

Memorandum 2002-33**Discovery Improvements from Other Jurisdictions
(Discussion of Issues)**

At the May meeting, the Commission selected a number of areas to explore in its study of civil discovery. The Commission gave the staff discretion to decide which areas to pursue first. This memorandum examines three relatively straightforward topics:

- (1) Nonsubstantive reform to shorten code sections and improve readability.
- (2) Duty to automatically supplement discovery response.
- (3) Presuit discovery.

A staff draft to implement nonsubstantive reform is attached. Comments of Commissioner Richard Best are also attached (Exhibit p. 1), as is a memorandum prepared by Ellen Nudelman, the Commission's summer legal assistant (Exhibit pp. 2-14). As a first step towards preparing a tentative recommendation, the staff seeks preliminary guidance from the Commission on the topics discussed in this memorandum.

NONSUBSTANTIVE REFORM

The provisions governing civil discovery (Code Civ. Proc. §§ 2016-2036) are generally well-organized, but a number of them are extremely long and cumbersome. As more fully discussed at pages 28-29 of Memorandum 2002-21, short code sections are preferable because they facilitate statutory revisions and enhance readability for courts and practitioners. The attached draft proposes nonsubstantive revisions to divide the civil discovery provisions into short, readily used sections.

The draft is not yet complete. In particular, several lengthy provisions have not yet been divided into short sections (Code Civ. Proc. §§ 2030, 2031, 2032, 2033, 2034). For purposes of comparison, these are included in the attached draft in their present form.

The staff also needs to prepare a narrative explanation of the proposal (preliminary part), search the codes for cross-references to conform, and cite-check the draft. Some Comments require revision to achieve consistency (where only a cross-reference was changed, some Comments say that the provision was “continued without substantive change,” whereas later-prepared Comments say that the provision was “continued without change, except to conform the cross-reference”). Revisions may also be necessary to account for legislation enacted in 2002.

In addition, we have not assessed the extent to which material in the existing statutes (reorganized in the attached draft) could be deleted as redundant. A few obvious redundancies are pointed out in Staff Notes, but it might also be possible to eliminate other material without loss of meaning. For instance, numerous provisions state that “the court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes [a specified discovery motion], unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” This duplication might be unnecessary.

The staff is reluctant, however, to do much to eliminate duplication, because that might trigger concerns about whether the proposal would have an unintended substantive effect. We are convinced that the reform would be useful, and do not want to jeopardize its enactment.

Unless the Commission instructs otherwise, the staff will continue to work on the attached draft, with the goal of completing it for the September meeting. We would appreciate any suggestions that Commissioners or interested parties might have regarding elimination of redundancies or any other aspect of the attached draft.

DUTY TO AUTOMATICALLY SUPPLEMENT DISCOVERY RESPONSE

Another area that the Commission decided to explore was the possibility of imposing an automatic duty to supplement discovery responses.

In California, there is no such duty. Subject to certain restrictions, however, a party may propound a supplemental interrogatory (Code Civ. Proc. § 2030(c)(8)) or a supplemental inspection demand (Code Civ. Proc. § 2031(e)) to elicit later-acquired information.

In federal court, a party “is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party 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) (hereafter “Rule 26(e)(2)”) (emphasis added.) There is no duty to amend a response to make immaterial corrections.

A third approach is to require correction of a discovery response, regardless of whether the correction is material or immaterial. Under this approach, a discovery request is said to be “continuing.” California specifically prohibits continuing interrogatories. Code Civ. Proc. § 2030(c)(7).

A memorandum discussing the pros and cons of these approaches is attached Exhibit pp. 2-14. This memorandum was prepared by Stanford Law School student Ellen Nudelman, who favors the federal approach. *Id.* at 9-10. She explains that this approach entails “the efficiency of less paperwork and the resultant cost reduction, the elimination of unfair surprises at trial, possibly speedier resolution of a case, and the promotion of a less adversarial pretrial relationship between opposing counsel.” *Id.* at 9.

Commissioner Richard Best points out, however, that supplemental discovery requests “have the advantage of notice and a formal response and avoid the issue of inadvertent failure to supplement.” Exhibit p. 1 He “see[s] few motions involving these supplemental requests and wonder[s] if lawyers use them.” *Id.* He does not have a firm opinion on whether the California approach is preferable to the federal one. *Id.* He notes that persons who work in federal court may have opinions on the subject, and he queries whether “there are meaningful studies or polls on the federal experience to suggest how valuable or effective or popular [that] approach may be.” *Id.* He suggests contacting Judge David Levy (United States District Court, Eastern District of California) for information on this point.

