the apparent lack of interest in limiting document inspection, **the Commission should direct its attention elsewhere.**

Duty to Automatically Supplement Information in Initial Response

As with interrogatories, California does not impose an automatic duty to supplement a response to a document request when additional responsive documents are obtained. Code Civ. Proc. § 2031(e). The federal rule is otherwise. Fed. R. Civ. Proc. 26(e)(2). Like the rule pertaining to interrogatories, **California's rule on supplementing a response to a document request may warrant reexamination.**

MEDICAL EXAMINATIONS

With regard to medical examinations, CAOC expresses concern regarding “the increasing practice of defendants to use the defense IME as a second deposition of the plaintiff.” Exhibit p. 7. CAOC explains that “[s]afeguards must be in place to protect patients from doctors who use the examination process to elicit information about the cause of the action and other information irrelevant to a medical examination.” *Id.* CAOC does not suggest specific reforms in this regard.

It would be helpful to have more information about this problem and possible means of addressing it. Prof. Weber points out that Arkansas and Pennsylvania have provisions prohibiting ex parte contacts between a party and another party's physician. Weber Study at 1095-96 [CLRC version at 42]. Perhaps this is one step that could be taken to address CAOC's concern.

ADMISSION REQUESTS

In an email message to the staff, Commissioner Best asked whether anyone was evaluating the effectiveness of requests for admissions “with the idea of eliminating them altogether.” The staff replied that we were not aware of any discussion along those lines, but the Commission would be interested in hearing any ideas Commissioner Best had. We have not heard anything further on this subject. If we receive a proposal or other comments regarding requests for admissions, we will bring this to the Commission's attention. **At this point, there is no concrete proposal for the Commission to evaluate.**

EXPERT WITNESS INFORMATION

Under specified circumstances, Code of Civil Procedure Section 2034 permits any party to demand exchange of information about expert witnesses. “This

exchange occurs only if demanded by some party to the case, but if any party demands it, then all parties must comply.” Weber Study at 1097 [CLRC version at 43].

In contrast, federal courts require automatic exchange of expert witness information. Fed. R. Civ. Proc. 26(a)(2). Some state courts have also adopted this approach. Weber Study at 1097 [CLRC version at 43].

The only comment on this point is from CAOC, which “would object to mandatory disclosure as it would simply cost more money.” Exhibit p. 7. Because the Commission has only received negative input regarding automatic exchange of expert witness information, it should **focus its attention on other reforms**.

NONSUBSTANTIVE REFORM

The provisions in the Discovery Act are generally well-organized, but some of them are extremely long. For example, Code of Civil Procedure Section 2025 now consists of subdivisions (a)-(v), most of which are divided into paragraphs and some of which are even divided into subparagraphs. A pending bill to amend the provision is 22 pages long, but the bill as would only add 3 words to one sentence, delete the next sentence, and replace it with a new sentence. AB 421 (Wayne), as amended Jan. 28, 2002. Other provisions are also lengthy (e.g., Code Civ. Proc. §§ 2020, 2030, 2031, 2032, 2033, 2034). This suggests the possibility of a nonsubstantive reform in which the long sections are divided into short sections that are grouped together in an article.

For example, the substance of Section 2025 could be placed in an article entitled “Oral Depositions,” which would consist of a series of sections numbered as Sections 2025.010, 2025.020, etc. This approach would require relabeling of some of the headings in Title 3 of Part 4 of the Code of Civil Procedure, but that does not appear difficult. Retaining the familiar section number (2025) with a decimal ending would help overcome the usual resistance to renumbering of code provisions.

Such reform would conform to the drafting principle that short sections are preferable to long ones. That principle was endorsed long ago by the California Code Commission, and has since been approved by the Legislature, Legislative Counsel, and the Law Revision Commission. See *Drafting Rules and Principles for the Use of California Code Commission Draftsmen* (hereafter, “Drafting Rules

and Principles”), at 4; Joint Rule 8; Legislative Drafting Manual (1975), at 26-28; First Supplement to Memorandum 85-64. As the Code Commission explained:

In our codes we endeavor to break up the law into comparatively short sections. The primary purpose of this is to facilitate subsequent amendment and to reduce the length of amendatory bills which must conform to the constitutional requirement that the section amended must be set forth at length.

Drafting Rules and Principles, at 4. This is not just a matter of saving trees and sparing legislators, consultants, lobbyists, and other interested persons from reviewing material unrelated to a proposed reform. It also leads to better legislation, because short sections facilitate insertion of new statutory material, promoting clear and straightforward drafting as opposed to confusing and convoluted provisions. Perhaps even more importantly, short sections enhance readability for courts and practitioners, assisting them in interpreting and following the law.

The staff could prepare a draft of such a nonsubstantive proposal if the Commission is interested. We would like to hear what the participants in this study think of this idea.

NEXT STEP

The Commission needs to determine its priorities, goals, and process for conducting this study. In particular, it needs to decide whether it wants to explore any of the above innovations in greater depth.

In reviewing the discovery rules, the Commission’s goal should be to provide each party with fair and sufficient access to the information that the party needs to assess and support its case, while streamlining procedures to eliminate unnecessary expense and thereby promote access to justice. The Commission should strive to identify and pursue reforms that hold the greatest promise for achieving these ends.

The Commission should also bear in mind that this is a highly politicized subject. While it may be intellectually or idealistically appealing to advocate dramatic reforms, the Commission should not waste its time, and the time of the participants in this study, by developing a recommendation that is not enactable.

The Commission should concentrate its scarce resources on areas in which it can be effective.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

RE Background Study: Potential Innovations in Civil Discovery
TO Law Review Commission
FROM Richard E. Best
November 24, 2001

In response to the Background Study: Potential Innovations in Civil Discovery and the invitation to comment from the Law Revision Commission, the following three specific proposals are made followed by general comments.

(1) Any proposed revisions to the Discovery Act should be based on statistical facts and consensus rather than anecdotes and the limited perspective of a few segments of the litigation community. The essential prerequisite to worthwhile legislation is fact finding and determining from litigators how, how often and why **they** [not other persons] abuse the discovery process. What measures do they believe should be adopted to control or deter **their** abuses or to improve the process. Is the discovery process considered a profit center for some?

(2) Any proposed revisions to the Discovery Act should, as to each proposal:

- . Identify the specific problem or need;
- . Propose a specific statute or rule to address that problem or need;
- . Show how the proposal will achieve its purpose;
- . Show how the issue has been addressed in the past, including case law and rules, and explain why that rule or approach has not worked;
- . Consider the adverse effects and consequences from the prospective of different types of litigants and litigation recognizing that one rules will apply to all; and
- . Provide the factual basis and statistics that supports the proposal

(3) The Law Review Commission should consider establishing a standing committee or commission with specific, expedited, discovery rule making authority including the power and procedure to adopt form discovery over a 3 to 6 month period. Such a commission should represent all segments of the litigation community. It would be charged with the continual review and refinement of rules, authorized to adopt and amend rules subject to legislative veto, and obligated to hold periodic public meetings throughout the state where lawyers would be encouraged to propose new rules or improvements to existing rules.

Since 1974, I have heard civil discovery motions in San Francisco Superior Court: under the new discovery act, the old discovery act, and various permutations along the way; under state rules, local rules and unwritten rules. I have read and briefed every California discovery case at least once. Most likely, I have heard more discovery motions than any person in the State of California. I have also heard lawyers and parties express their views on the system and the various rules from many different perspectives. Two

constants have emerged: discovery issues and abuses exist and everyone has an opinion on how the law could be changed. However, opinions alone do not justify change or its rejection.

My experience convinces me that most abuses and unnecessary expenses are attributable to the players --- lawyers, judges and parties --- rather than the rules. The rules can and should be improved but that will not be a panacea, just as it has not been in the past despite the hopes and hype that accompanied prior revision and reform. In the past, some changes have made significant contributions. In the late 70's, San Francisco Superior Court adopted a meet and confer rule that revolutionized the nature and extent of discovery motions made in that court. That rule was adopted on a statewide level in the California Rules of Court, Rule 222.1 and has been incorporated in the various motion provisions of the current Discovery Act. Even this simple and effective prerequisite to discovery has been abused by lawyers and neglected by judges. However, efforts should continue to be made to improve the discovery rules and to educate judges and lawyers. The most recent Judicial Council task force to study the subject concluded that fundamental change was not required but that the current system should be refined and improved as experience dictated.

Everyone has an opinion on the subject of civil discovery that is based on that person's personal experience and point of view. If polled, a majority would probably say that discovery is abused. If probed, most would admit their adversaries are guilty of abuse and that they have been deprived of legitimate discovery, though the obverse would not be conceded. Lacking is a clear identification of specific "abuses" that need to be remedied and of a consensus on exactly how particular practices, procedures or rules should be revised, eliminated, or perpetuated. The Law Revision Commission report illustrates the numerous approaches and variations on the basic discovery procedures that have been adopted during the past 40 years by various jurisdictions. Some seem better, some worse and some just different. None is a panacea. Many of the benefits sought, e.g. close court supervision and planning of discovery or automatic disclosures, are available under the existing laws but often not well known or employed by counsel or the courts. Most have been considered previously. Over the past forty years, many changes have been made to the discovery laws in California: some have been improvements some have not To avoid superficial or ineffective changes, specific problems need to be identified by consensus of the bench and bar and specific solutions to address those problems adopted.

Generally, discovery procedure should be neutral since all parties participate and are affected in much the same way. On that assumption some attempt should be made to determine exactly what lawyers conducting litigation need and want. Once that is determined, language can be drafted to reflect accurately the consensus of the trial bar. If not determined, any changes will be a gamble. As part of the process, it should be determined whether prior reform has been effective.

For example, is the limit of 35 interrogatories effective? Litigators and judges experienced in discovery should be polled to determine the consensus rather than proceed on unsupported assumptions.

- (1) Do most lawyers limit themselves to 35 special interrogatories?
- (2) Should the number be increased or decreased ?

- (3) Should the limit be eliminated or retained?
- (4) Does the current rule result in excessive discovery by interrogatory?
- (5) Does the current rule control excessive discovery by interrogatory?
- (6) Should the person seeking to serve more interrogatories be required to make a motion?
- (7) Is the current procedure of attaching a form declaration and requiring the opposing party to make a motion preferable to requiring the party seeking additional discovery to make the motion?
- (8) Are the standards to be applied by the court on a motion for additional discovery meaningful and clear?
- (9) On motion, have courts enforced the limit or ignored the limit?
- (10) On motion, have courts made meaningful and understandable decisions based on the unique needs of the case?
- (11) Should subparts be allowed but counted in the limitation?
- (12) Should definitions be limited?
- (13) What is the effect of prohibiting compound interrogatories or local rules?

The answers to such questions would at least assist in determining if the rule works and whether changes are desired by the bench and bar.

Of course, posing vague and meaningless questions will not provide any guidance. It is predictable that any survey will confirm that discovery is abused by opponents and results in excessive and unnecessary expense. Everyone will agree that reform to achieve cost effective discovery is a good thing.

In addition to evaluating the need and effectiveness of new rules, alternative rule making procedures should be considered and existing alternatives should be exploited. The Discovery Act is long and detailed but it can be supplemented where necessary for refinement or further clarification by California Rules of Court adopted by the Judicial Council. The Judicial Council is also charged in CCP §2033.5 with providing form interrogatories and admissions and that could be expanded to include document requests. Form discovery is a more precise alternative to a general disclosure rule that other jurisdictions do not have but it can be abused. Carefully drafted form discovery designed for specific types of litigation can be evaluated against specific criteria such as particularity of request or relevance to achieve the general goals that all agree should be pursued and applied to all discovery. Local rules have been prohibited by California Rule of Court 981.1 but that rule also prohibits experimentation and creativity. An exception might be considered for discovery under defined criteria. A permanent or long term body might be established and empowered to effectuate continual review and revision of the discovery procedures to achieve defined goals.

Richard E. Best

SBonagof@aol.com, 5/14/99

Discovery -- deadlines for motion

From: SBonagof@aol.com
Date: Fri, 14 May 1999
Subject: Discovery -- deadlines for motions to compel further responses
To: comment@clrc.ca.gov

To whom it may concern:

One proposal I would like the Commission to consider is removing the deadlines as they presently exist for motions to compel further responses to discovery, and adding new deadlines in line with the local rules of the U.S. District Court, Northern District of California (the FRCP does not appear to have any deadline at all for motions to compel further responses). Under federal law, a party is not limited to 45 days after the response to move to compel a further response.

Under the state rule, a party may make a determination at the beginning of a case not to file a motion to obtain a further response on a discovery request that seems only marginally important at the time. Later, when facts are fleshed out and the need for the particular information becomes more apparent to the propounding party, it is usually too late to ask for more information on the same topic, using the same discovery device. Professional Career Colleges, Magna Institute (1989) holds that a party cannot simply re-issue substantially the same interrogatory or discovery request seeking the same information at a later date, once the motion to compel date has passed.

Under the N.D. Cal. local rules, which provide a much longer deadline for moving to compel information, this problem almost never arises (unless a litigant truly waits until the last minute to compel further discovery), and even then, I do not believe that the deadline is "quasi-jurisdictional," as it is under the state rule. The federal rule is the much better rule, since it prevents parties from hiding behind an arbitrary deadline in the hope that an unwary opponent will not realize that they really do need a better answer than they were given.

The federal rule also avoids the constant barrage of telephone calls and letters seeking extensions of deadlines for motions to compel, which results in lower fees for the litigants. The federal rule also results in smaller motions, since the moving party does not need to attach the writing extending the deadline to a declaration to prove to the Court that he hasn't blown the deadline.

Thanks for your time,

Scott Bonagofsky
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Comment by Consumer Attorneys of California re: Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts

We appreciate the opportunity to comment upon Professor Weber's comprehensive review of California's civil discovery statutes. Our members are generally comfortable with the current state of California discovery law and practice. Members are concerned that a comprehensive rewrite of our discovery statutes would import uncertainty into the law until there is definite judicial construction. With that general concern in mind, we offer the following comments.

Mandatory pre-trial disclosure

While a mandatory pretrial disclosure is a good theory, the experience of our attorneys is that the plaintiff often faces the risk of having to prove his case on the evidence he presents at the outset of the case. Moreover, the plaintiff's burden to disclose is independent from the opposing party's compliance. The party failing to disclose may have an immediate advantage over the disclosing party. Furthermore, the scope of the disclosure requirements is not always clear. It is a great burden on the plaintiff to litigate the scope of disclosure requirements, as prolonged litigation over disclosure requirements may keep a potential plaintiff's attorney from accepting a case. Also, there is the chance that the plaintiff's attorney, in disclosing information he considers relevant, educates the opposing party as to the relevancy of certain evidence. Finally, there appears to be more work for the judge in determining what evidence was produced according to the rule, what evidence should have been produced, and what sanctions to apply for noncompliance with the rule, if any. From the plaintiff's perspective, there is the increased chance that the litigation may be weighed down with dilatory motions.

Narrowed discovery relevance

Members of Consumers Attorneys of California are opposed to the narrowing of the "relevant to the subject matter" standard. First, the narrowing of the scope of discovery could dangerously hinder the ability of plaintiffs to obtain discovery from defendants in product liability suits and environmental hazards cases. In such cases, where it is often not clear at the outset of the case exactly what went wrong, plaintiffs would fight an uphill battle to obtain relevant discovery. There is also

the potential of increased judicial involvement and dilatory motions practice to discourage plaintiffs from maintaining the case against the defendant. The same is true of the federal two-tier process for attorney-initiated and judiciary-initiated discovery.

Mandatory discovery planning

In practice, members of Consumer Attorneys have found that this requirement is often a procedural morass. Trying to coordinate the schedules of parties, judges, and witnesses is often very difficult. The increased judicial involvement oftentimes only serves to make scheduling more complicated. Currently under California law, California Rule of Court 212, there is already a mechanism for judicial requirement of case management conferences should they become necessary.

Certification of compliance

California should not adopt the requirement of a certification of compliance for all discovery filings, and the “substantial justification” necessary to defeat mandatory sanctions under such a rule. In many cases, this rule will be used by defense counsel to intimidate plaintiff’s attorney during the discovery process. This rule adds another yet another available measure by which defense counsel may make the plaintiff justify discovery requests, or otherwise be subject to sanctions.

Judicial control over discovery

California’s existing requirements of the pre-discovery “meet and confer” and the ability of the court to limit unreasonably cumulative or duplicative discovery leave room for the parties to negotiate case-specific discovery in good faith. Increasing the role of the judiciary and adding provisions invoking judicial control of discovery are not economically efficient or timely. Making the judge the referee for discovery is potentially costly, and discovery is often the most expensive part of a plaintiff’s litigation. Furthermore, removing the path of discovery from the discretion of the court with specific provisions in the rules is antithetical to the historical role of the judiciary in discovery. California’s present two-step discovery process has the advantage of allowing attorneys to control the discovery, but makes provisions for court intervention should it become necessary.

Deposition practice

While current California law places no presumptive limits on the number of depositions or the number of hours of deposition each side can take, any duplicative or unreasonable requests may be reviewed and decided on by the court.

Presumptive limits are not necessary. However, presumptive limits on length is an advantage to all parties, as long as time limits is rebuttable in cases in which more time is justified, like those identified in Professor Weber's article. Equally worth considering is the present "hold" placed on plaintiffs before they may take depositions. A twenty-day hold in which the defendant may schedule and take depositions removes the parity from the deposition practice. Consumer Attorneys also supports the availability of depositions by "remote electronic means," including teleconferencing. Legislation passed in 2001, AB 223 (Frommer) addresses the use of electronic discovery. In general, technological advancements may significantly decrease the costs of travel time presently necessary under California discovery law. Not present in Professor Weber's proposal, but one Consumer Attorneys feels is an advantageous revision, is the use of a video recording by a member of the staff of either attorney, should the deposition also be stenographically recorded. Allowing either party to produce and reproduce the videotape would be an economic advantage for both parties.

Inspection demands

Consumer Attorneys would object to any limitation upon the right to inspection of documents.

Medical examinations

Not mentioned in the study, but a common concern of Consumer Attorneys is the increasing practice of defendants to use the defense IME as a second deposition of the plaintiff. Safeguards must be in place to protect patients from doctors who use the examination process to elicit information about the cause of the action and other information irrelevant to a medical examination.

Expert Witnesses

Consumer Attorneys would object to mandatory disclosure as it would simply cost more money.

Richard L. Haeussler, 2/26/98

Suggested amendment to CCP 2030

From: "Richard L. Haeussler" <haeu@ix.netcom.com>
To: <RMurphy@clrc.ca.gov>
Subject: Suggested amendment to CCP 20309c) (8)
Date: Thu, 26 Feb 1998

I have previously suggested that CCP sec 2030(c) (8) be amended to provide that if the trial date in a matter is continued for more than 120 days, that a party may send as a matter of right a supplemental interrogatory to update the information.

This would get away from the requirement that a party would have to make a motion as provided for now.

The section would read

"..... Section 2024, once after the initial setting of a trial date. Provided however, that if any trial date is continued for 120 days or more, a party may propound an additional supplemental interrogatory to elicit any additional later acquired information bearing on all answers previously made by any party for each such continuance. However, on motion, for good cause [etc]..."

I would also suggest that the interrogatory would have to be served at least 75 days prior to the continued trial date, but do not know how you would put that in.

