

First Supplement to Memorandum 2002-21

Discovery Improvements from Other Jurisdictions (Comments of the Civil Justice Association of California)

The Civil Justice Association of California (“CJAC”) has provided comments on Prof. Weber’s background study. CJAC’s comments are attached to this supplement and summarized below.

GENERAL COMMENTS REGARDING THE COMMISSION’S STUDY

CJAC echoes Joseph Hurley’s concerns regarding the politics of discovery reform:

Discovery changes that make facial sense and read well upon introduction in the Legislature will almost certainly emerge, if they emerge at all, differently in form and substance. When there are strong differing opinions about what ought to be done with respect [to] a particular provision, as there will undoubtedly be with discovery reform, the Legislature will frequently, and understandably, opt for ambiguity. This leaves it to the courts or a later legislative session to revisit the issue and attempt to clarify the ambiguity.

For these reasons, CJAC does not feel that its resources warrant a detailed response at this time to each reform that Prof. Weber describes. Rather, when a bill is introduced in the Legislature, CJAC will poll its members “on the initial bill draft of what the Commission recommends and weigh-in with focused and constructive comment.”

This position is disappointing, because it would be helpful to have CJAC actively involved in this study, instead of having to address CJAC’s concerns on-the-fly in the legislative process. One of the Commission’s strengths is the ability to analyze topics carefully, rather than rushing to conclusions to comply with legislative deadlines. We understand CJAC’s concern about conserving its resources. Perhaps, however, CJAC would be willing to comment on a tentative recommendation when the Commission issues one.

DISCOVERY PLANNING AND JUDICIAL CONTROL OVER DISCOVERY

The only reform that CJAC specifically discusses is CAJ's proposal that there be an early meeting with a judge regarding discovery. CJAC's general counsel, Fred Hiestand, regards this proposal as "sensible." His own "limited litigation experience with California and federal discovery is that when the court becomes involved early with counsel in setting a discovery schedule, matters generally go smoother than when counsel are left to their own devices and the rules of discovery."

Respectfully submitted,

Barbara S. Gaal
Staff Counsel



May 7, 2002

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

Dear Ms. Gaal:

A principal advantage of responding last to a request for comment is that one gets to read the remarks of those who responded earlier. So it is with the Commission's invitation to comment on Gregory Weber's thoughtful paper about "Potential Innovations in Civil Discovery" for California. The Civil Justice Association of California commends the Commission and Professor Weber for undertaking this project, but for reasons well stated by Mr. Joseph Hurley in his letter, does not feel that our resources warrant a detailed response to each of the various recommendations at this time.

When it comes to discovery, what is one litigator's meat is another's poison. Since discovery is a two-edged sword, this means the positions in the debate on discovery cannot even be conveniently attributed to, say, plaintiff attorneys on one side and defense attorneys on the other. Discovery changes that make facial sense and read well upon introduction in the Legislature will almost certainly emerge, if they emerge at all, differently in form and substance. When there are strong differing opinions about what ought to be done with respect a particular provision, as there will undoubtedly be with discovery reform, the Legislature will frequently, and understandably, opt for ambiguity. This leaves it to the courts or a later legislative session to revisit the issue and attempt to clarify the ambiguity. And the beat goes on . . . and on ad infinitum.

My own limited litigation experience with California and federal discovery is that when the court becomes involved early with counsel in setting a discovery schedule, matters generally go smoother than when counsel are left to their own devices and the rules of discovery. Thus the suggestion from the State Bar



Committee on the Administration of Justice that there be “an early meeting with [the] judge . . . who would make appropriate orders governing discovery” seems sensible. The courts, though, may feel differently about having this early role in discovery.

Whatever the Commission decides to do about discovery will, as the Commission knows, require legislation. At that time, CJAC will poll our members on the initial bill draft of what the Commission recommends and weigh-in with focused and constructive comment.

Thank you for soliciting our views and please keep us informed of your progress to improve California discovery law.

Cordially,

A handwritten signature in cursive script that reads "Fred Hiestand".

Fred J. Hiestand
CJAC General Counsel

FJH:wp