Commissioner Best also proposes an alternative approach:

Perhaps there should be some focused, limited and combined mandatory disclosure and duty to supplement, e.g. documents or witness expected to be presented at trial with the enforcement provision that those not disclosed when known cannot be introduced except on some significant showing of excusable neglect etc. Perhaps a mandatory disclosure of this limited but critical information could be made with the initial pleadings and on

request or periodically thereafter. This has the appeal of getting the key discovery immediately at lower cost and without formal responses that tend to be expensive and counterproductive. The specificity of the requirement avoids the difficulty of enforcing a vague obligation.

Id.

This is an interesting possibility, which the Commission could consider in connection with the complex topic of pretrial disclosure. At present, the staff tentatively leans towards the approach of Rule 26(e)(2), for the reasons discussed at the May meeting and the reasons given by Ms. Nudelman. We recommend, however, that the Commission **refrain from taking a position on this issue until we follow-up on Commissioner Best's suggestion to contact Judge Levy and attempt to obtain further information on the federal experience.**

PRESUIT DISCOVERY

Under specified circumstances, Code of Civil Procedure Section 2035 permits discovery to preserve evidence or perpetuate testimony before a lawsuit is filed. Two possible revisions of this provision are discussed below.

Law Applicable to a Deposition to Perpetuate Testimony

Section 2035(g) provides:

(g) If a deposition to perpetuate testimony has been taken either under the provisions of this section, or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation, that deposition may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with subdivision (u) of Section 2025 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

In his background study, Professor Gregory Weber (McGeorge Law School) suggests revising this provision to make clear that a presuit deposition taken in another state may only be used if it would be admissible under the law of that state. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051, 1071 (2001) (hereafter "Weber Study"). Ms. Nudelman analyzes that suggestion in her memorandum, and indicates that such a revision would eliminate "the ambiguity and potential for

gamesmanship in Section 2035 in a clear, easily-administered manner.” Exhibit pp. 11-13.

The staff believes that clarification of this point might help to prevent disputes. It might also be helpful to make a similar clarification with regard to a deposition taken in a foreign nation. **These clarifications could be achieved by revising Section 2035(g) along the following lines:**

(g) If a deposition to perpetuate testimony has been taken either under the provisions of this section, or under comparable provisions of the laws of ~~another state~~ the state in which it was taken, or the federal courts, or a foreign nation in which it was taken, that deposition may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with subdivision (u) of Section 2025 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

....

Comment. Subdivision (g) of Section 2035 is revised to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under this section or under a comparable provision of the federal courts or of the jurisdiction in which it was taken.

Suit to be Filed by Petitioner’s Heirs or Representatives

Professor Weber also points out that two states have statutes specifying that a person may take presuit discovery even if the anticipated lawsuit would be filed not by the person but by the person’s heirs or representatives. Weber Study at 1072. In contrast, Section 2035(a) permits presuit discovery by “[o]ne who expects to be a party to any action that may be cognizable in any court of the State of California, whether as plaintiff, or as defendant, or in any other capacity” (Emphasis added). The statute does not refer to a successor in interest of a person *seeking* presuit discovery, although subdivision (g) does refer to “the successor in interest of any party, named in the petition as an *expected adverse party*.” (Emphasis added.) By negative implication, Section 2035 does not appear to permit a person to take presuit discovery in anticipation of a suit by the person’s successor in interest.

Due to an apparent lack of published decisions on presuit discovery in anticipation of suit by a successor in interest, Ms. Nudelman sees no need to revise Section 2035 to address this point. Exhibit pp. 13-14. The staff believes, however, that there is a potential for litigation over this point, and that a person

should be able to engage in presuit discovery in anticipation of suit by an heir or representative, provided that the usual requirements for granting presuit discovery are satisfied, including a showing that “the discovery requested may prevent a failure or delay of justice” Code Civ. Proc. § 2035(f). **Such a result could be achieved by revising Section 2035 along the following lines:**

2035. (a) One who expects to be a party or expects a successor in interest to be a party to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, for the purpose of perpetuating that party’s person’s own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed. One shall not employ the procedures of this section for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.