I hope that the Law Review Commission will consider my recommendation

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JOSEPH G. HURLEY
A LAW CORPORATION

JOSEPH G. HURLEY
DAVIA SOLOMON

Law Revision Commission
RECEIVED

JUL 26 2001

File: J-500

July 24, 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

Dear Barbara Gaal,

Justice Oliver Wendell Holmes said, "A page of history is worth a volume of logic." A number of years ago we held a large and authoritative convocation lasting over 18 months sought to revise the problems with California Discovery. It was balanced with plaintiff and defense lawyers, judges, Justice Eugene McCloskey, and a recently appointed Magistrate Wayne Brazil.

It was shepherded by a distinguished law professor (Jim Hogan?) from UC Davis. He later wrote a book about it. Following an exhaustive investigation, a compromise report was sent to the legislature. As a member of the States Judicial Council, I became the Supreme Court's appointee to that council. When the "sausage making" process in the legislature became law to all of us who knew what went on, it was a retching experience. The law never resembled what our commission, good intentions and compromises included, recommended.

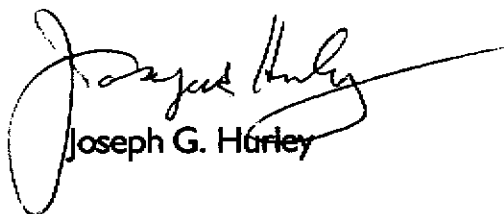
It appeared to most of us that the forces that dominate the legislature couldn't give a damn about what the lawyers, judges or public thought about the issue. That's the page of history that will smother Professor Weber and McGeorge, along with the Law Revision Commission.

My only notable memory from those vain efforts is a titanic battle with Wayne Brazil on one side and me on the other. Brazil thought that all of the evils of the processes of the administration of justice can be laid at the feet of practicing lawyers. His solution, like Draco's was sanctions, punishment and penalties.

I won the debates and our report was far less hazardous to practioners than Brazil desired. Those of us who left the battlefield early were convinced that the balanced result should serve us well. I always have suspected that Brazil lurked on the battlefield long after we departed. The mania for sanctions proceeds today with vigor. Your invitation for public comment describes, "innovations such as mandatory pretrial...etc., mandatory discovery planning...etc., good faith...etc. and increased judicial control".

As politely as I can I eschew the opportunity to comment further. If you haven't been able to solve the problem with the "judicial" control you have had and all the mandatory stuff you have imposed, it is unlikely that the further application of this good medicine will do anything other than what burning his feet and bleeding his veins did for ailing George III.

Sincerely,


Joseph G. Hurley

JOSEPH G. HURLEY
A LAW CORPORATION

JOSEPH G. HURLEY
DAVIA SOLOMON

Law Revision Commission
RECEIVED

AUG 10 2001

Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

File: J-500

Dear Ms. Gaal,

My reference to the distinguished Magistrate, Wayne Brazil, was not ad hominem, it was merely to signal to you that "sanctions" have produced no improvement in practice. Wayne thought it would. Others demurred. So now you need a new commission, lawyers are fleeing the practice, and we have even lower public esteem.

My remarks had another purpose. Raising the anticipation that the result of the commission's work will remedy some "evil" is naïve. All fair persons already know all the evils. The issues are clear, ten cooks or trash haulers can tell what is fair or useful.

The problem is that "evils" are "advantages" to whatever side has the money and power to cause the legislature to rewrite anything you submit. Do you think for a second that there is not already a ginned up phalanx watching everything you do even now? Why in heaven's name would the lobbyists snooze if your report could even threaten to "right some wrong beloved by their client's." We all know the "wrongs" but righting them is not the job of some commission. You cannot push through anything "they" don't want.

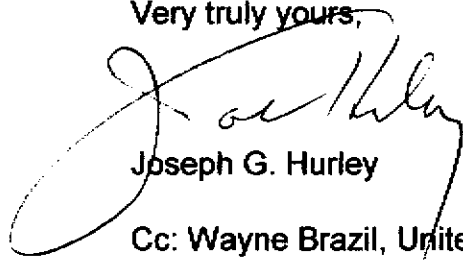
Today you buy margarine that looks like butter. Do you think we did not know how to make nice yellow margarine before? Of course, we did, but the butter-state senators held off generations and margarine remained a blob of white hydrogenated fat. Later then we were allowed little red capsules that we crushed and kneaded into the fat to color our butter substitute.

The ultimate power to shape discovery lies in the hands of those who watch every vote, pay every lobbyist, or contribute to every campaign. No one really needs help to know what is fair, just and efficacious which is what you will be aiming at. We simply have no practical means to import those sentiments into legislative or executive types *whose controlling agenda* is something else.

Didn't you marvel at how they could get all of those tobacco company executives to say under oath that they believed tobacco was not addictive? Well you can put the heads of all the executives of all the big companies on the bodies you saw, and they will say the law is fair, the courts just and reasonable and the playing field is level. (And if it isn't you can just bet they can make it so).

Kindest regards to Wayne and best of luck in your commission.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Joseph G. Hurley". The signature is written in black ink and is positioned above the printed name.

Joseph G. Hurley

Cc: Wayne Brazil, United States Magistrate Judge

MEMORANDUM

TO: California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: February 11, 2002

SUBJECT: Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts [Study J-500]

**COMMITTEE
POSITION:**

Recommend that the California Law Revision Commission ("CLRC") consider changes to the Code of Civil Procedure ("CCP") with respect to an early meeting of counsel to discuss discovery, limitations on discovery, and stipulations in lieu of discovery, as appropriate to the issues and facts in the case, to be followed by a joint report and an early meeting with a judge or judicial officer, who would make appropriate orders governing discovery on matters on which the parties disagree; early meetings of counsel may be made either mandatory or optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.

Recommend that the CLRC consider changes to the CCP with respect to initial disclosures; initial disclosures may be made either mandatory or optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.

Recommend that the CLRC pursue changes to the CCP that strengthen presumptive limits on the number of interrogatories.

Recommend that the CLRC pursue a stronger sanctions regime.

ANALYSIS

This Report is prepared by the Committee on Administration of Justice ("CAJ")¹ of the State Bar of California, in response to the Background Study by Professor Gregory S. Weber, "Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts," commissioned by the California Law Revision Commission ("CLRC"), which is referred

¹ CAJ is a diverse group of attorneys concerned with civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in the civil courts.

to herein as the "CLRC Background Study."² The CLRC has solicited comments on the Background Study, including whether any of the innovations employed by the federal courts or the courts of other states should be considered for implementation in California.

As a starting point, we would like to note that the current discovery regime works relatively well in many cases, and works best when counsel act professionally and in good faith. However, in the significant portion of cases where the discovery regime does not work, it can result in considerable hardship, burden, and expense. Such cases impose an undue financial burden on clients, detract from the practice of law, and fail to serve the process of resolving and trying cases on the basis of their merits.

Although the CLRC Background Study suggests many innovations, CAJ does not feel that the California discovery system as a whole requires major reconstruction. If the few areas are targeted where there is the most abuse, waste, and expense, the discovery system as a whole would improve. In discussing the issues raised by the CLRC Background Study, the various members of CAJ did not always agree. In general, opinions concerning a suitable rule were based on practice areas, and were not split along traditional plaintiff and defendant lines. The amount of discovery that is deemed appropriate tends to increase along with the size, complexity, and economic stakes of the litigation. CAJ members also believe that discovery abuse is driven, to a large degree, by individual personalities and practice styles. The system cannot, however, account for all cases and practice styles with an infinite variety of rules. The rules need to be flexible enough to accommodate the vast array of cases, and, at the same time, need to set some boundaries with mechanisms such as presumptive limits and sanctions. With this in mind, we turn to some specific suggestions that could ease the burden and expense of discovery, promote collegiality and professionalism, improve the practice of law in this state, and promote resolution of cases based on their merits.

1. The Early Meeting of Counsel

As the CLRC Background Study discusses, California does not require discovery planning. Both the federal courts and the courts of many other states require an early meeting of counsel to discuss the case and to plan discovery. In addition, when complex litigation is involved, many California judges require the parties to meet and discuss discovery planning and other issues.

A major advantage to such a meeting is that it provides counsel the opportunity to meet and talk face-to-face before disputes arise and temperatures rise. It also can allow counsel to better plan their schedules over the coming months, and provide greater predictability. It can lead to stipulations on factual issues in lieu of discovery, and to agreement on the appropriate limitations (or lack of limitations) on written discovery or depositions, as appropriate to the case and resources of the parties. Finally, it is an opportunity to discuss settlement before many litigation costs are incurred. The main — and perhaps only — drawback to requiring an early meeting of counsel is that it may take an hour or more of counsel's time. In our opinion, this

² The CLRC Background Study can be found at <http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-WeberDiscovery.pdf>.

may be a case of an ounce of prevention being better than a pound of cure, given that the hour spent may save many more hours further down the road. Another potential drawback is that, if the early meeting of counsel is held too early in the litigation — before all counsel have had the opportunity to evaluate their cases — it may simply be a useless exercise. It also is not likely to be of great use when counsel do not participate in good faith. Leaving it up to the parties to schedule the conference within 30-60 days after all defendants have appeared seems to take into account the concerns on both sides of this issue.

At least one study has found that the majority of counsel who participated in early meetings found that the process of meeting increased overall fairness and reduced overall litigation expense, time from filing to disposition, and the number of issues in the case. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev 525, 568 (1998) (“Willging et al., *An Empirical Study*”). We believe that in the majority of cases an early meeting of counsel could benefit all parties. We therefore recommend that the CLRC pursue changes to the CCP that would require an early meeting of counsel.

An early meeting of counsel would also be most useful if counsel were required to discuss the following issues:

- . Whether the case is complex and what procedures may be appropriate to its complexity (e.g., special masters, early exchange of expert information without waiver of work-product, management and numbering of documents, etc.).
- . Whether the case should be sent to mediation.
- . Prospects for early settlement.
- . Whether it is appropriate to “opt in” to the procedures provided for discovery in limited cases, or to “opt out” of any initial disclosure requirement that may ultimately be imposed, whether any other limits on discovery should be imposed, and whether any presumptive limits should be lifted (e.g., any limits on depositions or other discovery devices that may ultimately be imposed).
- . Whether discovery should be conducted in stages.
- . Preliminary scheduling of depositions, if any.
- . Any stipulations as to fact or as to scheduling that could streamline the litigation.

CAJ recognizes that an early meeting might not be appropriate in all cases. There is some concern, for example, that very small cases may not merit an early meeting of counsel. The CLRC should therefore consider whether early meetings should be made either mandatory or

optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.³

The early meeting of counsel needs to be followed up with a joint report that would be submitted to the court. Requiring discussion of a set list of matters and preparation of a joint report would create a procedural safeguard that encourages good faith participation on matters that can be resolved without court intervention, even if significant matters were to remain unresolved.

In some, if not all, cases, an early meeting should be followed by a status conference with a judge or judicial officer, preferably one who is appointed to manage all pretrial procedures for that case, to resolve significant issues or differences that are identified in the early meeting. Many counties have had case management systems to implement trial court delay reduction, but these systems have been inconsistent. Making them more uniform by rule in the discovery-related matters to be discussed and issues to be resolved will aid in resolving discovery issues without costly motions, and make law practice more uniform and predictable for practitioners who must increasingly travel between counties. The judge or judicial officer should be presented with the same list of issues that counsel were to discuss at the early meeting, be informed of any significant disagreements, and discuss those issues with the parties in the context of the issues in the case. The judge or judicial officer should either expressly reserve ruling on items on which there is disagreement, or make provisional orders regarding such matters as limitations on discovery, which would require a motion on good cause to supercede.

2. Required Initial Disclosures

Studies of initial disclosures have found that such disclosures generally decrease a client's overall litigation expenses, decrease time from filing to disposition, and increase overall fairness. Willging et al., *An Empirical Study*, *supra*, 39 B.C. L. Rev. at 562-63. In a subset of cases, initial disclosures were less effective: cases with high stakes, a high level of complexity, or contentious relationships between counsel. CAJ members who litigate in federal court have generally found the required initial disclosures to be very useful. On the other hand, some CAJ members are concerned that overbroad disclosure requirements would be detrimental to the adversarial process, and could intrude upon the attorney-client privilege and protected work product. CAJ members also expressed concern that early in some cases parties may not be fully informed of issues about which disclosure is required or know of all the documents or facts to be disclosed. Therefore, while we believe it would be beneficial to take the first steps towards requiring initial disclosures, initial steps in that regard should be carefully tailored and limited. Moreover, initial disclosures should not preclude parties from supplementing their disclosures as the issues become clearer, as long as this is done in a timely manner as the documents or facts become

³ As an alternative to a mandatory early meeting of counsel, provisions might be developed for allowing any party to request a discovery conference, where counsel could propose, or the court could require, a discovery plan suited to the particular litigation at hand. Usually counsel are on their best behavior in informal (or broadly structured) meetings with the court. Such meetings deter counsel from advancing positions they might otherwise advance.

available. It therefore would be useful to borrow from the seven-year long experiment in initial disclosures conducted by the federal courts, and use the current federal disclosure requirements as a starting point.

The following initial disclosures could greatly streamline the discovery process:

- The name, address and telephone number of each individual likely to have discoverable information that the disclosing party may use in support of its claims or defenses, unless solely for impeachment, identifying the subjects of the information (FRCP 26(1)(A));
- A copy of all documents, data compilations, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment (FRCP 26(1)(B));
- A computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based (FRCP 26(1)(B)); and
- A copy of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment (FRCP 26(1)(D)).

The timing of the initial disclosures should be relatively early in the case, ideally at or within a few weeks following any early meeting of counsel. Parties should be able, by stipulation and/or court order, to opt out of these required initial disclosures.⁴ Finally, while parties cannot, of course, disclose information they do not yet have, the CLRC should consider a rule that would permit courts to impose evidentiary sanctions if a party fails to make any required disclosure. Such a rule would permit supplementation of disclosures for items that clearly were not found or could not have been found or understood at an earlier time, but would establish a cut-off date for disclosures that influence central issues in the case. CAJ recognizes — as with the early meeting of counsel — that requiring initial disclosures might not be appropriate in all cases. The CLRC should therefore consider whether initial disclosures should be made either mandatory or optional, either generally or only in either unlimited or limited cases, perhaps with opt-in or opt-out provisions.

⁴ CAJ recognizes that there is some resistance to initial disclosures. Permitting counsel to opt out of the initial disclosures would allow the attorneys to select those cases where the disclosure process would not be good for whatever reason.

3. Strengthening Presumptive Limits on the Number of Interrogatories

Under the current rules, a party may propound only 35 special interrogatories *unless* the propounding party prepares a boilerplate Declaration for Additional Discovery, in which case there is no limit on the number of interrogatories a party may propound. Code of Civil Procedure section 2030(c). Under the current rule, a responding party who does not believe the declaration was made in good faith, and does not believe there are grounds for exceeding 35 interrogatories, cannot merely object (as in federal court) that the propounding party has exceeded the interrogatory limit, but has no recourse but to seek a protective order. Many — if not all — CAJ members have found that the declaration has essentially become meaningless and is often abused by some counsel to propound huge numbers of interrogatories largely for the purpose of harassing opposing counsel.

The majority of CAJ members believe that a modification of the current system would likely curb the worst abuses. Specifically, CAJ would like the CLRC to consider a system whereby a party may propound more than 35 special interrogatories if the party serves, with the interrogatories, a “Declaration for Additional Discovery” that certifies the *specific reasons* why there is *good cause* to exceed 35 interrogatories. In addition, CAJ would like the CLRC to consider an amendment to the Code of Civil Procedure whereby a party who believes that there is not good cause for exceeding the limit of 35 interrogatories can object to the excess interrogatories on the ground that there is not good cause to exceed the limit rather than having to bring a motion for a protective order. If the propounding party still believes that there is the need for more than 35 interrogatories, that party would then need to bring a motion to compel. A minority of CAJ members favor more radical change.⁵

4. Sanctions

The prior sections of this Report have dealt specifically with discovery provisions. The CLRC should also consider whether the perceived failures in California’s discovery scheme stem not from California’s discovery provisions, but the approach of counsel to discovery, and the lack of uniformity in enforcement.

One well-discussed approach to address any perceived failure is mandatory pre-trial disclosure. The problems are discussed in the CLRC Background Study. One party’s failure to

⁵ For example, in the economic litigation provisions dealing with discovery, Code of Civil Procedure sections 93 to 97, the Legislature has limited combined written discovery to 35 items, and one deposition per party, with the opportunity to conduct additional discovery via stipulation or court order on a motion. CAJ members who have had experience in economic litigation have found these limits to be useful and appropriate. An expansion of such limits for use in non-economic litigation cases, except for cases that qualify for complex status, could curb the abuses that many attorneys have experienced. Other CAJ members favor following a system similar to that used in federal court, by imposing the current California limit of 35 interrogatories, subject to increase on a motion, after a meet and confer, or by stipulation. However, some CAJ members are concerned that these changes are too restrictive, and might unduly limit counsel’s ability to propound sufficient interrogatories in cases that truly merit more than 35.

disclose does not excuse the other party from disclosing; gamesmanship interpreting one's disclosure obligations; and subversion of the adversary process. Lack of implementation, even in the federal courts, hinders our ability to evaluate pre-trial disclosure. Any pre-trial disclosure system would most likely be effective when coupled with specific sanction powers and uniformity in enforcement.

Some counsel currently approach discovery by evaluating the consequences of their actions. Familiarity with the applicable court's practices resolving discovery disputes probably drives most litigation attorneys. Few have ever experienced a stern judge or commissioner who will impose the type of sanctions that will modify the attorney's behavior.

In many cases, the most effective sanctions are evidentiary and issue sanctions. The federal court's absolute preclusion rule at trial is an effective sanction. In other cases, where evidence preclusion is inappropriate, issue sanctions should be prescribed. These two punitive remedies would certainly encourage counsel to avoid discovery disputes. A court in many instances may, however, be reluctant to impose such harsh remedies for many offenses. In those instances, monetary sanctions would be necessary. Unfortunately, monetary sanctions are currently set at counsel's cost to bring and enforce a motion. To be effective, monetary sanctions should be set to punish. If counsel has already received a monetary sanction in the case, then evidentiary and/or issue sanctions should be in order. CAJ also believes that discovery sanctions over a certain monetary threshold should be referred to the State Bar for further investigation to determine counsel's ethical and professional conduct in the matter.

In short, the current sanctions regime does not generally sanction what has become routine gamesmanship, but only sanctions conduct in the most egregious cases and only after the non-offending party has incurred great costs. The CLRC should evaluate whether the sanctions regime should be strengthened.

DISCLAIMER

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

From: Chris Wilson <cjw@tyler-law.com>
To: Stan Ulrich <sulrich@clrc.ca.gov>
Subject: Re: CLRC Tentative Agenda -- Dec. 14-15, 2000
Date: Friday, October 20, 2000

This is Chris Wilson from the LA County Bar Bioethics committee (LTC sub-committee).

I am writing to you on a completely different subject. I am wondering if the Law Revision Commission has ever addressed how the "one deposition" rule in limited civil cases is applied where there is a deposition of a "person most knowledgeable". This has come up in more than one case in our office, but because these are small cases and are limited civil, the issue will never make it to the Court of Appeal. Specifically, the question is, under the "one deposition" rule, if a deposition of an entity is set to testify on a number of subjects, must the entity produce several individuals if no one person is knowledgeable in all areas? Or, are they required only to produce one person even if that individual knows nothing about some of the subject areas? The statute does not address this and we have actually had to seek an order from the trial judge each time this issue has come up.

Just wondering if this has ever come up or if there is some way it could be considered as a recommendation for "clean up" legislation to clarify CCP section 94 (b).