(b) The methods available for discovery conducted for the purposes set forth in subdivision (a) are (1) oral and written depositions, (2) inspections of documents, things, and places, and (3) physical and mental examinations.

(c) One who desires to perpetuate testimony or preserve evidence for the purposes set forth in subdivision (a) shall file a verified petition in the superior court of the county of the residence of at least one expected adverse party, or, if no expected adverse party is a resident of the State of California, in the superior court of a county where the action or proceeding may be filed.

(d) The petition shall be titled in the name of the one who desires the perpetuation of testimony or the preservation of evidence. The petition shall set forth all of the following:

(1) The expectation that the petitioner or the petitioner’s successor in interest will be a party to an action cognizable in a court of the State of California.

(2) The present inability of the petitioner either to bring that action or to cause it to be brought.

(3) The subject matter of the expected action and the petitioner’s involvement.

(4) The particular discovery methods described in subdivision (b) that the petitioner desires to employ.

(5) The facts that the petitioner desires to establish by the proposed discovery.

(6) The reasons for desiring to perpetuate or preserve these facts before an action has been filed.

(7) The name or a description of those whom the petitioner expects to be adverse parties so far as known.

(8) The name and address of those from whom the discovery is to be sought.

(9) The substance of the information expected to be elicited from each of those from whom discovery is being sought.

The petition shall request the court to enter an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.

(e) The petitioner shall cause service of a notice of the petition to be made on each natural person or organization named in the petition as an expected adverse party. This service shall be made in the same manner provided for the service of a summons. The service of the notice shall be accompanied by a copy of the petition. The notice shall state that the petitioner will apply to the court at a time and place specified in the notice for the order requested in the petition. This service shall be effected at least 20 days prior to the date specified in the notice for the hearing on the petition.

If after the exercise of due diligence, the petitioner is unable to cause service to be made on any expected adverse party named in the petition, the court in which the petition is filed shall make an order for service by publication. If any expected adverse party served by publication does not appear at the hearing, the court shall appoint an attorney to represent that party for all purposes, including the cross-examination of any person whose testimony is taken by deposition. The court shall order that the petitioner pay the reasonable fees and expenses of any attorney so appointed.

(f) If the court determines that all or part of the discovery requested may prevent a failure or delay of justice, it shall make an order authorizing that discovery. The order shall identify any witness whose deposition may be taken, and any documents, things, or places that may be inspected, and any person whose physical or mental condition may be examined. Any authorized depositions, inspections, and physical or mental examinations shall then be conducted in accordance with the provisions of this article relating to those methods of discovery in actions that have been filed.

(g) If a deposition to perpetuate testimony has been taken either under the provisions of this section, or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation, that deposition may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with subdivision (u) of Section 2025 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

Comment. Subdivisions (a) and (d) of Section 2035 are amended to permit a person to take presuit discovery in anticipation of a suit by the person's successor in interest, so long as the statutory requirements for such discovery are satisfied.

We do not feel strongly on this point, however, and we encourage comments on it, as well as on any other aspect of this study.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

COMMENTS OF COMMISSIONER BEST

From: Richard Best <rbest@sftc.org>
To: Barbara Gaal <bgaal@clrc.ca.gov>
Subject: Discovery revisions
Date: June 26, 2002

Thanks for your response. I have spent most of my professional life dealing with these problems from the vantage of a neutral in cases of all sizes and shapes presented by lawyers of widely differing styles and competence; yet, I still find the subject of interest. I have often reviewed proposals for “reform” and have obviously worked with the changes in the law over the last 30 years. I would like to make what contribution I can to the improvement of the system. I will try to give some thought to this subject and would like to present it to you in the form that would be most useful — specific proposed rule, ID of issue and general solution, comments on proposals, or whatever would be of value.

On the subject of automatic supplementation as well as some other areas I don’t have a firm opinion or experience; but, those in the federal court may and I wonder if there are meaningful studies or polls on the federal experience to suggest how valuable or effective or popular their approach may be. Judge David Levy [E.D.Ca] is now chair of their discovery rules subcommittee and might at least put you in touch with your federal counterpart who might have some empirical data on the various topics including this one.

In this area as in others, California has the alternative approach on interlogs and documents of supplemental discovery requests which have the advantage of notice and a formal response and avoid the issue of inadvertent failure to supplement. I see few motions involving these supplemental requests and wonder if lawyers use them.

Perhaps there should be some focused, limited and combined mandatory disclosure and duty to supplement, e.g. documents or witness expected to be presented at trial with the enforcement provision that those not disclosed when known cannot be introduced except on some significant showing of excusable neglect etc. Perhaps a mandatory disclosure of this limited but critical information could be made with the initial pleadings and on request or periodically thereafter. This has the appeal of getting the key discovery immediately at lower cost and without formal responses that tend to be expensive and counterproductive. The specificity of the requirement avoids the difficulty of enforcing a vague obligation.

June 26, 2002

To: Barbara Gaal
From: Ellen Nudelman
Re: Supplemental Interrogatory Rule and Presuit Discovery

Questions Presented:

- (1) Should California amend Code of Civil Procedure Section 2030 to adopt Rule 26(e) of the Federal Rules of Civil Procedure, which mandates automatic supplemental responses to interrogatories and other discovery responses, such as requests for document production?
- (2) Should the text of Code of Civil Procedure Section 2035, relating to presuit discovery, be amended to clarify the regulation of presuit depositions?

Supplementation of Discovery Responses

Code of Civil Procedure Section 2030(c)(8) (hereafter “Section 2030(c)(8)”) was part of the Civil Discovery Act of 1986, a product of the State Bar-Judicial Council Joint Commission on Discovery. Section 2030(c)(8) took effect in 1987 and is unamended to date. This provision allows a party to request a supplemental interrogatory, subject to certain limitations, if that party wishes for the interrogatory to be updated. In contrast, Rule 26(e)(2) of the Federal Rules of Civil Procedure (hereafter “Rule 26(e)(2)”) imposes an automatic duty to supplement discovery responses. At issue is whether the California rule should be changed to conform with Rule 26(e)(2), at least with respect to interrogatories and requests for document production.

I. California Approach: Section 2030(c)(8)

This section recounts the historical background of Section 2030(c)(8), discusses the impact of the provision, and describes related safeguards to prevent undue surprise.

Historical Background

Before the adoption of Section 2030, there was no provision regarding continuing interrogatories. Section 2030(c)(7) states that an “interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement an answer to it that was initially correct and complete with later acquired information.”

Before the enactment of this provision, the use of continuing interrogatories was an “open question” in California discovery practice. State Bar-Judicial Council Joint Commission on Discovery, *Proposed California Civil Discovery Act of 1986: Proposed Act and Reporter’s Notes*, at 69 (1986) (hereafter “1986 Discovery Act Report”); see *Rangel v. Graybar Electric Co.*, 70 Cal. App. 3d 943, 950 n. 6, 139 Cal. Rptr. 191 (1977). Thus, counsel preparing interrogatories could include a continuing duty to supplement the responses and have a chance of enforcing this duty at trial if the responding party failed to supplement a response when it became incorrect or incomplete.

The Joint Commission on Discovery felt that the issue of continuing interrogatories needed a definitive answer. 1986 Discovery Act Report at 69. The Commission explained its decision to preclude continuing interrogatories as follows:

[The Commission] fears that imposition of a duty to supplement on the responding party opens the door to the possibility of evidentiary hearings, both before and during the trial, to determine just when the new information came into possession of an opponent. [The Commission] also concluded that it is burdensome on the responding party to be required periodically to review the previous answers.

Id.

The Commission decided to “temper” the prohibition against continuing interrogatories by allowing a minimum of three supplemental interrogatories.

Id. The Commission noted that

[t]he right to propound these supplemental interrogatories should make more palatable the Commission’s proposal for a presumptive limit on the number of interrogatories, and for a banning of “continuing” interrogatories.

Id. This comment suggests that some attorneys were opposed to the prohibitions against continuing interrogatories, as well as the new limitation

on the number of interrogatories. The right to supplemental interrogatories appears to be a step the Commission took to appease the opposition.

The supplemental interrogatories may be requested subject to Section 2030(c)(8), which states:

In addition to the number of interrogatories permitted by paragraphs (1) and (2), a party may propound a supplemental interrogatory to elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories (1) twice prior to the initial setting of a trial date, and (2) subject to the time limits on discovery proceeding and motions provided in Section 2024, once after the initial setting of a trial date. However, on motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental interrogatories.

It is important to note the broad language for later comparison with Federal Rule of Civil Procedure 26(e).