Chris Wilson

Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts

Gregory S. Weber*

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* Professor of Law, University of the Pacific, McGeorge School of Law. The views expressed in this paper are entirely those of the author. The author would like to thank Deans Gerald Caplan and Kathleen Kelly for generously supporting this work through summer research grants. This article was prepared to provide the California Law Revision Commission with background information for its study of the subject. The opinions, conclusions, and recommendations contained in this article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

Nearly fifteen years ago, in response to the proposals of a Joint Commission on Discovery of the California State Bar and Judicial Council, the California Legislature enacted the Discovery Act of 1986. That legislation made sweeping statutory changes that affected all phases of civil discovery practice in the California state courts. In large part, it codified three decades of case law. In addition, it imported several ideas from other courts, particularly the federal courts. Finally, it created some of its own innovations. At least some of the sweeping changes enacted in 1986 became models for courts in other jurisdictions.

With discovery expenses still occupying the lion's share of pretrial expenses, and discovery disputes still commonplace, the California Law Revision Commission has turned its attention toward possible discovery reform. As its starting point, it has asked for preparation of this paper to provide background research on discovery laws in other jurisdictions in the United States with an eye toward identifying potential innovations for the Commission's consideration.¹

In response to the Commission's request, the author has examined the discovery laws in the other forty-nine states, as well as the District of Columbia, the Commonwealth of Puerto Rico, and the federal courts. As can be expected, in so broad a survey, hundreds of differences appear from California law. Most of these differences are not reported in this paper. Many are relatively minor, such as the number of days that a given jurisdiction permits for an answer to an interrogatory, the number of days of notice before a deposition may be taken, or the amount of space that a propounding party must leave on an interrogatory to accommodate the response. Other differences represent areas where the respective state legislature has either not yet addressed matters covered by the Discovery Act of 1986, or it has taken a different path from that adopted by the California Legislature in that Act.²

Out of this sea of differences, the author has fished those which, in the author's opinion, represent potentially useful approaches to matters not otherwise adequately addressed in the 1986 Discovery Act.³ In general, these approaches seem to offer the potential to do some or all of the following: (1) reduce discovery disputes, either by providing different or clearer expectations of permissible conduct, or by providing better mechanisms for managing disputes; (2) reduce discovery costs; (3) reduce the time spent on discovery; (4) respond to technological innovations; or (5) improve the quality of information produced in response to discovery.⁴

1. The discovery provisions summarized here are those in effect on January 1, 2001.

2. For example, many states require some or all discovery to be filed with the court. Others permit pre-suit discovery in order to investigate whether a claim might be brought. In the author's opinion, these types of "differences" are not "innovations," but, rather, represent rules that were intentionally, and appropriately, rejected by the Discovery Commission and Legislature when they proposed and adopted the Discovery Act of 1986.

3. The author recognizes that local court rules in California and the practices of individual judges throughout the state anticipate many of the suggestions noted below. The author, however, has included them here as they have not otherwise been codified in the Discovery Act of 1986, as amended, as a matter of statewide law.

4. Many of the potential innovations noted below run counter to specific provisions of the Discovery Act of 1986. With rare exception, the author has not gone back and re-examined the reasoning (or the Reporter's Notes) taken by the Discovery Commission and Legislature when they considered the 1986 Act. Matters that run counter

This report proceeds in two parts. The first part addresses those broad rules that apply across-the-board, without regard to particular discovery devices. These rules present the most sweeping potential innovations for California to consider. This part also includes a discussion of mandatory pretrial disclosure; narrowed discovery relevance; mandatory discovery planning; certification of good faith in the conduct of discovery; and increased judicial control over discovery. The second part focuses on each specific discovery device. By far, deposition practice presented the most potential opportunities for California's consideration. Nevertheless, each of the other discovery devices—interrogatories, inspection demands, medical examinations, exchanges of expert witness information, and admission requests—also presented a few possible innovations.

I. POTENTIAL ACROSS-THE-BOARD INNOVATIONS

A. *Mandatory Pretrial Disclosure*

The most significant conceptual change in discovery practice has come from the mandatory pretrial disclosure provisions of Rule 26(a) of the Federal Rules of Civil Procedure. Unlike “discovery,” where the burden lies with the party seeking information to initiate the process via the correct discovery mechanism, “disclosure” places an independent obligation on each party to produce *without a prior request* specific information by specific deadlines. This fundamental shift in pretrial practice has remained controversial, and its adoption by both state and federal courts has been slow.

As originally promulgated in 1993, Rule 26(a) required three sets of pretrial disclosures: (1) initial disclosures, (2) disclosure of expert witness testimony, and (3) pretrial disclosures. As summarized by the Advisory Committee, the rule requires all parties: (1) to exchange information early in the case regarding potential witnesses, documentary evidence, damages, and insurance;⁵ (2) at an appropriate

to such specific provisions are included here because, in the author's opinion, they represent matters that should be reconsidered afresh as part of an overall comprehensive re-evaluation of California civil discovery law. During such a reconsideration, the collective wisdom of the earlier Joint Commission would, of course, be highly relevant.

5. The “Initial Disclosures” included:

- (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
- (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
- (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
- (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment

time during the discovery period, to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts;⁶ and (3) to identify the particular evidence that may be offered at trial, as the trial date approaches.⁷

According to the Committee, the disclosure rules were meant to accomplish two goals: acceleration of the exchange of basic case information and elimination of the paperwork necessary to request such information, with a concomitant reduction in time and expense.⁸ In addition, an unstated but implicit premise, was the fostering of the search for truth. No longer would one party—or more importantly, one party’s client—be limited to the information it requested. Thus, if within the scope of the required disclosures, a party that held the “smoking gun” would be forced to turn over that piece of information regardless of whether the other party’s attorney asked for it.

The disclosure rules generated substantial controversy. Three principal objections were made. First, critics claimed that the system was unfair since it made each party’s duty to disclose independent of the other party’s compliance with its own disclosure obligations. Thus, one party’s failure to disclose did not excuse the other party from disclosing. This, it was argued, would give an unfair advantage to the party who failed to disclose.

Second, critics argued that uncertainty over the scope of the required disclosure would create more paperwork, not less. In particular, they claimed that the triggering language for two of the initial disclosure obligations—“relevant to disputed facts

which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

FED. R. CIV. P. 26(a)(1)(A)-(D) (1993) (amended 2000).

6. The “Expert Witness Testimony” provisions require disclosure of “the identity of any person who may be used at trial to present [expert opinion] evidence.” *Id.* 26(a)(2). Accompanying the revelation of identity is a required report, “prepared and signed by the witness,” containing:

a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Id. 26(a)(2)(B).

7. FED. R. CIV. P. 26 advisory committee reports ¶ 1 (1993). The required “Pretrial Disclosures” include:

- (A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;
- (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition . . . ; [and]
- (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Id. 26(a)(3)(A)-(C).

8. FED. R. CIV. P. 26(a) advisory committee notes ¶¶ 2, 3 (1993).

alleged with particularity in the pleadings”—invited uncertainty, manipulation and motion practice.

Finally, and more fundamentally, critics claimed that the disclosure provisions subverted the adversary system. To comply with the requirements, they argued, a party's attorney would have to first imagine what information the opposing party's attorney would consider relevant, and then turn that very evidence over to opposing counsel. Along the way, counsel would be educating his or her opponent about facts and theories that opposing counsel might never have considered absent the disclosure rules. Smart, hard-working, and often higher-priced counsel would be building the cases for their less-gifted or less-motivated opponents.

Partly due to these criticisms, but largely for other reasons, adoption of the disclosure requirements—even within the federal courts themselves—has been slow. As of 1999, only seven states have adopted them all or in part.⁹ And, until recently, the disclosure provisions were not in effect in roughly half the federal courts.¹⁰ This oddity resulted from the generous “opt-out” provisions of Rule 26(a)(1). That provision allowed district courts, by local rule, to exempt themselves from the disclosure rules. The opt-out provisions sprang from the timing of the 1993 amendments to Rule 26. Those amendments came just a few years after passage of the Civil Justice Reform Act of 1990.¹¹ As mandated by that Act, the district courts were required to develop programs to reduce civil litigation delays. The Advisory Committee recognized that adoption of the mandatory disclosure requirements of Rule 26(a) might interfere with the delay reduction efforts already underway in response to the 1990 Act.¹² Accordingly, it allowed district courts to exempt themselves entirely from Rule 26(a).

Given their inconsistent welcome within the federal courts themselves, it is no surprise that the state courts have been hesitant in experimenting with such changes. Most apparently have adopted “wait and see” approaches. But the waiting period may soon be ending, as the federal Judicial Council has recently approved changes

9. These include: Alaska, Arizona, Colorado, Illinois, Nevada, Texas and Utah. ALASKA R. CIV. P. 26(a); ARIZ. R. CIV. P. 26(b)(5); COLO. R. CIV. P. 26(a); ILL. SUP. CT. R. 222(a) & (d); NEV. R. CIV. P. 16.1(b); TEX. R. CIV. P. ANN. 194.2 (Vernon 2001); UTAH R. CIV. P. 26(a). The Texas provisions, while the most extensive of all, are demand driven, not automatic. In addition, Kansas and New Hampshire require disclosure of the identify of testifying experts upon request. KAN. STAT. ANN. § 60-226(b) (2000); N.H. SUPER CT. R. 35(f). Oregon requires disclosure, upon request, of insurance agreements only. OR. CT. R. CIV. 36(B)(2). In Connecticut, defenses in foreclosure or quiet title proceedings must be disclosed. CONN. R. SUPER. CT. (Civil) §13-19. New York's rules set up “disclosure” requirements, but this is simply New York's nomenclature for standard “discovery” practice. See N.Y. C.P.L.R. 3101 (Consol. 2001).

10. See Donna Stienstra, Federal Judicial Center Report, *Implementation of Disclosure in U.S. District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (1998) at 4, available at <http://www.fjc.gov/newweb/jnetweb.nsf/pages/50.2> (last visited Sept. 4, 2001) (copy on file with *McGeorge Law Review*).

11. Civil Justice Reform Act of 1990, Title 1, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C.A. §§ 471, 472-82).

12. FED. R. CIV. P. 26 advisory committee's notes ¶ 5 (1993).

to Rule 26(a) that make an amended version of mandatory disclosure the uniform rule within the federal courts.

In addition to eliminating the “opt-out” option, the 2000 amendments to Rule 26(a) make three key changes to the disclosure obligations. First, they only require disclosure of information “that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”¹³ This reduces the circumstances where the disclosing party will have to help make the opposing party’s claim (or defense) for that opposing party. It also breaks the connection between disclosure and the pleadings. Under the 1993 version of Rule 26(a), disclosure was triggered by allegations made “with particularity” in the pleadings. This link brought on the criticism that disclosure would either change federal pleading practice, or lead to a whole new level of disputes over the meaning of “particularity.” Now, however, disclosure is triggered by the disclosing party’s behavior (i.e., the disclosing party’s decision to “use” certain information to develop its claims or defenses), not the pleading party’s behavior.

Second, following the lead of several states, and the local practice of many federal districts, the rule now exempts a list of eight types of cases.¹⁴ This list is exclusive; neither the district courts nor individual federal judges can develop local rules or standing orders that exempt other classes of cases.¹⁵ Case specific orders, however, remain appropriate.

Finally, the rule now allows a party who contends that disclosure is inappropriate under the circumstances of the case to object to the court.¹⁶ The court must rule on the objection and determine which information, if any, needs to be disclosed by any party.

The few studies that have been done about practice under the disclosure rules suggest that it has met its basic goals without causing the increase in litigation that some had predicted. The Judicial Center sponsored an empirical study that indicated that most attorneys with experience under the system had found the rules workable.¹⁷ The scholarship, however, reflects a broader range of reactions to the rules.¹⁸

13. *Id.* 26(a)(1)(A) & (B) (2000).

14. *Id.* (a)(1)(E). These include: (1) an action for review on an administrative record; (2) a petition for habeas corpus; (3) a prisoner’s action in pro per; (4) an action to enforce or quash an administrative summons or subpoena; (5) an action by the United States to recover benefit payments; (6) an action by the United States to collect on a guaranteed student loan; (7) ancillary proceedings; and (8) an action to enforce an arbitration award.

15. Fed. R. Civ. P. 26 advisory committee’s notes ¶ 20 (2000).

16. FED. R. CIV. P. 26(a)(1)(E).

17. Thomas E. Willging, et al., Federal Judicial Center Report, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* (1997), available at <http://www.fjc.gov/newweb/jnetweb.nsf/pages/50.2> (last visited Sept. 4, 2001) (copy on file with the *McGeorge Law Review*).

18. See, e.g., Anthony J. Divenere & Benita P. Render, *Mandatory Disclosure—Success or Failure?*, 67 CLEVE. B.J. 16 (1996); Rock, Scissors, Paper: *The Federal Rule 26(a)(1) “Gamble” in Iowa*, 80 IOWA L. REV. 363 (1995).

Were the Commission to consider adopting mandatory disclosure provisions, it might consider some of the variations made by the states. For example, Alaska, Colorado and Utah have all exempted broad classes of cases from disclosure.¹⁹ In addition, Alaska and Colorado have created separate disclosure provisions for divorce and domestic relations cases,²⁰ while Arizona has separate rules for medical malpractice cases.²¹ Illinois makes disclosure apply only in cases valued at \$50,000 or less,²² while Colorado has slightly modified its disclosure rules in such “limited monetary claim” actions.²³ Alaska neatly addresses the timing of discovery in cases where disclosure does not apply.²⁴

Three states have addressed the interaction between disclosure obligations, the law of privilege and work product protection. Alaska clarifies that the work product protection applies to matters that would otherwise be required to be disclosed.²⁵ Colorado, while less explicit, has a comparable provision.²⁶ Unlike Alaska, Texas makes the work product protection inapplicable to required disclosure materials.²⁷

Arizona goes further than the federal courts in its disclosure obligations. Unlike the original version of the federal disclosure provision, Arizona has not limited the initial disclosure duty to matters “relevant to facts alleged with particularity.”²⁸ In addition, it expressly imposes a duty of reasonable inquiry prior to disclosure.²⁹ Moreover, in addition to matters required by its federal rule counterpart, it requires disclosure of: (1) “[t]he factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense[;]” (2) “[t]he legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case

19. ALASKA R. CIV. P. 26(a); COLO. R. CIV. P. 26(a); UTAH R. CIV. P. 26(a).

20. ALASKA R. CIV. P. 26(a), 26.1 (divorce). COLO. R. CIV. P. 26(a); Rule 26.1 (domestic relations).

21. ARIZ. R. CIV. P. 26.2(a). These require the plaintiff, within five days of service on the last defendant, to serve upon the defendants “copies of all of plaintiff’s available medical records relevant to the condition which is the subject matter of the action.” *Id.* at 26.2(a)(1). In response, defendants must serve similar copies of all of plaintiff’s records that they have. *Id.* at 26.2(a)(2).

22. ILL. SUP. CT. R. 222(a) & (d).

23. COLO. R. CIV. P. 26.3(c). This rule modifies the time of the general disclosure duties imposed by Colorado Rule 26(a). In addition, in personal injury cases, it states, “the plaintiff shall disclose all health care providers and employers for the past ten years, and the defendant shall disclose the present claim case file, including any evidence supporting affirmative defenses and provide a copy of all insurance policies including each declaration page.” *Id.*

24. ALASKA R. CIV. P. 26(d).

25. *Id.* (a)(1)(d) & (e).

26. COLO. R. CIV. P. 26(a)(6) & 26(e).

27. TEX. R. CIV. P. 194.5.

28. ARIZ. R. CIV. P. 26.1.

29. *Id.* 26.1(b)(3).

authorities[;]”³⁰ and (3) in personal injury or wrongful death cases, the “identity, location, and the facts supporting the claimed liability” of nonparties.³¹

Arizona also differs from its federal model as to the consequences of a failure to disclose. The federal courts absolutely preclude a party at trial from using material that was required to be—but was not—disclosed.³² Arizona, however, allows such a use at trial if good cause is shown.³³ Finally, rather than making disclosure occur in conjunction with a pretrial discovery planning conference, Arizona simply requires disclosure within forty days of the defendant’s answer.³⁴ Late disclosure, however, limits subsequent trial use of the material by the disclosing party.³⁵

30. *Id.* 26.1(a). The complete list includes:

- (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
- (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
- (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness’ expected testimony.
- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.
- (5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.
- (6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.
- (7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.
- (8) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.
- (9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party’s possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

31. *Id.* 26(b)(5). In cases valued at less than \$50,000, Illinois also requires disclosure of the factual and legal bases of each claim or defense. ILL. SUP. CT. R. 222(d).

32. FED. R. CIV. P. 37(c)(1). If there was substantial justification or if the failure to disclose was harmless, the material may be used at trial. *Id.*

33. ARIZ. R. CIV. P. 37(c)(1)-(3).

34. *Id.* 26.1(b).

35. *Id.* 37(c)(1)-(3).

Texas currently has the most extensive disclosure provisions of all the states. Unlike the federal model, it does not occur automatically, but is initiated by request.³⁶ Upon request, the opposing party has thirty days to produce:

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- (f) for any testifying expert:
 - (1) the expert's name, address, and telephone number;
 - (2) the subject matter on which the expert will testify;
 - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (B) the expert's current resume and bibliography;
- (g) any indemnity and insuring agreements described in [another Rule];
- (h) any settlement agreements described in [another Rule];
- (i) any witness statements described in [another Rule];
- (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
- (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.³⁷

36. TEX. R. CIV. P. 194.1.

37. *Id.* 194.2.

Texas gives defendants who have not yet answered the complaint additional time to answer the disclosure request.³⁸ In addition, if the responsive documents are “voluminous,” the responding party can designate “a reasonable time and place for the production of documents.”³⁹

B. Narrowed Discovery Relevance

For over half a century, the fulcrum upon which broad discovery has rested in the federal courts has been “relevance to the subject matter involved in the pending action.” Incorporated by the federal rulemakers in the original 1938 version of the Federal Rules of Civil Procedure, its broad scope was affirmed by the rulemakers in their 1946 amendments to federal Rule 26. At that time, the rulemakers clarified that relevant discovery materials also included information that was not “admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”⁴⁰

In the Discovery Act of 1956, California adopted verbatim the “relevant to the subject matter” standard.⁴¹ As interpreted by both California and federal courts, this standard permits discovery of matters beyond the specific factual issues raised by the pleadings.⁴²

The breadth of discovery permitted by the “relevant to the subject matter” standard has long been the target of criticism by those who believe that it is responsible for excessive discovery. A quarter century ago, the American Bar Association (ABA) proposed amending the standard to one of “relevance to the issues raised by the claims or defenses of any party.”⁴³ In response, the federal Advisory Committee toyed with a different possible amendment: “relevance to the claim or defense” of a party.⁴⁴ Ultimately, however, it rejected both its own and the ABA’s proposals.⁴⁵

38. *Id.* 194.3(a).

39. *Id.* 194.4.

40. FED. R. CIV. P. 26(b)(1) (1946) (amended 2000).

41. Discovery Act of 1956, ch. 1904, § 3 (current version at CAL. CIV. PROC. CODE § 2016). *See* 1 JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY 579 (Bancroft-Whitney) (1997) (hereinafter HOGAN & WEBER).

42. *See, e.g., Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 390, 15 Cal. Rptr. 90, 108, 364 P.2d 266, 284; *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 632 (D. Ut 1998).

43. *See* Comm. on Rules of Practices & Procedure of the U.S., 85 F.R.D. 539 (1979).

44. Preliminary Draft of Proposed Amendments to the Fed. Rules of Civil Procedure. 77 F.R.D. 613, 627-28 (1978).

45. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms “issues” and “claims or defenses.” It was objected that discovery could not be restricted to issues because one of the purposes of discovery was to determine issues. . . . Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to “shotgun” pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery.