Instead of limiting the supplemental response to updating materially incomplete or incorrect answers, like the federal rule does, Section 2030(c)(8) allows the interrogatory to elicit *any* later acquired material information, regardless of whether it is material to the case. In a complex case, this may require disclosure of many details irrelevant to the resolution of the case. However, the benefit of the broad language is that the responding party does not have discretion to decide what is material. Thus, there is no opportunity for disputes over the materiality of the information counsel chooses not to disclose; any failure to disclose in response to a supplemental interrogatory is a discovery violation.

Impact of Section 2030(c)(8)

Since there is no requirement in California to file a supplemental response, the issue has not been litigated and the impact of the provision is hard to tell. However, the possible impact in California may be gleaned from cases in other states where the duty to supplement interrogatories has not been fulfilled.

Most of these cases arise from an attorney's failure to notify opposing counsel of trial witnesses who were not included on the witness list in the initial interrogatory response. *See, e.g., Yeldell v. Holiday Hills Retirement & Nursing Center, Inc.*, 701 S.W.2d 243, 246 (Tex. 1985) (approving trial court's exclusion of excluding witness's testimony where counsel did not supplement

interrogatory after gaining knowledge of witness with pertinent information about case); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986) (upholding exclusion of testimony where counsel discovered that witness listed as living in another state had moved to city within state and did not supplement its answer to plaintiff); *Duke v. Westvaco Dev. Corp.*, 279 S.C. 464, 467, 309 S.E.2d 293 (1983) (approving exclusion of testimony where, on afternoon of trial, counsel sought to add two witnesses to witness list, despite having provided supplemental responses to interrogatories twice previously); *Pettite v. Lizotte*, 454 A.2d 329 (Me. 1982) (approving continuance when witness was unintentionally omitted in the interrogatories and supplemental responses by counsel). In all of these cases, it was within the discretion of the trial judge to exclude the testimony or grant a continuance to alleviate undue surprise.

Two Illinois cases illustrate the impact of imposing no duty to supplement interrogatories unless the opposing counsel requests supplementation. In *Clay v. McCarthy*, 73 Ill. App. 3d 462 (1979), the appellate court held improper the trial court's decision to exclude the testimony of a witness not revealed in the interrogatory responses. The appellate court pointed out that there was no duty to supplement and the initial interrogatory was answered fully and accurately. *Id.* at 465. Similarly, in *Thorsen v. Chicago*, the appellate court approved the admittance of the testimony of a witness not disclosed before trial, because the defendants "never requested supplementation of the answer nor otherwise requested disclosure of any additional witnesses, and therefore plaintiff was under no duty to advise defendants of the unlisted witness." 74 Ill. App. 3d 98, 105 (1979).

Thus, without a duty to supplement interrogatories, the discovery process may become more secretive and adversarial. When there is a duty to supplement, adversarial impulses not to disclose may be sanctioned with either a continuance to allow counsel to prepare for the witness or the exclusion of the witness's testimony altogether. However, it should be kept in mind that an attorney can avoid adversarial tactics such as surprise witnesses under the present system by requesting a supplemental interrogatory which may reveal witnesses previously not on the list.

Other Protections Against Surprise Witnesses

Aside from supplemental interrogatories, there are some additional safeguards in California to prevent surprise witnesses. For example, in limited

civil cases, any party may serve on any other party a Judicial Council form requesting a statement of witnesses. Code Civ. Proc. § 96. No party required to respond to the Section 96 form may call a witness not revealed in the statement. Code Civ. Proc. § 97. Attorneys may also demand a mutual and simultaneous exchange by all parties of information concerning each other's expert trial witnesses. Code Civ. Proc. § 2034(a). If a party unreasonably fails to disclose an expert witness or submit requisite information about that expert, the trial court will exclude that expert's testimony. Code Civ. Proc. § 2034(j). Some superior courts have local rules requiring the exchange of witness lists before trial. A witness not listed is barred from testifying, unless "good cause" is shown. See Brown & Weil, California Practice Guide: Civil Procedure Before Trial at 8:88 (2002). In criminal cases, there is a duty for both the defendant and the prosecuting attorney to disclose all witnesses intended to be called at trial. Penal Code §§ 1054.1, 1054.3.

II. Federal Approach: Rule 26(e)

In contrast to Section 2030(c)(8), Rule 26(e) imposes a duty to supplement discovery responses. Rule 26(e) states:

Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is 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. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party 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.