In the mid-1980s, the California Discovery Commission considered possible changes to the broad scope of discovery relevance. In particular, the Commission considered restricting discovery relevance to the “issues” raised by the standards. Like its federal counterparts, the Discovery Commission ultimately rejected any changes.⁴⁶ Currently, section 2017 of the California Code of Civil Procedure allows discovery

regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.⁴⁷

Two states, however, have adopted the narrower versions of discovery relevance rejected by the federal rulemakers in the late 1970s. Mississippi Rule 26(b)(1) adopted the ABA proposal and restricts discovery to matters relevant to “the issues raised by the claims or defenses” of a party.⁴⁸ In specified actions, Virginia does likewise.⁴⁹ Connecticut Rule 13-2 exemplifies the path not taken by the federal Advisory Committee. Under that provision, discovery must relate to the “claim or defense” of any party.⁵⁰ New York charts a different path altogether. It limits discovery to matters “material and necessary in the prosecution or defense of an action.”⁵¹

In the 2000 amendments to Rule 26(b)(1), the federal rulemakers have reversed their earlier opinions, and have now presumptively embraced the narrower Connecticut-like standard they first considered and rejected in 1978. Under the Rule’s new version, “[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party . . .*”⁵² The rulemakers did not, however, completely embrace the narrower definition. Rather, the new standard applies only to “party-controlled” discovery. The courts, however, “may order discovery of any matter relevant to the subject matter involved in the action” if “good cause” is shown.⁵³

Comm. on Rules of Practice & Procedure. 85 F.R.D. 541 (1979).

46. “The Commission feared that in ‘issue’ standard would produce a dramatic increase both in objections on relevance grounds, and in the need for trial court intervention to resolve these objections.” Reporter’s Notes to Section 2017(a) (quoted in 1 HOGAN & WEBER, *supra* note 41, 580-81).

47. CAL. CIV. PROC. CODE § 2017(a) (West 1998 & Supp. 2001).

48. MISS. R. CIV. P. 26(b)(1).

49. VA. SUP. CT. R. CIV. P. 4:1(e) (e.g., divorce).

50. CONN. R. SUPER. CT. (Civil) § 13-2. The rule further restricts discovery to those matters that are within the “knowledge, possession or power” of the party from whom discovery is sought. In addition, discovery is only permissible where the burden of obtaining the information would be much greater if discovery were not permitted. *Id.*

51. N.Y. C.P.L.R. 3101 (Consol. 2001).

52. FED. R. CIV. P. 26(b)(1) (emphasis added).

53. *Id.*

In explaining its decision to reverse the half-century of broad discovery, the Advisory Committee noted that, despite its many efforts to reduce overbroad discovery, “[c]oncerns about costs and delay of discovery have persisted.”⁵⁴ Its own empirical study suggested that “nearly one-third” of the lawyers surveyed “endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions.” In apparent response to its earlier concerns that a new standard would lead to more discovery litigation, the Committee welcomed more active judicial involvement “in regulating the breadth of sweeping or contentious discovery.”⁵⁵ Nevertheless, it cautioned:

The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter cannot be defined with precision. . . . [¶] The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action.⁵⁶

The 2000 amendments to Rule 26(b)(1) make one additional change to the general scope of discovery. They clarify the relationship between admissibility at trial and discoverability. The concluding sentence of Rule 26(b)(1) now reads: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”⁵⁷ The addition of “relevant” before “information” makes clear that although discoverable information need not itself be “admissible” at trial, it still must meet the test of relevance for discovery. Absent the qualification, the Advisory Committee feared that the language allowing discoverability of information that was not admissible at trial would swallow the other restrictions on discoverability.⁵⁸

C. Mandatory Discovery Planning

No California statute or rule requires mandatory discovery planning by the parties or discovery supervision by the courts. Of course, parties may always voluntarily cooperate on discovery planning and, in individual cases, courts may

54. *Id.* advisory committee notes ¶ 28 (2000).

55. *Id.* at ¶ 29.

56. *Id.* at ¶ 30.

57. FED. R. CIV. P. 26(b)(1).

58. *Id.* 26(b)(1) advisory committee notes ¶ 32 (2000).

supervise discovery planning in conjunction with their general case management venues, such as settlement or status conferences. But, as a matter of law, none of these actions are routinely required. Rather, under the 1986 Discovery Act, each party chooses for itself whether, how, and when to engage in the various forms of discovery without regard to what another party has done or plans to do. Indeed, the other party may get no notice of its opponent's strategic decisions until served with a formal discovery demand; advance notice is a matter of opposing counsel's grace. And the recipient of a notice who has objections with the manner or matter for discovery is placed in a reactive position and must decide one of the following: 1) do nothing and see if the other side responds; 2) file objections and then wait to see if the other side moves to compel; or 3) go to court now and demand a protective order.

The 1986 Discovery Act made great progress in requiring the parties to manage their reactions. In virtually every situation where one party objects to the time, place, manner or subject of discovery, that party may not seek judicial intervention until he or she has "met and conferred" with opposing counsel in a good faith attempt to resolve the dispute. But the 1986 Discovery Act does nothing to attempt to avoid possible problems *before* they occur.⁵⁹

In contrast to the Discovery Act's hands-off approach, both the federal rulemakers, and many of the states, have embraced formal discovery planning mechanisms. These mechanisms require the parties to act together to develop a discovery plan to present to the court. The federal rules generally go the farthest in these requirements. Beginning with their 1993 amendments to Rule 26, the rulemakers have required the parties to meet early⁶⁰ in the case

to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for [required disclosures], and to develop a proposed discovery plan.⁶¹

The rule further specifies that the plan must contain four elements: (1) any changes to the required disclosures; (2) "the subjects on which discovery may be

59. Indeed, in its preservation of limited "holds" on a plaintiff's discovery until 10 days after the defendant is served, the 1986 Act actually encourages rapid initiation of discovery by defendants. A defendant who perceives a strategic advantage in initiating discovery before the plaintiff can has little incentive to attempt to cooperate in framing a mutually acceptable discovery plan.

60. Under the 1993 version, the parties needed to meet "as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." The 2000 amendments to Federal Rule 26(f) extend that period to 21 days. FED. R. CIV. P. 26(f).

Under Rule 16(b), a scheduling order must issue "as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." FED. R. CIV. P. 16(b). Combining the provisions of 16(b) and 26(f), the parties' discovery planning meeting must occur within 69 days of a defendant's appearance and within 99 days of service upon a defendant.

61. FED. R. CIV. P. 26(f) (1993) (amended 2000).

needed, when it should be completed, and whether discovery should be conducted in phases or be limited or focused upon particular issues;" (3) any limitations on discovery; and (4) any protective orders and case scheduling orders.⁶² According to the Advisory Committee's notes, the parties "should also discuss . . . what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests."⁶³ The Advisory Committee also acknowledged the possibilities that the parties may not be able to reach agreement. In such cases, resolution of the dispute is left for the court when it issues its initial scheduling orders.⁶⁴ Sanctions are possible for failure to cooperate meaningfully.⁶⁵

To varying extent, discovery planning mechanisms have been adopted by other states. Adoptions generally follow two different models. Like the federal courts, a half-dozen states make planning meetings mandatory in all cases.⁶⁶ In these states, as in the federal courts, absent a court order, discovery may not occur prior to the planning meeting.⁶⁷ More states, however, make the planning meetings optional unless ordered by the courts either *sua sponte* or after motion.⁶⁸ In some of these states, the meetings can become required if either party requests one.⁶⁹

Texas has now upped the federal ante through enactment of the most sweeping mandatory discovery "planning" provisions to be found in this survey. Under Texas law, every case must be governed by a "discovery control plan."⁷⁰ Plaintiffs indicate which of three separate "levels" of discovery will be pursued. Level 1 applies to suits involving \$50,000 or less, unless the parties stipulate otherwise; Level 2 applies to cases of more than \$50,000 except those cases, deemed Level 3, where the court crafts an individual control plan.⁷¹ For each level, the rules specify schedules and presumptive limits. For example, for Level 1, each party is allowed six hours total for all its depositions and twenty-five written interrogatories; this

62. *Id.* The 2000 amendments keep these requirements intact.

63. FED. R. CIV. P. 26(f) advisory committee notes ¶ 49 (1993).

64. *Id.* ¶ 51.

65. *Id.*

66. *See, e.g.*, ALASKA R. CIV. P. 26(f); COLO. R. CIV. P. 16; ILL. SUP. CT. R. 218; NEV. R. CIV. P. 16.1(b); TEX. R. CIV. P. 190; UTAH R. CIV. P. 26(g). *See also* N.C. GEN. STAT. § 1A-5, R.26(f) (requiring mandatory planning conferences only in medical malpractice cases).

67. *Cf.* COLO. R. CIV. P. 26.3(d)(1)(B) (explaining in cases valued at \$50,000 or less, "all forms of discovery may be had immediately after the case is at issue and without completion of the [mandatory conferences]").

68. *See* ALA. R. CIV. P. 26(f); DEL. SUPER. CT. R. CIV. P. 26(f); D.C. SUPER. CT. R. CIV. P. 26(g); HAW. R. CIV. P. 26(f); IOWA R. CIV. P. 124.2; MD. CIRC. CT. R. 2-401; MINN. R. CIV. P. 26.06; MISS. R. CIV. P. 26(c); MONT. R. CIV. P. 26(f); N.M. DIST. CT. R. CIV. P. 26(f); N.C. GEN. STAT. § 1A-5, R. 26 (f) (optional except in medical malpractice cases, where it is required); OKLA. STAT. ANN., tit. 12, § 3226(f). S.C. R. CIV. P. 26(f); TENN. R. CIV. P. 26(f); VT. R. CIV. P. 26(f); WASH. R. SUPER. CT. CIV. P. 26(f); WYO. R. CIV. P. 26(f).

69. MINN. R. CIV. P. 26.06, MISS. R. CIV. P. 26(c), MONT. R. CIV. P. 26(f). *Compare* MINN. R. CIV. P. 26.06 (providing comments that show that discovery planning is to be the norm) *with* MISS. R. CIV. P. 26(c) (providing comments that show that discovery planning meetings are to be the exception, not the norm).

70. TEX. R. CIV. P. 190.1

71. *Id.* 190.2, 190.3 & 190.4.

discovery may occur up to thirty days before trial.⁷² For Level 2, each side is given a maximum of fifty hours in depositions and twenty-five interrogatories; this discovery must occur no later than the earlier of thirty days before trial or nine months after the first deposition was held or the first response to written discovery was made.⁷³

California's sole statewide provision on discovery planning is found in Rule 212 of the California Rules of Court. That rule addresses optional case management conferences in general. These conferences "may be held if requested by *all* parties or ordered by the court, either on its own motion or on the noticed motion of a party."⁷⁴ Prior to any such conference, the parties must "meet and confer" to address, among other topics, "preliminary schedules of discovery." Each participant must produce a case management conference statement that "shall discuss the areas of agreement and disagreement between the parties on each of the required subjects."⁷⁵

To date, the little empirical evidence that exists regarding the usefulness or effectiveness of mandatory discovery planning suggests that it can provide benefits with few perceived drawbacks. The 1997 Federal Judicial Center study concluded that of those attorneys who had "met and conferred" to plan discovery, the majority

did not think that meeting and conferring had any effect on litigation expenses, disposition time, fairness, or the number of issues in the case. For those who thought there had been an effect, however, the effect was most often in the desired direction: lower litigation expenses, shortened disposition time, greater procedural fairness, greater outcome fairness, and fewer issues in the case.⁷⁶

California's optional, nonstatutory, vague discovery planning rule deserves closer review.

D. Certification of Compliance

A fourth federal inspired development in discovery law is certification of good faith compliance with discovery rules. Federal Rule 26(g) requires each party or party's attorney to sign disclosure and discovery requests, responses and objections. The signature is "designed to prevent seemingly proper discovery that is grossly disproportionate to the case, unduly burdensome, or intended to harass the opposing

72. *Id.* 190.2(b)(2) & (3). Without a court order, the parties may agree to extend this amount to up to 10 hours total. *Id.* 190.2(b)(2).

73. *Id.* 190.3(b)(2) & (3). If one side designates more than two experts, the other side is given six additional hours of deposition time for each additional designated expert. *Id.* 190.3(b)(2).

74. CAL. R. CT. 212(a) (emphasis added).

75. *Id.* 212(c).

76. Willging, *supra* note 18, at 31-32.

party.”⁷⁷ A signature on a disclosure “constitutes a certification that to the best of the signer’s knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.”⁷⁸ A signature on a discovery request, response or objection certifies that it is

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.⁷⁹

Sanctions, including reasonable attorney’s fees, are imposable for improper certifications.⁸⁰ These sanctions are in addition to sanctions imposable under Rule 37 for failure to make disclosure or to cooperate in discovery.⁸¹

The Rule 26(g) certification provision is similar to the general federal certification requirement set out in Rule 11. The latter governs all papers filed in federal court actions except those involved with discovery. Rule 26, however, tailors the certification standards to the circumstances of discovery and disclosure. Unlike Rule 11, it requires that requests are not “unreasonable” or “unduly expensive or burdensome.” Sanctions, however, are not imposable on the certifying attorney’s law firm, as they can be under Rule 11. Courts may impose Rule 26 sanctions on their own motion; there is no “safe harbor” or withdrawal provision applicable; and unlike the discretionary Rule 11 sanctions, sanctions are mandatory under Rule 26 “unless substantial justification” is shown.

By statute, California adopted Rule 11.⁸² And like its federal counterpart, California’s certification statute does not apply to discovery papers.⁸³ But, unlike the federal system, California has no direct equivalent to Rule 26(g). Instead, the only sanctions in California that are available for noncompliance with the discovery laws are those that are the device-specific equivalents of the sanctions available under federal Rule 37.⁸⁴

77. WILLIAM SCHWARZER, ET AL., *Civil Procedure Before Trial—Federal* 11:260 (The Rutter Group 2001).

78. FED R. CIV. P. 26(g)(1).

79. *Id.* 26(g)(2).

80. *Id.* 26(g)(3).

81. *See* *Thibeault v. Square D Co.*, 960 F.2d 239, 245 (1st Cir. 1992) (providing sanctions under prior version of Rule 26(g) even if no prior discovery order has been violated).

82. CAL. CIV. PROC. CODE § 128.7 (West 1998 & Supp. 2000).

83. *Id.* § 128.7(g) (Supp. 2001).

84. *See generally* 2 JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY ch. 14.

To date, only about a dozen states have expressly adopted Rule 26's certification requirements.⁸⁵ In many other states, however, the general certification requirements of their equivalent to Rule 11 would appear to apply to discovery.⁸⁶

E. Judicial Control Over Discovery

Originally, discovery was meant to be self-executing, with minimal judicial involvement. Increasingly, however, courts have taken a more active role in discovery management. This active role includes the resolution of discovery disputes, the enforcement of discovery rules via orders and sanctions, and, more recently, the proactive control of the process, through conferences and scheduling orders.

Both the mechanisms for invoking judicial supervision and the standards to guide that intervention have received some attention in other jurisdictions. For example, as discussed more fully below, many jurisdictions place tighter limits than California on the presumptive number of interrogatories and depositions that can be obtained without permission from the court or opposing counsel. Indeed, one state, Colorado, goes so far as to preclude the parties from stipulating away the presumptive numerical limits—any excess requires judicial permission.⁸⁷ In addition to these limits, several jurisdictions require a much stronger showing than California in order to overcome the presumptive limit. As noted below, California simply requires a propounding party to file a “declaration of need” for additional discovery.⁸⁸ Moreover, California summarizes the courts’ ability to limit discovery in section 2019(b) of the Code of Civil Procedure. Under that section,

The court shall restrict the frequency or extent of use of these discovery methods if it determines either of the following: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.⁸⁹

85. MICH. R. CIV. P. 2.302(g); N.C. Gen. Stat. § 1A-1, R. 26(g); N.D. R. CIV. P. 26(f); OKLA. STAT. ANN. tit. 12, § 3226(g); PA. R. CIV. P. 1023 (in pleading provision); S.C. R. CIV. P. 26(g); TENN. R. CIV. P. 26(a); VT. R. CIV. P. 26(g); VA. SUP. CT. R. CIV. P. 4.1(g); WASH. SUPER. CT. CIV. 26(g); WYO. R. CIV. P. 26(g). *See also* COLO. R. CIV. P. 16(b)(1)(iv) (certifying that counsel has informed the client of the likely discovery expenses); N.J. CT. R. 4:18-4 (certifying that all reports of testifying experts have been turned over to opposing counsel) & 4:23 (certifying that client has been informed that the client is in default for failing to answer interrogatories).

86. *See, e.g.*, ALASKA CT. R. CIV. P. 11 (no provision comparable to FED. R. CIV. P.11(d)).

87. COLO. R. CIV. P. 29. *Cf.* D.C. SUPER. CT. R. CIV. P. 28 (parties may not stipulate to deadline extensions; those are governed exclusively by Rule 16 scheduling orders).

88. CAL. CIV. PROC. CODE § 2030(c) (West 1998 & Supp. 2001) (interrogatories). *Id.* § 2033(c) (admission requests) (West 1998 & Supp. 2001).

89. *Id.* § 2019(b) (West 1998 & Supp. 2001).

These limitations, however, may only be imposed if a party moves for a protective order; the statute does not give the court power to act *sua sponte*.⁹⁰

In contrast, the federal courts provide the prime example of an affirmative showing that must be made to obtain permission. Moreover, Federal Rule 26(b)(2) both sets out the showing required to overcome presumptive limits, and gives the court discretionary authority to place even tighter limits on discovery. That rule provides:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).⁹¹

Colorado echoes the federal provision, but adds an additional consideration: “Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.”⁹² In contrast to the California provision, the federal and Colorado provisions provide more details on the factors necessary to guide the court’s discretion. More importantly, they expressly recognize the court’s power to act on its own initiative.

Beyond these two general provisions, several additional potential innovations address the mechanics of invoking judicial control. In a practice now widely copied,⁹³ California requires that, in virtually every discovery dispute, the parties

90. *Id.* § 2017(b) (West 1998 & Supp. 2001).

91. FED. R. CIV. P. 26(b)(2) (2000 amendments). In its comments to the 2000 amendments to Federal Rule 26(b), the federal Advisory Committee noted:

The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly”).

92. COLO. R. CIV. P. 26(b)(2)(iv).

93. *E.g.*, FED. R. CIV. P. 37(d).

“meet and confer” in order to attempt to work out the dispute in good faith.⁹⁴ Occasionally, obstreperous opposing counsel block these efforts to “meet and confer.” Many courts have informal standards governing the extent to which one party must attempt to meet the other prior to filing its motions. In one court system, the practical scope of the “meet and confer” obligation has received formal attention in its discovery rules. In the District of Columbia, the requirement is deemed fulfilled if, ten days before filing a discovery motion, counsel sends a letter to opposing counsel proposing a meeting date and makes two follow-up phone calls attempting to negotiate that date.⁹⁵ If, despite these efforts, agreement cannot be reached, the requirement to “meet and confer” is deemed met.

Delaware also addresses the amount of effort required to satisfy the “meet and confer” requirement, although it does not have a “deemed met” standard like the District of Columbia rule. Instead, Delaware specifies that any motion to compel must detail “the dates, time spent, and method of communication with the other party or parties and the results, if any, of such communication.”⁹⁶ In a further effort to reduce the burden on the judiciary, Delaware places tight formal restrictions on motions to compel, including: (1) a four-page limit on both the motion and any response which “shall contain all authorities and facts which the moving party desires to bring to the attention of the Court”; (2) the waiver of any objection by failure to file a response; (3) the prohibition of a written reply to the response; (4) the limit of fifteen minutes total for oral argument, divided equally between the sides; (5) the summary granting, or denial, of the motion, as the case may be, if either side does not show up for the oral argument; (6) a mandatory attorney’s fee of not less than one-hundred dollars against the nonappearing party; and (7) a prohibition against any further filings in the case from the nonappearing party until the fee has been paid.⁹⁷

Maine goes furthest in its control of access to the courts to force intervention. Maine requires prior court approval before a party may file any discovery motion.⁹⁸ In effect, Maine thus gives the courts an opportunity to prescreen the amount of “meeting and conferring” that has occurred in the dispute, and to direct further, perhaps more focused, efforts. Maine, however, relents in one area: where there has been a complete failure to respond to a discovery request, Maine permits *ex parte* rulings.⁹⁹

94. *E.g.*, CAL. CIV. PROC. CODE § 2030(l) (West 1998 & Supp. 2001) (meet and confer prior to filing a motion to compel further responses to interrogatories). The lone exception is when there has been a complete failure to respond. *E.g.*, CAL. CIV. PROC. CODE § 2030(k).

95. D.C. SUPER. CT. R. CIV. P. 26(h).

96. DEL. SUPER. CT. R. CIV. P. 37(e)(1).

97. *Id.* 37(e)(2)-(8).

98. ME. R. CIV. P. 26(g)(1).

99. *Id.* 26(g)(2).

Illinois addresses a plaintiff's strategic manipulation of discovery law through voluntary dismissals. It precludes avoidance of discovery compliance or deadlines by a voluntary dismissal followed by a refile of the case.¹⁰⁰

Several jurisdictions mandate the contents of any motion to compel. These courts require the moving party to either attach or set out in full a copy of the request and the response.¹⁰¹

Sanctions have received attention in many jurisdictions, with several paths charted that are different from the California approach. In general, like most jurisdictions,¹⁰² California envisions a two-step approach to sanctions. In the first step, a party unhappy with a discovery response and unable to work out an informal resolution with opposing counsel, must move to compel further response to discovery.¹⁰³ If that motion is granted, the court ordinarily grants the moving party "a monetary sanction."¹⁰⁴ If the recalcitrant party then disobeys the order compelling further response, the party who obtained the order may seek a second order imposing a harsher sanction, such as the "the imposition of an issue sanction, an evidence sanction, or a terminating sanction In lieu of or in addition to that sanction, the court may impose a monetary sanction."¹⁰⁵

In contrast to this two-step approach, Rhode Island allows its court to make the initial order to compel self-executing. Under that approach, the recalcitrant party's failure to comply with the order within the specified time period will automatically put that party in default or support an order of dismissal.¹⁰⁶

The federal courts, and many states, make a party's complete failure to respond to a discovery request potentially subject to an immediate terminating sanction.¹⁰⁷ New Hampshire and New Jersey take a stronger approach, allowing the demanding party to have the recalcitrant party's conditional default entered.¹⁰⁸

Maryland specifically addresses the circumstances where a court orders a defendant's default for failure to obey a motion to compel. It requires the court to ensure that it has personal jurisdiction over the defendant and then tells the court

100. ILL. SUP. CT. R. 219(e).

101. D.C. SUPER. CT. R. CIV. P. 37(a); IOWA R. CIV. P. 121.1; VT. R. CIV. P. 26(h) (unless reason for motion is complete failure to respond, party moving to compel must concisely describe the case, list verbatim the items of discovery sought or opposed and the reason why it should be allowed or denied).

102. *Compare* FED. R. CIV. P. 37.

103. *E.g.*, CAL. CIV. PROC. CODE § 2030(l) (West 1998) (response to interrogatories).

104. *Id.* The sanctions can be excused if the court finds that the recalcitrant party "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." *Id.*

105. CAL. CIV. PROC. CODE § 2030(l) (West 2001); *cf.* CAL. CIV. PROC. CODE § 2023 (West 1998 & Supp. 2001).

106. R.I. CIV. P. 37(a)(4)(a).

107. FED. R. CIV. P. 37(d); MASS. R. CIV. P. 33(a); N.H. R. CIV. P. 36.

108. N.H. SUPER. CT. R. CIV. P. 36; N.J. CT. R. 4:23-5 (default without prejudice entered; can be cured by "motion to restore pleading" made within 90 days of entry).

what it may consider when setting damages, specifically guaranteeing any right of the plaintiff to a jury trial.¹⁰⁹

A half-dozen states address the award of sanctions against the state itself or one of its political subdivisions. Most which have such provisions preclude the awarding of sanctions absent express statutory authority.¹¹⁰ Idaho, however, indicates that such awards are presumptively proper.¹¹¹

Finally, Arizona, Idaho and Illinois expressly give their courts substantial residual authority to craft sanctions for objectionable conduct. Arizona allows its courts to sanction any “unreasonable, groundless, abusive, or obstructionist conduct.”¹¹² Idaho gives its courts “discretion [to] impose sanctions or conditions, or assess attorney’s fees costs or expenses against a party or the party’s attorney for failure to obey [a discovery] order”¹¹³ Illinois gives its court power to sanction any willful violations of the discovery rules.¹¹⁴

F. *Presuit Discovery*

Like most states, under conditions specified by statute, California allows a person who may become a party to a lawsuit that has yet been filed to petition to the court for an order allowing the preservation of testimony via depositions, inspection demands, and medical examinations.¹¹⁵ It makes any such presuit deposition admissible if taken under the California Code, the federal rules, or “comparable provisions of the laws of another state.”¹¹⁶

Although infrequently used, the text is ambiguous and could be improved; it does not clarify whether the deposition must have been taken under the laws of the state in which it was taken, or just “another state.” Both the federal courts and several other states, however, clarify that such depositions are admissible not if taken just under the laws of another state, but if “it would be admissible in evidence in the courts of the state in which it was taken.”¹¹⁷ Michigan places a caveat on the admissibility of depositions taken under laws of other jurisdictions: the deposition procedure actually used must still have been “in substantial compliance” with Michigan rules.¹¹⁸

109. MD. CIR. CT. R. 2-433.

110. ARK. R. CIV. P. 37(e); HAW. R. CIV. P. 37(e); KY. R. CIV. P. 37.05; MASS. R. CIV. P. 37(e); N.D. R. CIV. P. 37(f).

111. IDAHO R. CIV. P. 37(f). *Cf.* P.R. R. CIV. P. 34.5 (court may award expenses against the commonwealth but not attorney’s fees).

112. ARIZ. R. CIV. P. 26(f).

113. IDAHO R. CIV. P. 37(e).

114. ILL. SUP. CT. R. 219(d).

115. CAL. CIV. PROC. CODE § 2035 (West 1998 & Supp. 2001).

116. *Id.* § 2035(g).

117. FED. R. CIV. P. 27(a)(4); IND. R. CIV. P. 27(A)(4).

118. MICH. CT. R. 2.303(A)(4)(b).

Maine expressly authorizes the recording of a presuit deposition in the registry of deeds.¹¹⁹ Vermont mandates such filing.¹²⁰

Louisiana has extensive provisions governing the issuance of ex parte orders to take the presuit deposition of someone who is about to die or become incapacitated.¹²¹

Finally, Ohio and Oklahoma specify that a petition can be made even if it is not the petitioner but rather his or her heirs or representatives who will be the parties to the action that cannot yet be brought.¹²² Ohio also specifies that the deposition costs must be born by the petitioning party.¹²³

G. *Miscellaneous Potential General Innovations*

This final section addresses a handful of unrelated provisions that, in and of themselves, would not justify substantial attention, but might be worth considering as part of an overall reconsideration of California discovery law.

Like some states, such as Florida,¹²⁴ California currently imposes no duty upon a party responding to an interrogatory to automatically supplement the information provided in that initial response. Instead, California requires the demanding party to send supplemental interrogatories if it wants to be assured that it has the most current and accurate information.¹²⁵ This provision was evidently adopted in 1986 with some thought, as it was contrary to the then-longstanding federal practice.¹²⁶ As part of any reevaluation of its own discovery law, California should revisit this provision. It remains contrary to current federal law¹²⁷ and the law of a number of other states.¹²⁸

Section 2024 of the California Code of Civil Procedure sets a discovery cut-off that is calculated by counting backwards thirty days from “the date initially set for

119. ME. R. CIV. P. 27(c).

120. VT. R. CIV. P. 27(c).

121. LA. CODE CIV. PROC. ANN. art. 1430 (West 2000).

122. OHIO R. CIV. P. 27; OKLA. STAT. ANN. tit. 12, § 3227 (West 2000).

123. OHIO R. CIV. P. 27.

124. FLA. R. CIV. P. 1.280(e).

125. CAL. CIV. PROC. CODE § 2030(c)(8) (West 1998).

126. See FED. R. CIV. P. 26(e) ¶¶ 61-65 advisory committee’s notes to 1970 amendments.

127. FED. R. CIV. P. 26(e).

128. CONN. R. SUPER. CT. (Civil) 13-15 (must supplement if failure to amend earlier response is a knowing concealment); IOWA R. CIV. P. 122(d) (extensive duties to supplement identities of knowledgeable and expert witnesses and any material claims or defenses); KY. R. CIV. P. 26.05 (like Iowa); LA. CODE CIV. PROC. art. 1428 (West/year) (like Iowa); ME. R. CIV. P. 26(e) (like Iowa); MICH. CT. R. 2.302(e) (like Iowa); MINN. R. CIV. P. 26.05 (duty to supplement information regarding experts and their proposed testimony); N.J. CT. R. 4:17-4 (must supplement interrogatory answers no later than 20 days before the start of trial); NEV. R. CIV. P. 26(b)(4) (like current federal provision); P.R. R. CIV. P. 23.1(d) (“continuing duty” imposed); R.I. R. CIV. P. 26(e) & 33(c) (continuing duty to answer interrogatories); S.C. R. CIV. P. 26(e) (continuing requests under Rules 31, 33, 34 & 36); TEX. R. CIV. P. 193.5; VT. R. CIV. P. 26 (e) (like current federal provision). Cf. ILL. SUP. CT. R. 214 (duty to supplement responses to inspection demands).

the trial of the action.”¹²⁹ Several states, however, determine the end of the discovery period by the passage of time *from* certain events rather than time *before* other events. These methods offer parties the incentive to move cases forward. Georgia ends discovery six months after the defendant files its answer.¹³⁰ New Jersey requires discovery to begin within forty days from the end of the time allowed for the last responsive pleading; it must end within one-hundred and fifty days of service upon the defendant.¹³¹ Puerto Rico has the tightest discovery schedule of all. It requires discovery to be completed within sixty days of the service of the answer.¹³² Finally, for cases valued at more than \$50,000, Texas requires discovery to end at the earlier of thirty days before trial or nine months after either the first deposition was taken or the first answer to written discovery was served, whichever came first.¹³³

Three states have work product provisions worth noting. Illinois allows the court to apportion the costs of any attorney work product that is otherwise discoverable.¹³⁴ In an exception to the work product protection, Minnesota allows any person or party to obtain a copy of any person’s prior statement.¹³⁵ Pennsylvania echoes that approach. It authorizes any person to get a photostatic copy of a prior statement that person made, or any party made, or a witness made, regardless of how it was recorded.¹³⁶ Pennsylvania’s general work product protection, however, is worded strongly. Like the federal provision,¹³⁷ and unlike California,¹³⁸ it expressly extends beyond an *attorney’s* work to protect from discovery the work of other party representatives.¹³⁹ It also expressly bars from disclosure such classic attorney work product as case valuation, analyses of the merits of claims or defenses, and strategy and tactics.¹⁴⁰ Moreover, for nonattorney party representatives, the express bar extends to “disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.”¹⁴¹

129. CAL. CIV. PROC. CODE § 2024(a) (West 1998 & Supp. 2001).

130. GA. SUPER. CT. R. 5.1 (2000).

131. N.J. CT. R. 4:17-2 (service of initial interrogatories), 4:24-1 (completion of discovery).

132. P.R. R. CIV. P. 23.4.

133. TEX. R. CIV. P. 190.3(b)(1)(B)(ii).

134. ILL. SUP. CT. R. 201(b)(2).

135. MINN. R. CIV. P. 26.02(c).

136. PA. R. CIV. P. 4003.4.

137. FED. R. CIV. P. 26(b)(3).

138. CAL. CIV. PROC. CODE § 2017 (West 1998 & Supp. 2001) (attorney’s work product). The work product of other party representatives, however, is protected through the requirement that “good cause” exist for an inspection demand. See HOGAN & WEBER, *supra* note 41, at § 13.3.

139. PA. R. CIV. P. 4003.3.

140. *Id.*

141. *Id.*

Other provisions worth noting are: Illinois calculates time periods not in multiples of five days but in multiples of seven. This calculation makes it easier to relate compliance schedules with calendar weeks.¹⁴²

Nevada allows later joined parties to formally demand copies of all prior discovery responses;¹⁴³ New York has provisions within its discovery rules addressing the appointment of referees;¹⁴⁴ Oregon has a specific provision authorizing the court to shift a responding party's discovery costs to the requesting party "to prevent hardship."¹⁴⁵

II. POTENTIAL DEVICE-SPECIFIC INNOVATIONS

A. *Deposition Practice*

Of all the discovery devices, deposition practice has by far received the most extensive attention by federal and state courts across the country. Courts that have been concerned about problems in deposition practice have made a half-dozen major changes, and many more minor changes.

1. *Presumptive Limits on the Number of Depositions*

Current California law permits only a single deposition of a natural person.¹⁴⁶ It places no other presumptive limits on the number of depositions that may be taken in a case.¹⁴⁷ The lack of presumptive limits on deposition practice contrasts with the presumptive limits California places on other discovery devices, such as interrogatories and admission requests.

In comparison, since 1993, the federal rules have presumptively limited depositions to ten per side.¹⁴⁸ That is, all of the plaintiffs collectively may take only ten depositions; all of the defendants collectively may take only ten; and all third-parties collectively may take only ten. According to the Advisory Committee, this limit "emphasize[s] that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case."¹⁴⁹

142. See, e.g., ILL. SUP. CT. R. 215(c) (21 day period for completion of medical examiner's report); *id.* at 216(c) (matters deemed admitted unless response to admission request made within 28 days of service of request).

143. NEV. R. CIV. P. 26(h).

144. N.Y. C. P. L.R. § 3104 (McKinney 2001).

145. OR. R. CIV. P. 36(c).

146. CAL. CIV. PROC. CODE § 2025(t) (West 1998 & Supp. 2001). For good cause shown, an additional deposition of a natural person may be taken. *Id.* Cf. S.C. R. CIV. P. 30(a)(2) (one deposition limit applies to organizations as well).

147. A party, of course, may move for a protective order to challenge the propriety of any individual deposition. See, e.g., CAL. CIV. PROC. CODE § 2025(i)(1) (West 1998 & Supp. 2001); *cf.* CAL. CIV. PROC. CODE § 2019(b) (West 1998 & Supp. 2001).

148. FED. R. CIV. P. 30(a)(2)(A).

149. FED. R. CIV. P. 30 advisory committee's note ¶ 3 (1993).

With only a couple exceptions, the specific federal limits have not been copied by the states.¹⁵⁰ Rather, of the states that have placed presumptive limits on the number of depositions have placed much more stringent limits. Alaska limits depositions to three per side, not counting depositions of parties and testifying experts.¹⁵¹ Colorado goes even further. It limits each side to a total of three, of which one can be of an adverse party and two may be of other persons.¹⁵² Arizona and Illinois take a different path. Arizona puts no limits on the total number of depositions, but, absent agreement or court order, it does not allow any depositions of nonparties, other than experts or custodians of documents.¹⁵³ Similarly, in cases valued at less than \$50,000, Illinois only allows depositions of parties and testifying treating physicians and opinion witnesses.¹⁵⁴

Texas takes a very different approach. It puts no limit on the number of depositions; rather, it puts a limit on the total number of hours of deposition that each side can take. In cases valued \$50,000 or less, it allows each party six hours total for examination and cross-examination of witnesses.¹⁵⁵ In other cases, it limits the total deposition time to fifty hours per *side*, with additional time permitted if the opposing side designates more than two experts as trial witnesses.¹⁵⁶

2. Presumptive Limits on the Lengths of Depositions

California statutes put no presumptive limit on the length of a deposition. A party or nonparty deponent who believes that a deposition either has, or will, take too much time, must move for a case-specific protective order.¹⁵⁷

In contrast, at least seven states have placed presumptive limits on the lengths of depositions. In Alaska, absent court order or stipulation, depositions of parties, independent expert witnesses and treating physicians may last only six hours.¹⁵⁸ All other depositions may presumptively last no more than three hours.¹⁵⁹ Oklahoma and

150. See UTAH R. CIV. P. 30(a)(2) (following federal model); WYO. R. CIV. P. 30(a)(2) (same).

151. ALASKA R. CIV. P. 30(a)(2)(A). It also limits the total number of expert witnesses to 3 per side. ALASKA R. CIV. P. 26(a)(2)(D).

152. COLO. R. CIV. P. 26(b)(2).

153. ARIZ. R. CIV. P. 30(a).

154. ILL. SUP. CT. R. 222(f)(2)(a)-(b).

155. TEX. R. CIV. P. 190.2(c)(2). The parties may agree among themselves to expand this to 10 hours per side, but need court permission to exceed that limit. *Id.*

156. TEX. R. CIV. P. 190.3(b)(2). For each expert beyond two, an additional 6 hours of deposition time is permitted. *Id.* More complicated cases, where discovery is controlled by court orders, may have very different limits. See TEX. R. CIV. P. 190.4.

157. See, e.g., CAL. CIV. PROC. CODE § 2025(i)(5) (West 1998 & Supp. 2001).

158. ALASKA R. CIV. P. 30(d)(2).

159. *Id.* A party seeking to overcome the presumption must show the court, among other matters, that “the complexity of the case, the number of parties likely to examine a deponent, and the extent of relevant information possessed by the deponent” justify a longer length. *Id.*

Texas have similar six hour limits.¹⁶⁰ Arizona places even tighter limits. Absent stipulation or order, no deposition of any witness, including experts, may last more than four hours.¹⁶¹ In cases valued at less than \$50,000, Illinois places stringent deposition limits. It presumptively limits all depositions to three hours.¹⁶² Maine and Montana provide more generous limits. In both of those states, absent stipulations or orders to the contrary, depositions are limited to eight hours.¹⁶³

The decision by these states to presumptively limit the length of a deposition has recently received a federal imprimatur. Under the 2000 amendments to federal Rule 30, a deposition may presumptively last only for “one day of seven hours.”¹⁶⁴ The limitation does not include “reasonable breaks during the day for lunch and other reasons, and . . . the only time to be counted is the time occupied by the actual deposition.”¹⁶⁵ Additional time may be ordered “if needed for a fair examination of the deponent or if the deponent or another person, or another circumstance, impedes or delays the examination.”¹⁶⁶ As examples of cases where more time may well be justified, the Advisory Committee included depositions using interpreters, questions about numerous or lengthy documents which the deponent had not read in advance, multi-party cases where different parties have a need to examine the witness from different perspective, and depositions of expert witnesses.¹⁶⁷

3. Deposition Behavior

The California discovery statutes have two provisions governing deposition misconduct in general and the making of objections in particular. Under section 2025(n) of the California Code of Civil Procedure, a deposition may be stopped to allow a party or the deponent to “move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party.”¹⁶⁸ The statute gives no examples of specific bad faith or unreasonable conduct. Section 2025(m) addresses the circumstances when an objection must be made in order to avoid a waiver of the grounds for the objection should the deposition be used as evidence in a subsequent

160. OKLA. STAT. ANN. tit. 12, § 3230(A)(3). The deposition must be held between 8:00 a.m. and 5:00 p.m. on weekdays. *Id.* TEX. R. CIV. P. 199.5(c) (breaks not included).

161. ARIZ. R. CIV. P. 30(d). The four hours may be spread over two days. Absent a stipulation or order to the contrary, a deposition noticed for a given day continues the next day until done. ARIZ. R. CIV. P. 30(c).

162. ILL. SUP. CT. R. 222(a), (f)(2).

163. ME. R. CIV. P. 30(d)(2); MONT. R. CIV. P. 30(b)(8).

164. FED. R. CIV. P. 30(d)(2).

165. FED. R. CIV. P. 30(d) advisory committee’s note ¶ 3 (2000).

166. *Id.*

167. *Id.*

168. CAL. CIV. PROC. CODE § 2025(a).

proceeding.¹⁶⁹ It does not, however, specifically address the misuse of deposition objections. A frequent misuse is pointed coaching of the witness.

In contrast, both the federal courts and an increasing number of states have language to address the improper use of objections during deposition testimony. Louisiana simply reserves all objections to deposition testimony.¹⁷⁰ Texas limits objections to three: “objection, leading,” “objection, form,” and “objection, non-responsive.”¹⁷¹ These objections are waived if not stated “as phrased.”¹⁷² Maryland does not require the grounds of objections to be stated, unless a request for grounds is made by any party.¹⁷³ In addition, if an objection “reasonably could have the effect of coaching or suggesting to the deponent how to answer, then the deponent, at the request of any party, shall be excused from the deposition during the making of the objection.”¹⁷⁴ Michigan requires a party who knows that it will be asserting a privilege at a deposition to move to prevent the taking of the deposition or be subject to specified costs.¹⁷⁵

The federal rule now states:

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to [move for a protective order].¹⁷⁶

Similar provisions are found in Alaska, Arizona, Oregon, Maryland, Texas, Washington and South Carolina, with Maryland further expressing its concern in the form of its official Guidelines for Discovery.¹⁷⁷ In addition, six of these states,

169. See CAL. CIV. PROC. CODE § 2025(m)(1)-(3), (u)(1) (West 1998 & Supp. 2001) (citing such examples as privilege, cure of defects, and lack of competency as grounds for objection).

170. LA. CODE CIV. PROC. ANN. art. 1443(d) (West 2000).

171. TEX. R. CIV. P. 199.5(e).

172. *Id.*

173. MD. R. DISCOVERY 9.

174. *Id.*

175. MICH. R. CIV. PROC. 2.306(D)(3).

176. FED. R. CIV. P. 30(d)(1).

177. ALASKA R. CIV. P. 30(d)(1); ARIZ. R. CIV. P. 32(d)(3)(d)-(e); OR. R. CIV. P. 39(d)(3). These provisions draw largely from the pre-2000 version of the Federal Rule. Neither the Alaska nor the Arizona rule requires the objecting party to state the grounds for the objection unless requested by the questioning party. MD. R. CIV. P. 2-415(a). See MD. R. DISCOVERY 8(c). Texas’ provisions come from its recent substantial revision to its discovery law. TEX. R. CIV. P. 199.5(e). Argumentative or suggestive objections or explanations waive any objections. *Id.* South Carolina enacted its deposition conduct provisions in 2000. S.C. R. CIV. P. 30(j). These state:

- (1) At the beginning of each deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness’ own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions.
- (2) All objections, except those which would be waived if not made at the deposition under [another

rule], and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to [another rules] shall be preserved.

- (3) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under [another rule]. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under [another rule] within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.
- (4) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.
- (5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.
- (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.
- (7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.
- (8) Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.
- (9) Violation of this rule may subject the violator to sanctions under [another rules].

Id.

Washington's provisions resemble a simpler version of South Carolina's provisions. WASH. R. CIV. P. 30(h).

These state:

- (1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.
- (2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.
- (3) Instructions Not to Answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.
- (4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.
- (5) Private Consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

as well as Delaware, address off-the-record conferences. Alaska and Arizona specifically prohibit “continuous and unwarranted off-the-record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition”¹⁷⁸ Maryland’s Discovery Guidelines make it “presumptively improper” for a deponent’s attorney “to initiate a private conference with a deponent” except to determine whether to assert a privilege.¹⁷⁹ Guideline 6 then describes the specific information required of any party who does assert such a privilege.¹⁸⁰ Delaware prohibits any consultations or conferences between the deponent and counsel during the deposition, including recesses of up to five days, except to discuss assertions of privilege or compliance

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- (6) Courtroom Standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

Id.

178. *Id.*

179. MD. R. DISCOVERY 8(e).

180. *Id.* 6. The guideline specifies:

Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:

- (a) The attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed; and
- (b) The following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of the allegedly privileged information:
 - (1) For oral communications:
 - (i) the name of the person making the communication and the names of the persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communications;
 - (ii) the date and place of the communication; and
 - (iii) the general subject matter of the communication.
 - (2) For documents, to the extent the information is readily obtainable from the witness being deposed or otherwise:
 - (i) the type of document, e.g., letter or memorandum;
 - (ii) the general subject matter of the document;
 - (iii) the date of the document; and
 - (iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other;
 - (3) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the deposition.
- (c) After a claim of privilege has been asserted, the attorney seeking disclosure should have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exception to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

Id.

with a court order.¹⁸¹ Texas also bars conferences except to discuss assertions of privilege. Unlike Delaware, however, Texas does allow “private conferences . . . during agreed recesses and adjournments.”¹⁸² Texas also sets out a general “trial behavior” standard.¹⁸³

In addition to these specific prohibitions, several courts are moving towards more detailed listing of appropriate and inappropriate deposition conduct. As noted already, Maryland has developed a series of guidelines for the conduct of discovery. Guidelines 8 and 9 address the conduct of depositions. Guideline 9 simply encourages attorneys who are objecting to the form of a deposition question, “if requested, to state the reason for the objection.”¹⁸⁴ Guideline 8, however, lists a half-dozen presumptively improper deposition tactics. In addition to the two noted above, two others are specific enough to give real guidance to counsel on impermissible conduct. They are: asking questions that misstate or mischaracterize a witness’ previous answer; and insisting “upon an answer to a multiple-part question after objection.”¹⁸⁵

Closer to home, the federal district court for the Central District of California has also published “Civility and Professional Guidelines”¹⁸⁶ for attorneys who practice before it. Section four of that document sets out eight guidelines for deposition practice. Among other matters, attorneys commit: to only take depositions where actually needed to obtain information or to perpetuate testimony; not to engage in any conduct during a deposition that would be inappropriate in the presence of a judge; not to make irrelevant inquiries into a deponent’s personal affairs or question a deponent’s integrity; to limit objections to those that are “well-founded and necessary to protect [the] client’s interests” recognizing “that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought;” and not to coach witnesses through deposition objections or otherwise.¹⁸⁷

181. DEL. R. CIV. P. 30(d)(1). Under this rule:

From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered.

Id.

182. TEX. R. CIV. P. 199.5(d).

183. “The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial.” *Id.*

184. MD. R. DISCOVERY 9.

185. *Id.* 8(a), (b).

186. See SCHWARZER ET AL., *supra* note 77, at 11:17.2 (2001) (quoting “Civility and Professionalism Guidelines” Central District of California, <http://www.cacd.uscourts.gov>).

187. *Id.*

4. Deposition Scheduling

Several states have some deposition scheduling provisions worth noting. Many states, including California, place a brief “hold” on the initiation of deposition practice by plaintiffs. During this time, the defendant may notice a deposition, but the plaintiff may not. Like Indiana, New Hampshire, and Puerto Rico, California places the hold at twenty days.¹⁸⁸ At least eight states use a longer hold.¹⁸⁹ Two add to the usual circumstances when judicial permission is needed before a party may take a deposition. In Massachusetts, a party must obtain judicial permission if “there is no reasonable likelihood that recovery will exceed \$50,000 if the plaintiff prevails”¹⁹⁰ or if “there has been a hearing before a master.”¹⁹¹ In Michigan, permission is required “only if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney.”¹⁹² The statute then details five circumstances under which a “reasonable time is deemed to have elapsed.”¹⁹³ These include four specific actions to defend the case and a fifth: the passage of twenty-eight days after service.¹⁹⁴ A third state, Illinois, specifically precludes the scheduling of depositions on weekends or holidays, absent stipulation or judicial order.¹⁹⁵ Additionally, jurisdictions with discovery “guidelines” also include admonitions on deposition scheduling.¹⁹⁶ Finally, in contrast to California practice, the filing of a motion for a protective order in Colorado, New Mexico, New York and Wyoming automatically stays the taking of a deposition.¹⁹⁷

5. Depositions By “Remote Electronic Means”

In addition to the attempts to respond to perceived problems with deposition conduct, other jurisdictions have revised their rules to adapt to new technological developments. Unlike many state and the federal courts, California has no separate

188. CAL. CIV. PROC. CODE § 2025(b) (West 1998 & Supp. 2001); IND. R. CIV. P. 30(a); N.H. R. CIV. P. 38 (applies to both plaintiffs and defendants); P.R. R. CIV. P. 27.1.

189. One state, New Jersey, imposes a 35 day hold. N.J. CT. R. 4:14-1. At least 6 states impose a 30 day hold: MONT. R. CIV. P. 30(a); NEB. R. CIV. P. 30(a); N.M. DIST. CT. R. CIV. P. 1-030(A); N.D. R. CIV. P. 30(a); OKLA. STAT. tit.12, § 3230(A)(2)(a)(2) (2000); R.I. SUPER. CT. R. CIV. P. 30(a). One state—Michigan—imposes a 28 day hold. MICH. CT. R. 2.306(A)(1)(e). Cf. OHIO R. CIV. P. 30(B) (no hold at all).

190. MASS. R. CIV. P. 30(a)(ii).

191. *Id.* 30(a)(iv).

192. MICH. CT. R. 2.306(a)(1).

193. *Id.*

194. *Id.* The four specified actions are: a) the filing of an answer; b) the filing of an appearance; c) the defendant’s formal action seeking discovery; and d) the filing of certain motions. *Id.*

195. ILL. SUP. CT. R. 72(b).

196. For example, Maryland’s Guideline 7 urges counsel to clear deposition dates with opposing counsel and clients ahead of time, and makes any agreed to schedule presumptively binding, requiring a new agreement in order to be changed. MD. R. DISCOVERY 7(c).

197. COLO. R. CIV. P. 121, 1-12; N.M. R. CIV. P. 1-030(G)(3) (if filed within 3 days of deposition, deponent excused from attendance at deposition); N.Y. C. P. L.R. 3103; WYO. R. CIV. P. 26(c)(4).

provision on depositions by telephone or other “remote electronic means.” Although a telephonic or teleconference deposition would be permissible under California rules by stipulation of counsel, there is no express provision giving any party a right to attend or take such a deposition. Similarly, while a court has considerable authority to fashion protective orders, there is no express statutory authority for a court to order that a deposition be taken by telephone. In addition, there is no express direction given on such practical questions as the location of the deposition or the required presence of the deposition officer.

The federal courts have resolved any uncertainties by expressly authorizing the taking of depositions via “telephone or other remote electronic means.”¹⁹⁸ Under the federal rules, such a deposition is permissible either by stipulation or by court order. For purposes of determining who is an appropriate deposition officer or for filing motions to compel further testimony, a telephonic deposition is “taken in the district and at the place where the deponent is to answer questions.”¹⁹⁹

Over a dozen states have provisions addressing telephonic depositions.²⁰⁰ Most of these allow the practice either by stipulation or court order. Maryland only allows them by stipulation. Florida only allows them by court order. Several go beyond the rather terse provisions of their federal counterpart and add useful additional material. For example, Colorado and Texas specify that the officer who swears the deponent need not be the person who records the testimony. This would allow the provision of separate swearing and recording “officers” in separate locations.²⁰¹ Texas also allows the parties to be at the place where the witness will answer the questions, even if the party noticing the deposition will not be there.²⁰² Iowa specifies that the deposing party must pay all costs incurred that are attributable to the telephonic format. It also prohibits the subsequent taxation of these costs. In addition, Iowa specifically requires the deposing party to send copies of any exhibits that will be discussed in the deposition to other parties before the deposition.

The most extensive additional provisions are found in Nevada, Illinois and Virginia. To the basic federal formula, Nevada Rule 30(b)(7) adds:

Unless otherwise stipulated by the parties: (A) the party taking the deposition shall arrange for the presence of the officer before whom the

198. FED. R. CIV. P. 30(b)(7).

199. *Id.* Cf. OR. R. CIV. P. 38(A)(2) (deposition taken in Oregon if either the deponent or the person administering the oath is in Oregon) 39(c)(7) (oath may be administered telephonically); TEX. R. CIV. P. 199.1(b) (electronic deposition taken under Texas law is taken at the place where the witness is located).

200. COLO. R. CIV. P. 30(b) and 30(f)(1); FLA. R. CIV. P. 1.310(b)(7); GA. CODE ANN. § 9-11-30(b)(4) (2000); HAW. R. CIV. P. 30(b)(7); ILL. SUP. CT. R. 206(h); IOWA R. CIV. P. 140(g); MD. CIRC. CT. R. CIV. P. 2-417; MISS. R. CIV. P. 30(b)(1)(7); NEV. R. CIV. P. 30(b)(7); N.M. DIST. CT. R. CIV. P. 1-030(B)(7); N.D. R. CIV. P. 30(b)(7); OR. R. CIV. P. 38, 39; S.C. R. CIV. P. 30(b)(7); TEX. R. CIV. P. 199.1; TENN. R. CIV. P. 30.02(7).

201. Texas specifies that the “officer” may be at the noticing party’s location, not the deponent’s location, provided that the witness is placed under oath by someone present with the deponent and authorized to administer oaths in the jurisdiction of the deponent’s location. TEX. R. CIV. P. 199.

202. *Id.* 199.

deposition will take place; (B) the officer shall be physically present at the place of the deposition [i.e., where the deponent is physically located]; (C) the party taking the deposition shall make the necessary telephone connections at the time scheduled for the deposition. Nothing in this paragraph shall prevent a party from being physically present at the place of the deposition, at the party's own expense.²⁰³

Similarly, Illinois' recently enacted provision adds to the basic provisions:

Except as otherwise provided [in this paragraph], the rules governing the practice, procedures and use of depositions shall apply to remote electronic means depositions.

- (1) The deponent shall be in the presence of the officer administering the oath and recording the deposition, unless otherwise agreed by the parties.
- (2) Any exhibits or other demonstrative evidence to be presented to the deponent by any party at the deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition.
- (3) Nothing in this paragraph . . . shall prohibit any party from being within the deponent during the deposition, at that party's expense; provided, however, that a party attending a deposition shall give written notice of that party's intention to appear at the deposition to all other parties within a reasonable time prior to the deposition.
- (4) The party at whose instance the remote electronic means deposition is taken shall pay all costs of the remote electronic means deposition, unless otherwise agreed by the parties.²⁰⁴

Finally, Virginia rolls its provision regarding "remote electronic means" into a general provision regarding "audio-visual means."²⁰⁵ It expressly includes, without limitation, "videoconferencing and teleconferencing" within those means.²⁰⁶

6. *Audio and Video Recording of Depositions*

Section 2025(l) of the California Code of Civil Procedure extensively addresses the audio or video recording of depositions. Many states now have comparable provisions. Several points from these other statutes and rules are worth noting for

203. NEV. R. CIV. P. 30(b)(7).

204. ILL. SUP. CT. R. 206(h) (2001).

205. VA. SUP. CT. R. CIV. P. 4:7A(a).

206. *Id.*

possible adoption in California. At least eight states dispense with the requirement that, absent agreement or an order to the contrary, an electronically recorded deposition also be stenographically recorded.²⁰⁷ In such cases, for example, where there is no simultaneous stenographic transcript made, Virginia expressly eliminates the requirement that the transcript be submitted to the deponent for correction and signing.²⁰⁸

Almost the same number of states also expressly specify that electronically recorded deposition costs may be taxed.²⁰⁹

Five states require that a digital clock or other electronic timer appear in the screen at all times.²¹⁰

Ten states have provisions governing procedures for objecting to videotaped testimony, for editing tapes in response to rulings on objections, and for resolving discrepancies between the electronic recording and any stenographic transcription.²¹¹

Six states have provisions regarding the focus of the camera's attention. Alaska Rule 30.1 requires that the deponent be videotaped seated at a table and shot only from the waist up.²¹² Kentucky Rule 30.02 requires that the videotape operator receive a copy of Rule 30.02.²¹³ At the election of the noticing party, at the beginning of the taping, the operator must either focus on, and identify, each attorney, party and witness present, or may read a statement introducing the parties

207. ARK. R. CIV. P. 32(c); KY. R. CIV. P. 30.02(4)(c); ME. R. CIV. P. 30(b)(4)(F) ("The method of recording specified in the notice by the party noticing the deposition shall constitute the only official record of the deposition"). MONT. R. CIV. P. 30(h)(1)(a); N.D. R. CIV. P. 30.1(a)(1); R.I. R. CIV. P. 30(b)(2) & (3); TENN. R. CIV. P. 30.02(4)(b); VA. SUP. CT. R. CIV. P. 4:7A(D)(1).

208. *Id.* 4:7A(b).

209. ALASKA R. CIV. P. 30.1(e); MASS. R. CIV. P. 30(A); MICH. CT. R. 2.315(I); MONT. R. CIV. P. 30(h)(5); N.D. R. CIV. P. 30.1(e); TENN. R. CIV. P. 30.02(4)(b). *Cf.* WASH. R. SUP. CT. CIV. P. 30(b)(8)(D) (absent stipulation, costs of videotaping may not be taxed).

210. MASS. R. CIV. P. 30A(c)(6); MICH. CT. R. 2.315(c)(2); MONT. R. CIV. P. 30(h)(4)(f); N.D. R. CIV. P. 30.1(d)(6); TENN. R. CIV. P. 30.02(4)(B)(VI). *See also* ALASKA R. CIV. P. 30.1(d)(7) & (8) (requiring written counter log; permitting use of on-screen digital timer).

211. ALASKA R. CIV. P. 30.1(d)(11) (original must be preserved if editing order issued); KY. R. CIV. P. 30.02(4)(d)(c) & (e); ME. R. CIV. P. 30(b)(4) (all recording methods must "permit editing for use at trial in a manner that will allow the expeditious removal of objectionable and extraneous material without significant disruption in presentation of the edited testimony to a jury"); MASS. R. CIV. P. 30A(g) & (j); MONT. R. CIV. P. 30(h)(4)(i) (like Alaska); N.D. R. CIV. P. 30.1(d)(8) (must preserve original if court issues editing order); S.C. R. CIV. P. 30(h)(8)-(9) (extensive provisions); TENN. R. CIV. P. 30.02(4)(b)(vii) & (ix); VA. SUP. CT. R. CIV. P. A(b)(3) (no editing permitted without a court order); WASH. R. CIV. P. 30(b)(8)(G).

212. ALASKA R. CIV. P. 30.1.

213. KY. R. CIV. P. 30.02(4)(a). South Carolina requires that the equipment operator certify that he or she is familiar with the requirements of South Carolina's provisions on audio-visual deposition recording. S.C. R. CIV. P. 30(h)(13).

and attorneys present.²¹⁴ To prevent “unfair or undue influence upon the words of the witness,” the camera must

remain stationary at all times during the deposition and will not “zoom” in or out on the witness excepting those times during the deposition when the witness is displaying, for the jury’s viewing, exhibits or other pieces of demonstrative proof that can only be fairly and reasonably seen on the videotape by use of the camera “zooming” in on said evidence.²¹⁵

South Carolina, too, bans any close-ups taken without agreement, other than for exhibits.²¹⁶ Maine sets out seven criteria applicable to any deposition recording method, whether stenographic, electronic, or otherwise. Among other matters, all recording methods must “provide clear identification of the separate speakers.”²¹⁷ Similar to Alaska and Kentucky, the rule provides that in videotaped depositions, unless otherwise agreed, “the camera shall focus solely on the witness and any exhibits utilized by the witness”²¹⁸ Like Kentucky, Alaska, South Carolina, and Maine, Massachusetts has express provisions requiring the camera operator to maintain a constant view of the deponent, except when asked to zoom in to display a relevant exhibit or visual aid.²¹⁹ Michigan specifically approves the use of more than one camera “in sequence or simultaneously.”²²⁰

Finally, there are a handful of additional matters that are worth noting. For example, in addition to expressly qualifying the admissibility of the tape on the absence of distorting technical errors, Kentucky permits objections that “the general technical quality of the tape is so poor that its being viewed by the jury would be unfairly prejudicial to the side so objecting.”²²¹ Louisiana makes unnecessary the reading or signing of a taped deposition.²²² In extensive provisions that go far beyond section 2025(u)(4) of the California Code of Civil Procedure, Massachusetts details the circumstances governing the oral depositions of treating physicians or expert witnesses by parties who intend to use such depositions in lieu of trial testimony.²²³ New Hampshire’s rules provide three simple admonitions to counsel at a videotaped deposition. First, they must take care “to have the witnesses speak slowly and distinctly.”²²⁴ Second, they must have papers “readily available for

214. KY. R. CIV. P. 30.02(4)(a).

215. *Id.* 30.02(b).

216. S.C. R. CIV. P. 30(h)(2)(D).

217. ME. R. CIV. P. 30(b)(4)(c).

218. *Id.* 30(b)(4)(F)

219. MA. R. CIV. P. 30A(d).

220. *Id.* 30A(C)(5).

221. KY. R. CIV. P. 30.02(f).

222. LA. CODE CIV. PROC. ANN. art. 1445 (West 2001).

223. MA. R. CIV. P. 30A(m).

224. N.H. SUPER. CT. R. 45.

reference without undue delay and unnecessary noise.”²²⁵ Third, both counsel and witnesses must “comport themselves at all times as if they were actually in the courtroom.”²²⁶

South Carolina requires the party who wishes to playback testimony at trial to provide the proper playback equipment.²²⁷ South Carolina also has the most extensive provisions regarding the allocation of the costs of recording. It states:

The cost of videotape, as a material, shall be borne by the party taking the videotape deposition. Where an edited version is required, the cost of videotape, as a material, shall be borne by the party who caused to be recorded testimony or other evidence subsequently determined to be objectionable and ordered stricken from the tape by the court. The cost of recording the deposition testimony on videotape shall be borne by the party taking videotape deposition. The cost of producing an edited version of the videotape recording for use at trial shall be borne by the party who caused to be recorded testimony or other evidence subsequently determined to be objectionable and ordered stricken from the tape by the court.²²⁸

For depositions recorded nonstenographically, Vermont allows an attorney to swear the deponent, provided the attorney is a notary.²²⁹

7. *Miscellaneous Deposition Provisions*

Finally, a handful of specific, unrelated provisions collectively deserve mention as possible sources of changes to California deposition law. Many states have provisions regarding appropriate deposition officers that differ markedly from California’s general provision. In California, a deposition must simply be supervised by an officer “who is authorized to administer an oath.”²³⁰ This is often a notary public.²³¹ Further, California disqualifies anyone “financially interested in the action” and “a relative or employee of any attorney of any of the parties[,] or of any of the parties.”²³²

In contrast, other states specifically enumerate certain individuals who can preside over a deposition. Two states address depositions of members of the armed forces of the United States. Idaho allows any military officer to preside over the

225. *Id.*

226. *Id.*

227. S.C. R. CIV. P. 30(h)(10).

228. *Id.* 30(h)(ii).

229. VT. R. CIV. P. 30(b)(4)(A).

230. CAL. CIV. PROC. CODE § 2025(k) (West 1998 & Supp. 2001). Additional provisions address the appropriate officers for depositions taken in other U.S. jurisdictions or nations. *Id.* §§ 2026(c), 2027(c).

231. HOGAN & WEBER, *supra* note 41, at § 2.21.

232. CAL. CIV. PROC. CODE § 2025(k)(1) (West 1998 & Supp. 2001).

deposition of both a member of the military and the family of such members.²³³ Similarly, Iowa allows the taking of a deposition of members of the armed forces before their commissioned officer or any judge advocate general's officer.²³⁴ Kentucky and Missouri add city mayors to the list of approved deposition officers.²³⁵

In addition, several states have different approaches to the list of individuals presumptively disqualified from serving as deposition officers. Louisiana precludes the use of any court reporter with whom a party has a contract to provide reporting services.²³⁶ North Carolina echoes this provision, precluding the use, absent agreement, of any individual or firm that "is under a blanket contract for the court reporting services with an attorney of the parties, party to the action, or party having a financial interest in the action."²³⁷ In addition, it disqualifies anyone from serving as a deposition officer who is "under any contractual agreement that requires transmission of the original transcript [before it has been] certified."²³⁸ South Dakota also has a provision disqualifying persons working under certain standing contracts for court reporting services from serving as deposition officers.²³⁹ New Hampshire requires the deposition notice to include the name of the deposition officer.²⁴⁰ Puerto Rico, New York and Tennessee define disqualified "relatives" more specifically than California, by reference to "degrees of consanguinity."²⁴¹ Puerto Rico also excuses deposition officers from staying in attendance after the deponent has been sworn.²⁴²

Several states chart a different path regarding changes in the deposition transcript. For thirty days after the taking of a deposition, California allows the deponent to "change the form or substance of the answer to a question"²⁴³

233. IDAHO R. CIV. P. 28(c).

234. IOWA R. CIV. P. 153(d).

235. KY. R. CIV. P. 28.02; MO. ANN. STAT. § 492.090(2). Missouri also allows the taking of a deposition by anyone having a seal or the chief officer of a town. *Id.*

236. LA. CODE CIV. PROC. ANN. art. 1434A(2) (West 2001).

237. N.C. R. CIV. P. 28(c)(4). The rule further defines "a blanket contract" as "a contract to perform court reporting services over a fixed period of time or an indefinite period of time, rather than on a case-by-case basis, or any other contractual agreement which compels the, guarantees, regulates, or controls the use of particular court reporting services in future cases." *Id.*

238. *Id.*

239. S.D. Codified Laws § 15-16-28(c) (Michie 2000). It defines "employee of [an] attorney or counsel" to include "a person who has a contractual relationship with a person or entity interested in the outcome of the litigation, including anyone who may ultimately be responsible for payment to provide reporting or other court services, and a person who is employed part-time or full-time under contract or otherwise by a person who has a contractual relationship with a party to provide reporting or other court services." *Id.* It excludes "[c]ontracts for court reporting services for federal, state, or local governments and subdivisions" *Id.* It expressly does not prohibit "[n]egotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis" *Id.*

240. N.H. SUPER. CT. R. 39.

241. P.R. R. CIV. P. 25.3 (4th degree of consanguinity); N.Y. C.P.L.R. 3113 (McKinney 2001) (disqualified if would be disqualified to act as a juror because of consanguinity to a party); TENN. R. CIV. P. 28.03 (6th degree of consanguinity (civil)).

242. P.R. R. CIV. P. 25.1.

243. CAL. CIV. PROC. CODE § 2025(q)(1) (West 1998 & Supp. 2001).

Similar provisions apply in courts that follow the federal rules.²⁴⁴ In contrast, Illinois only allows corrections for “errors.”²⁴⁵ Even more stringently, New Hampshire, New Mexico and North Dakota prohibit any changes or alterations, but allow the deponent to set forth alleged errors in a separate document.²⁴⁶ New York refuses to permit claims of transcription errors unless a motion to suppress is made with reasonable promptness.²⁴⁷

Unlike California, Arkansas has eliminated the requirement that the deposition record be formally “sealed.” In Arkansas, a deposition need merely be “secured.”²⁴⁸ North Dakota allows a deposition officer to use a traceable commercial service to send a deposition transcript.²⁴⁹ Similarly, Ohio expressly authorizes transfer by express mail.²⁵⁰

Section 2025(u) of the California Code of Civil Procedure does contain extensive provisions regarding the use of deposition testimony at trial. Nevertheless, several provisions from other states are worth noting. Colorado encourages the parties to use summaries of testimony rather than reading verbatim from the transcript at trial.²⁵¹ Georgia requires the use of nonstenographic deposition recordings at trial, other than for cross-examination, if they exist.²⁵² Idaho clarifies that a party wishing to introduce a deposition transcript at trial or in support of a motion need not produce the original unless there is a genuine question about its authenticity.²⁵³ Ohio requires that any deposition that will be used at trial be filed at least one day before the start of trial.²⁵⁴ Kentucky provides an extensive list of persons whose deposition may be introduced at trial without a showing of their unavailability. The list includes state constitutional officers, postmasters, bank officers or clerks, doctors, lawyers, prison guards, and members of the armed forces.²⁵⁵ Finally, Michigan has an express “harmless error” provision regarding the admissibility of deposition provisions. Errors in the taking of depositions, even if not waived, will not restrict the usefulness at trial of the deposition unless the court finds that the deposition has been destroyed or that its use is unfair.²⁵⁶

Rhode Island and Texas have addressed attendance at depositions. Rhode Island prohibits anyone from being excluded from a deposition without a prior court order

244. *E.g.*, FED. R. CIV. P. 30(e). These courts require the deponent to state the reasons for any such changes. *Id.*

245. ILL. SUP. CT. R. 207(a).

246. N.H. SUPER CT. R. 41; N.M. DIST. CT. R. CIV. P. 30(e); N.D. R. CIV. P. 30(e).

247. N.Y. C.P.L.R. 3116.

248. ARK. R. CIV. P. 30(f)(1).

249. N.D. R. CIV. P. 30(f)(1).

250. OHIO R. CIV. P. 30(F)(1).

251. COLO. R. CIV. P. 32(a)(5).

252. GA. R. CIV. P. 30(g). *See also* KAN. STAT. ANN. § 60-232(c) (2000).

253. IDAHO R. CIV. P. 30(f)(4)(B).

254. OHIO R. CIV. P. 30(A).

255. KY. R. CIV. P. 32.01(c).

256. MICH. CT. R. 2.308(C)(5).

and requires forty-eight hours notice to all parties if persons, other than parties or party representatives, will be attending a deposition.²⁵⁷ Texas, too, requires notice if someone other than the witness, parties, spouses of parties, counsel, counsel's employees or the deposition officer plans to be present at the deposition.²⁵⁸

New York has given organizational deponents an option not available in California and other jurisdictions. In many jurisdictions, as in California, a party seeking to depose an organization has two options. First, it can describe the subject matter about which the deposing party wishes to examine the organization, and allow the organization to choose the appropriate person to be deposed on its behalf. Second, as for any individual, it can simply "name" an individual representative in the deposition notice or subpoena, and depose that individual accordingly.²⁵⁹ In contrast, under New York law, an organization that has been asked to produce a specific officer, director, member or employee for deposition can give ten days notice that it plans to produce someone else to be deposed on the matter.²⁶⁰

The substantial costs of taking depositions has prompted several jurisdictions to develop specific provisions addressing the payment, allocation and award of deposition expenses as costs. Louisiana requires the parties to state on the record which of them will be paying for the costs.²⁶¹ Iowa requires the deposing party to pay the costs of any depositions taken and prohibits the use of deposition testimony at trial until such costs have been paid.²⁶² In addition, Iowa only allows the court to tax as costs those portions of the depositions that were necessarily incurred for testimony admitted at trial.²⁶³ Michigan and North Dakota allow the court to apportion the transcription costs for nonstenographic depositions.²⁶⁴ Maine adds to the illustrative list of protective orders both a provision apportioning the costs of travel to a deposition as well as one that requires a witness under the control of a party to be brought into the state for deposition.²⁶⁵

Illinois has the most extensive provisions on deposition costs. Under the Illinois provision: (1) the party taking the deposition pays the fees for the witness, the officer, and the recorder; (2) the party at whose instance the deposition is transcribed pays the transcription costs; (3) if the scope of examination by any party exceeds the scope of the party at whose instance the deposition was taken, the court will apportion the excess to the additional party.²⁶⁶

257. R.I. SUPER. CT. R. CIV. P. 30(c).

258. TEX. R. CIV. P. 199.5(a)(3).

259. *E.g.*, CAL. CIV. PROC. CODE 2025(d)(6) (West 1998 & Supp. 2001); FED. R. CIV. P. 30(b)(6).

260. N.Y. C.P.L.R. 3106.

261. LA. CODE CIV. PROC. ANN. art. 1446(B)(4) (West 2001).

262. IOWA R. CIV. P. 157.

263. *Id.*

264. MICH. CT. R. 2.306(C)(3)(c) (if transcript used at trial); N.D. R. CIV. P. 30(c) (any transcript).

265. ME. R. CIV. P. 26(c)(10).

266. ILL. SUP. CT. R. 208(a).

Oklahoma places all of the burden of deposition costs, including the preparation of transcripts or copies of videotapes for adverse parties, on the noticing party. All of these costs, however, can ultimately be taxed.²⁶⁷

Finally, four states have provisions addressing attendance at written depositions. California, however, has no provisions addressing the physical attendance of parties or their attorneys at the site where the deposition officer will be propounding the written questions. Alabama and Iowa expressly allow any party to give notice that it intends to show up in person and cross-examine the deponent. Upon receipt of such notice, the examining party may choose to show up as well.²⁶⁸ In contrast, Kentucky expressly precludes any party or party's attorney from attending written depositions in person.²⁶⁹

B. Interrogatory Practice

Unlike the extensive provisions governing deposition practice, fewer potential innovations can be found in the survey of provisions governing interrogatories. Nevertheless, the important differences between California and other state and federal courts regarding the presumptive numbers of interrogatories that may be asked provide an opportunity for California to reexamine its limits. In addition, there are a handful of miscellaneous provisions worth noting.

1. Presumptive Numerical Limits

California allows any party to send any other party an unlimited number of "form" interrogatories and thirty-five "specially prepared" interrogatories.²⁷⁰ A party wishing to send more than the thirty-five "specially prepared" interrogatories need only attach a "declaration for additional discovery."²⁷¹ In such a declaration, the party must simply state that the complexity or quantity of issues in the case, or the expenses of obtaining the information through alternative means, justifies the additional discovery.²⁷² The burden is on the recipient to challenge the sufficiency of the affidavit, although the burden remains on the propounding party to justify the number.²⁷³

At the time of its enactment, section 2030(c) of the California Code of Civil Procedure was on the leading edge of attempts to rein in abusive interrogatory practice. Nearly fifteen years later, however, the provision is easily the weakest of

267. OKLA. STAT. tit. 12, § 3230(J) (2000).

268. ALA. R. CIV. P. 31(a); IOWA R. CIV. P. 150(c).

269. KY. R. CIV. P. 31.02.

270. CAL. CIV. PROC. CODE § 2030(c)(1)-(2) (West 1998). In addition, a party may send supplemental interrogatories up to three more times which do not count against the 35 special interrogatory limit. *Id.* § 2030(c)(8).

271. *Id.*

272. *Id.*

273. *Id.* § 2030(c)(2)(C).

the efforts to end interrogatory abuse. It finds closest company with the likes of Georgia, Minnesota, Montana, Nebraska, New Hampshire and South Carolina. Each of these five states allow a total of fifty interrogatories.²⁷⁴ At the tougher extreme lie the federal courts and two companion states. Since 1993, the federal courts have limited interrogatories to twenty-five total. A party who wishes to exceed that number must obtain permission from either opposing counsel or the court.²⁷⁵ Eleven other states are only slightly more generous: Colorado, Florida, Illinois, Iowa, Maine, Massachusetts, Mississippi, Oklahoma, Rhode Island, Virginia and Wyoming allow a total of thirty interrogatories without a stipulation or court order.²⁷⁶ Florida and Colorado include official form interrogatories in their limits, although Colorado excludes subparts of official form interrogatories from being considered separate interrogatories for purposes of its limit.²⁷⁷ Florida, however, requires the use of official form interrogatories if they have been developed for the type of action involved.²⁷⁸ Kentucky has a similar limit of thirty, but excludes interrogatories seeking names and addresses of witnesses from its count.²⁷⁹ Next lies Louisiana, with a limit of thirty-five.²⁸⁰ One tick higher are Arizona, the District of Columbia, Idaho and Nevada, each of which permit forty interrogatories.²⁸¹ Arizona includes official form interrogatories in this limit, although, like Colorado, does not count individual subparts of such interrogatories as separate items.²⁸² Finally, two states place extremely tight restrictions in certain kinds of cases. In certain personal injury cases in Connecticut, only official form interrogatories are permitted absent stipulation or court order.²⁸³ Similarly, in New Jersey, for specified types of cases with official form interrogatories, only ten specially prepared interrogatories may be used.²⁸⁴ Both of these last two jurisdictions allow a simple demand for answers

274. MINN. R. CIV. P. 33.01(a); MONT. R. CIV. P. 33(a); NEB. R. DISCOVERY 33(a); N.H. SUPER. CT. R. 36; S.C. R. CIV. P. 33(b)(8) South Carolina also allows seven official form interrogatories without counting towards the fifty interrogatory limit. *Id.*

275. FED. R. CIV. P. 33(a).

276. COLO. R. CIV. P. 26(b)(2); FLA. R. CIV. P. 1.340(a); ILL. SUP. CT. R. 213(c); IOWA R. CIV. P. 126(a); ME. R. CIV. P. 33(a); MASS. R. CIV. P. 33(a); MISS. R. CIV. P. 33(a); OKLA. STAT. tit.12, § 3233(A) (2000); R.I. SUPER. CT. R. CIV. P. 33(b); VA. SUP. CT. R. 4:8(g); WYO. R. CIV. P. 33(a).

277. COLO. R. CIV. P. 26(b)(2); FLA. R. CIV. P. 1.340(a).

278. FLA. R. CIV. P. 1.340(a).

279. KY. R. CIV. P. 33.01(3).

280. LA. CODE CIV. PROC. ANN. art. 1457(B) (West 2000).

281. ARIZ. R. CIV. P. 33.1(a); D.C. R. Civ. Proc. 33(a); IDAHO R. CIV. P. 33(a)(3); NEV. R. CIV. P. 33(d).

282. ARIZ. R. CIV. P. 33.1(a).

283. CONN. R. SUPER. CT. CIV. 13-6(c) The specified classes of cases are: "all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property . . ." *Id.*

284. N.J. R. SUPER. CT. CIV. 4:17-1(b)(1). The specified classes of cases are: "all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim . . ." *Id.*

Cf. ARIZ. R. CIV. P. 26.2(b) (limiting parties, in medical malpractice actions, to ten "non-uniform" interrogatories).

to the form interrogatories in lieu of formal service of copies of the interrogatories themselves.²⁸⁵

2. *Other Potential Innovations*

Beyond the provisions addressing the presumptive numerical limits, the jurisdictional survey produced only a handful of additional areas for possible innovation. New Jersey requires a responding party who is not answering from personal knowledge to indicate where it got the information from.²⁸⁶ It also allows service of a single copy of answers on parties represented by the same attorney.²⁸⁷ New Jersey also expressly requires a responding party to answer all form interrogatories unless they call for privileged information.²⁸⁸ North Dakota excuses responding parties from answering “an interrogatory that is repetitive of any interrogatory it has already answered.”²⁸⁹ Illinois sets out a general requirement that propounders of interrogatories “restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.”²⁹⁰ It also allows a responding party to make its business records available in lieu of answering interrogatories without regard to the relative burdens on the parties of combing through the records.²⁹¹ Maryland’s Discovery Guidelines detail requirements for making objections.²⁹² In specified

285. CONN. R. SUPER. CT. CIV. 13-6(c) (sufficient to send “notice” referring to individual official form interrogatories by number); N.J. R. SUPER. CT. CIV. 4:17-1(b)(2).

286. N.J. R. SUPER. CT. CIV. 4:18-4.

287. *Id.*

288. *Id.* 4:17-1(b)(3).

289. N.D. R. CIV. P. 33(b)(7).

290. ILL. SUP. CT. R. 213(b).

291. *Id.* 213(d).

292. MD. R. DISCOVERY 5. The guideline states:

- (a) No part of an interrogatory should be left unanswered merely because an objection is interposed to another part of an interrogatory.
- (b) The practice of objecting to an interrogatory or a part thereof while simultaneously providing partial or incomplete answer to the objectionable part is presumptively improper.
- (c) Where a claim of privilege is asserted in objecting to any interrogatory or part thereof and information is not provided on the basis of such assertion: (1) The party asserting the privilege shall be in the objection to the interrogatory or part thereof and information is not provided on the basis of such assertion: (2) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information: (i) For oral communications: (a) the name of the person making the communication and the names of persons present while the communication was made, where not apparent the relationship of the persons present to the person making communication: (b) the date and place of the communication and (c) the general subject matter of the communication. (ii) For documents: (a) the type of documents; (b) general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other. (3) The party

cases, New York bars simultaneous interrogatory and deposition discovery from the same party.²⁹³ Finally, Florida expressly clarifies that interrogatory answers do not bind coparties.²⁹⁴

C. Inspection Demands

The multi-jurisdictional survey developed only a handful of possible inspection demand innovations. Neither California nor the federal courts currently place any presumptive numerical limits on inspection demands. Three states, however, do place such limits. Arizona allows only ten demands.²⁹⁵ Colorado doubles the presumptive limit to twenty.²⁹⁶ Connecticut has no general limits, but, as it does for interrogatories, in specified classes of cases, it restricts inspection demands to official form demands.²⁹⁷

Three states have potentially useful provisions addressing the service of inspection demands upon nonparties. In such cases, California authorizes a “records-only” deposition subpoena.²⁹⁸ Under the Michigan procedure, a demand can be served without the need of a subpoena.²⁹⁹ In addition, Michigan, like New York,³⁰⁰ expressly provides for the court to order that the demanding party pay the costs of compliance with the demand by the responding party.³⁰¹ Under the Indiana procedure, a subpoena must be served on the nonparty.³⁰² But Indiana adds two wrinkles to the procedure. First, like Pennsylvania, it requires service of the intended nonparty demand on all *parties* fifteen days before service on the nonparty.³⁰³ Second, it requires the demand to state that the nonparty “is entitled to security

seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, notice the depositions of appropriate witnesses for the limited purpose of establishing other relevant information concerning the assertion of privilege including (i) the applicability of the privilege asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege. The party seeking disclosure may apply to the court for leave to file special interrogatories or redepose a particular witness if necessary.

293. N.Y. C.P.L.R. 3130 (Consol. 2001).

294. FLA. R. CIV. P. 1.340(d).

295. ARIZ. R. CIV. P. 34(a).

296. COLO. R. CIV. P. 26(b)(2).

297. CONN. R. SUPER. CT. (Civil) § 13-9. The specified cases include: “all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property.”

298. CAL. CIV. PROC. CODE § 2025(c) (West 1998 & Supp. 2001).

299. MICH. R. CIV. P. 2.310(D). The demand, however, must be served in the same manner as a subpoena would be served. *See* MICH. R. CIV. P. 2310(d)(2) (stating that the request must be served on the person to whom it is directed, and a copy must be served on the other parties).

300. N.Y. C.P.L.R. 3111 (Consol. 2001).

301. MICH. R. CIV. P. 2.310(D)(5).

302. IND. R. CIV. P. 34(c).

303. *Id.*; PA. R. CIV. P. 4009.21.

against damages or payment of damages resulting from such request.”³⁰⁴ If the nonparty moves to quash service of the demand, the court may condition relief “on the prepayment of damages . . . or require an adequate surety bond or other indemnity conditioned against such damages.”³⁰⁵

California and the federal courts allow a responding party to produce the demanded materials either as kept in the ordinary course of business or in separate categories that respond to the categories of the demand.³⁰⁶ Arkansas, however, only allows a responding party to produce documents “as kept in the ordinary course of business” if it is just as easy for the demanding party to find the responsive materials as it is for the responding party.³⁰⁷

Indiana makes an express exception to the best evidence rule for documents that are not produced in response to inspection demands.³⁰⁸ Under this exception, a party who has a document in its possession, custody or control, but failed to produce it in response to a proper inspection demand, may not raise the “best evidence rule” at trial.³⁰⁹

Texas, Nevada and Illinois address the costs of producing documents. Texas codifies the traditional but rarely-codified rule that the responding party pays for the costs of finding the materials demanded, while the demanding party pays for the costs of inspecting, copying or testing the materials produced.³¹⁰ Nevada expressly requires the party who wants copying to pay for it. It authorizes the court, however, to require the responding party to actually do the copying.³¹¹ Similarly, for “records only” subpoenas, Illinois clarifies that the requesting party, not the “deponent,” pays for any copying charges.³¹²

New Jersey has an interesting provision addressing documents referenced in pleadings. If such documents are neither annexed to the pleading nor quoted verbatim within the pleading, the opposing party has the right to demand a copy of the documents. The pleader must turn over a copy of the referenced materials within five days of the demand.³¹³

Pennsylvania offers parties faced with ambiguous requests two options. They can either produce what they believe the request is seeking, or they can identify the

304. IND. R. CIV. P. 34(c).

305. *Id.*

306. FED. R. CIV. P. 33(b); CAL. CIV. PROC. CODE § 2031(f) (West 1998 & Supp. 2001).

307. ARK. R. CIV. P. 34(b)(3)(B).

308. IND. R. CIV. P. 34(d).

309. *Id.*

310. TEX. R. CIV. P. 196.6. *Cf.* CAL. CIV. PROC. CODE § 2031(g)(1) (West 1998 & Supp. 2001) (demanding party pays for costs of translating databases into a useable format); OKLA. STAT., tit.12, § 3237(c) (requesting party pays the reasonable expense of making property available for inspection; court may tax costs later).

311. NEV. R. CIV. P. 34(d).

312. ILL. SUP. CT. R. 204(a).

313. N.J. CT. R. 4:18-2.

documents that they are not producing and present the reasons why they are not producing them.³¹⁴

Tennessee requires that a party seeking to do destructive testing on an item must move for a court order before conducting those tests.³¹⁵

Finally, Texas makes responses to inspection demands self-authenticating, unless a genuine question exists as to a document's authenticity.³¹⁶ Texas also requires the requesting party to specify the form in which it wants electronic materials produced.³¹⁷

D. Medical Examinations

Pertaining to medical examinations, only four potential innovations were found. The first addresses examinations by stipulation. Section 2032(c) of the California Code of Civil Procedure sets out the procedure for taking a routine physical examination of a plaintiff in a personal injury case. Section 2032(d) addresses all other medical examinations. Section 2032(e) then authorizes parties to make their own agreement regarding medical examinations "in lieu of the procedures and restrictions specified [in the other two sections]"³¹⁸ The line between these three categories of examinations, however, is unclear when an agreement covers only some portions of an examination. In contrast, the federal rules specify that the basic examination provisions control "except to the extent that agreement provides otherwise."³¹⁹ Arizona addresses the circumstances where the parties agree that an examination is necessary but cannot agree on the identity of the examining physician or psychologist. In such cases, the examination may be conducted, after notice, by the physician specified by the party seeking the examination without the prior need for a judicial order.³²⁰ The party unhappy with the selected physician may go to court to obtain an order changing the identity of the examiner.³²¹

The second innovation addresses *ex parte* contacts with physicians. The California discovery statutes are silent regarding *ex parte* contacts between a party and another party's physician. Arkansas and Pennsylvania, however, expressly

314. PA. R. CIV. P. 4009.12(d).

315. TENN. R. CIV. P. 34.01.

316. TEX. R. CIV. P. 193.7.

317. *Id.* 196.4.

318. CAL. CIV. PROC. CODE § 2032(e) (West 1998).

319. FED. R. CIV. P. 35(b)(3).

320. ARIZ. R. CIV. P. 35(c)(1).

321. *Id.* 35(c)(2).

prohibit any such ex parte contacts absent the party's consent.³²² Arkansas' rules state:

Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.³²³

The third medical exam innovation comes from South Carolina. It instructs the court that in setting the conditions for any court-ordered exam, it should give special consideration to the examinee's needs and the examinee's physician's needs, but only reasonable consideration to the examining physician's needs.³²⁴

Finally, Texas clarifies that the party whose condition is in controversy may not comment at trial on the adverse party's failure to request a discovery examination.³²⁵

E. Admission Requests

Two potential admission request innovations were found. The first involves presumptive numerical limits. As with specially prepared interrogatories, absent agreement or an order to the contrary, California currently limits admission requests to thirty-five. Requests for admission of the genuineness of documents do not count towards this limit.³²⁶ Again, like interrogatory practice, to exceed the limit, an attorney in a California action need only attach a "declaration for additional discovery."³²⁷ Most other jurisdictions, including the federal courts, do not place any presumptive limits on admission requests.³²⁸ Compared to seven other states who do impose such limits, however, California's limitations are the second weakest. Colorado and South Carolina are the toughest, limiting admission requests to twenty.³²⁹ Arizona, with twenty-five, and Iowa, Oklahoma and Oregon, with thirty, follow.³³⁰ Only Nevada has a more generous presumptive limit, allowing forty

322. ARK. R. CIV. P. 35(c)(2); PA. R. CIV. P. 4003.6.

323. ARK. R. CIV. P. 35(c)(2).

324. S.C. R. CIV. P. 35(a).

325. TEX. R. CIV. P. 204.3.

326. CAL. CIV. PROC. CODE § 2033(c)(1) (West 1998).

327. *Id.* § 2033(c)(2)(3) (West 1998).

328. *See, e.g.*, FED. R. CIV. P. 36.

329. COLO. R. CIV. P. 26(b)(2); S.C. R. CIV. P. 36(c) (stating requests involving authenticity of documents do not count toward this limit).

330. ARIZ. R. CIV. P. 26(b); IOWA R. CIV. P. 127; OKLA. STAT., tit.12, § 3236; OR. R. 45.

admission requests exclusive of those addressed to the genuineness of documents.³³¹ None of the other four states, however, allow an attorney to exceed the limit simply by attaching a declaration for additional discovery. All require a motion to the court.³³²

The second potential admission request innovation comes from Illinois and Michigan. In both states, a party can send copies of public records to an adversary for review. Under such circumstances, the genuineness of the copies is deemed admitted unless the adversary makes a formal objection.³³³

F. Expert Witness Information

The survey uncovered about a half-dozen potential innovations in discovery of expert witnesses' identity, background, prior reports, and expected testimony. California currently uses the "exchange of expert witness lists" procedure to address these matters.³³⁴ This exchange occurs only if demanded by some party to the case, but if any party demands it, then all parties must comply. Following the exchange, the experts may be deposed.³³⁵ For the most part, Nevada has adopted the "exchange" process as well.³³⁶

Other courts, however, have taken a different path. Since 1993, the federal courts have required automatic disclosure of testifying expert witness information.³³⁷ Automatic disclosure has been followed not only by the state courts who have generally adopted the federal disclosure requirements, but by a couple of others as well.³³⁸ For its part, Colorado has modified the federal disclosure requirement by sequencing expert disclosure; rather than the simultaneous disclosure contemplated by the federal courts, Colorado has the plaintiff disclose first, the defendant second, and rebuttal experts third.³³⁹

In addition to the disclosure provisions, several states have enacted some other general provisions that may be worth examining. Discovery of experts has traditionally been wrapped up in the law governing an attorney's work product. The work product doctrine attempts to give attorneys the freedom to examine both the positive and the negative aspects of their cases. Since, in many cases, consultation also with experts is essential to this examination, a party who had to first pay for and

331. NEV. R. CIV. P. 36(c).

332. COLO. R. CIV. P. 26(b)(2); ARIZ. R. CIV. P. 26(b); IOWA R. CIV. P. 127; NEV. R. CIV. P. 36(c).

333. ILL. SUP. CT. R. 216(d); MICH. CT. R. 2.312(E).

334. CAL. CIV. PROC. CODE § 2034(a)(1) (West 1998).

335. *Id.* § 2034(i).

336. NEV. R. CIV. P. 26(b)(5). *See also* N.Y. C.P.L.R. 3101 (offer to disclose names of medical experts in medical malpractice cases).

337. FED. R. CIV. P. 26(a)(2)(c). The date of the disclosure is either set by the parties, by the court, or occurs no later than ninety days prior to trial. *Id.*

338. *See, e.g.*, CONN. R. SUPER. CT. (Civil) § 13-4, KAN. STAT. ANN. § 60-226(b) (2001) (requiring automatic disclosure of discovery).

339. COLO. CT. R. CIV. P. 26(a)(2)(C).

then turn over, through discovery, the results of such expensive consultations would have much less incentive to do so. Once the decision has been made to present an expert's testimony at trial, however, fairness to the adversary tips the balance in favor of at least some exchange of information about the expert and his or her expected testimony. Accordingly, most jurisdictions have distinguished between experts who have been retained (or who are employed by a party as an in-house expert) but who are not planned to be called at trial and those who have been retained (or employed) and are expected to be called.

This basic dichotomy, however, oversimplifies the possible classifications of experts. For example, many jurisdictions, including California, have implicitly recognized that some experts, notably treating physicians, may testify as experts even though they have not been retained or employed by any party to provide such testimony.³⁴⁰ Several states are more direct in their recognition of this distinction among classes of testifying experts. For example, Colorado and Missouri expressly recognize that experts may not necessarily be either employed or retained by the party intending to call them at trial; both specify discovery obligations for such experts.³⁴¹ Illinois reaches a similar result simply by requiring that the identity, background and opinions of all "opinion" witnesses, whether retained or not, must be disclosed in answers to interrogatories.³⁴² Iowa expressly excludes percipient witness experts from any limitations on discovery of experts.³⁴³ And South Carolina expressly acknowledges that parties have no duty to produce information developed from an informally consulted expert.³⁴⁴

Although the use of experts in a case often adds greatly to litigation expenses, especially when the testimony of dueling experts turns a case into a battle of the experts, courts have shown no real interest in "arms control." Thus, virtually no presumptive numerical limits apply to the use of experts. The two exceptions to date

340. *E.g.*, CAL. CIV. PROC. CODE §§ 2034(a)(1) & (2) (West 1998). *See generally* HOGAN & WEBER, *supra* note 41, at § 10.1; *see also* notes 18-24 and accompanying text.

341. COLO. R. CIV. P. 26(a)(2)(B); MISSOURI R. CIV. P. 56.01(b)(5). Under the Colorado provision, the two classes are: (1) "a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony;" and (2) any other "witness who may be called to provide expert testimony." *Id.* The disclosure duties are most extensive for the first class of experts.

The Missouri provision also distinguishes between retained or employed and non-retained or employed testifying expert witnesses. It states:

A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial who may provide expert witness opinion testimony by providing the expert's name, address, and field of expertise. For the purpose of this Rule 56.01(b)(5), an expert witness is a witness qualified as an expert by knowledge, experience, training, or education giving testimony relative to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence. Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses. *Id.*

342. ILL. SUP. CT. R. 213(g).

343. IOWA R. CIV. P. 125(A)(1)(c).

344. S.C. R. CIV. P. 26(b)(4)(b).

are Alaska and Arizona. Alaska limits experts to three per side.³⁴⁵ Arizona has a presumptive limit of one independent expert per side.³⁴⁶

During the exchange of expert witness information, California requires the attorney for a party to sign a declaration describing the background and expected testimony of retained experts.³⁴⁷ Although its overall practices are different—using interrogatories rather than exchanged declarations—Iowa requires the retained, testifying expert to personally sign the document containing the information.³⁴⁸ Utah, however, excuses the testifying expert from having to author the report regarding his or her expected testimony.³⁴⁹ New Jersey takes a slightly different tack. It requires the attorney for any party who sends copies of expert reports in response to a discovery request to certify that there are no other relevant reports by that expert available.³⁵⁰

A testifying expert's fees are usually a subject of interest to other parties. California requires the parties to an exchange to include in the attorney's declaration "a statement of the expert's hourly and daily fee for providing deposition testimony" and for consulting with the retaining attorney.³⁵¹ Additional information about the expert's prior testimony and relevant fees can be developed if, as usually occurs, the expert is deposed after the information exchange. Florida, however, allows extensive discovery by interrogatories of a testifying expert's prior testimony and financial arrangements with retaining counsel.³⁵² If an expert is deposed, Texas requires the

345. ALASKA R. CIV. P. 26(a)(2)(D).

346. ARIZ. R. CIV. P. 26(b)(4)(D). If the parties on a side cannot agree, then either the court designates the expert, or, if good cause is shown, may allow more than one expert. *Id.*

347. CAL. CIV. PROC. CODE § 2034(f)(2) (West 1998).

348. IOWA R. CIV. P. 122(c)(1); OR. R. 4003.5.

349. UTAH R. CIV. P. 26(a)(3).

350. N.J. CT. R. 4:18-4.

351. CAL. CIV. PROC. CODE § 2034(f)(2)(E) (West 1998).

352. FLA. R. CIV. P. 1.280(b)(4)(A)(iii)(1)-(3). The rule provides:

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

deposing party to pay fees for the expert's time spent preparing for and giving the deposition, as well as reviewing and correcting the transcript.³⁵³

Two other provisions are worth noting. Iowa and Pennsylvania address the substance of an expert's trial testimony. They preclude trial testimony that is different from the expert's deposition testimony, but permit the expert to testify about matters that were not inquired into during discovery.³⁵⁴ Finally, absent the opposing party's consent, Hawaii expressly precludes *ex parte* contacts with an opposing party's retained expert.³⁵⁵

III. CONCLUSION

In conclusion, should the California Law Revision Commission decide to take up discovery reform as one of its topics, it will find plenty of possible innovations to consider. This report has made no attempt to make specific recommendations regarding specific innovations. It also has not fully evaluated the possible innovations to determine how much, if at all, they might further the goals of discovery reform. It is simply a starting point for a much more detailed conversation.

Should the Commission decide to initiate that conversation, the author recommends that it bring into the dialog as many of the different voices on discovery reform as possible. Many of the possibilities catalogued here, of course, will be quite controversial among the many parties interested in the civil litigation process. A collaborative approach to discovery reform, facilitated by the Commission, among the various stakeholders offers the greatest potential for long-term acceptance by both the general public and the legal community.³⁵⁶

353. TEX. R. CIV. P. 195.7.

354. IOWA R. CIV. P. 125(d); PA. R. CIV. P. 4003.5.

355. HAW. R. CIV. P. 26(b)(4)(A)(iii); PA. R. CIV. P. 4003.6 (health care experts).

356. The author, an Associate of the California Center for Public Dispute Resolution, a joint project of California State University-Sacramento and the University of the Pacific, McGeorge School of Law, would be happy to discuss with the Commission the feasibility and possible design of such a collaborative.