The Advisory Committee notes on the 1970 amendments to the Federal Rules of Civil Procedure discuss the pros and cons of imposing a “continuing burden” on the responding party to supplement answers when new information is obtained. Fed. R. Civ. P. 26(e) ¶¶ 61-65 Advisory Committee’s notes to 1970 amendments. The Advisory Committee states that Rule 26(e) is *not* a continuing burden rule “except as expressly provided.” *Id.* at ¶ 63. The exceptions are as follows:

An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D. Md. 1967).

Another exception is made for the situation in which a party or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties.

Id. at ¶¶ 63-64.

Although Rule 26(e) is not generally a continuing burden rule, the policy arguments for and against the continuing burden rule parallel that of the rule requiring “seasonal” supplements. The benefits and detriments are discussed below.

Benefits

As interpreted by the courts, the major benefit of Rule 26(e)(2) with respect to supplemental responses to interrogatories is to “prevent trial by ambush.” *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus.*, 42 U.S.P.Q.2D (BNA) 1369 (N.D. Ill. 1996) (quoting *Gorman v. Chicago Housing Authority*, 1991 WL 10893

(N.D. Ill. 1991)). The same principle should apply to document requests and requests for admission, as all are sources of information that may be potentially used at trial without the opposing counsel's prior knowledge of their existence. As the court in Heidelberg explains, "[i]f a party is allowed to withhold the supplementation of its discovery responses until after fact discovery is closed, the purpose of the Rule is effectively frustrated because the opposing party is denied the opportunity to conduct discovery on the supplemented responses." *Id.* If one party does not get a supplemental response, then they may be unfairly surprised at trial. *Id.* In fact, the idea behind the discovery rules in general is to "narrow and clarify the issues and give the parties mutual knowledge of all relevant facts, thereby preventing surprise." *Dilmore v. Stubbs*, 636 F.2d 966, 969 n. 2 (5th Cir. 1981).

More policy arguments for the duty to supplement responses can be found in the debate over the 1993 amendments to Federal Rule 26 concerning mandatory disclosure. Indeed, rule 26(e)'s requirement to supplement all disclosures and responses, including the interrogatory and document request provisions, is considered one of four components of the mandatory disclosure system. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 Fla. L. Rev. 9, 12 (1994). The mandatory disclosure rule "is designed to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 Ind. L.J. 657, 657-58 (1995).

This is an efficiency argument for imposing the duty to supplement. For example, imposition of the duty "reduces the proliferation of additional sets of interrogatories." Fed. R. Civ. P. 26(e) ¶ 62 Advisory Committee's notes to 1970 amendments. In other words, the party that would have needed to request a supplemental interrogatory no longer needs to do so. This, in turn, increases the efficiency of the discovery process and reduces litigation expenses. This is especially true if attorneys routinely request supplemental interrogatories and other supplemental discovery requests.

A positive corollary from this efficiency argument is that because the parties will have all of the information sooner, they can evaluate their case more quickly and perhaps settle earlier. Lang, 70 Ind. L.J. at 670. Another argument for the mandatory duty is to reduce the adversarial nature of the discovery process. *Id.*

Detriments

On the negative side of imposing a duty to supplement,

. . . there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated.

Fed. R. Civ. P. 26(e) ¶ 62 Advisory Committee's notes to 1970 amendments.

However, the above comment refers to a continuing burden to supplement. The federal rule is not a continuing burden rule so the lawyer only needs to supplement a response when there is a *material* change in fact relating to the previous response. Thus, the burden on the attorney is substantially less than under a continuing burden rule. Furthermore, if requesting a supplemental response is standard for California lawyers, as discussed by Professor Weber and others at the Commission's May meeting, the automatic supplementation rule would not increase the burden on the attorney at all. The only practical change would be that the lawyer would not get a reminder to supplement the response. On the other hand, if requesting supplemental responses is not standard practice among California attorneys, then the burden on the responding party would increase. The increased burden would be most intense for attorneys juggling numerous cases, because it would require them to seasonably review their caseload for developments that could be considered material.

A requirement to seasonably supplement material information might lead to the inefficiency of hearings over what constitutes "material" information and whether the material information was disclosed "seasonably." This is similar to the Joint Commission's fear that the imposition of a continuing duty to supplement "opens the door to the possibility of evidentiary hearings, both before and during trial, to determine just when new information came into possession of the opponent." 1986 Discovery Act Report at 69.

Another argument against the duty to supplement is that the discovery process should be adversarial. Automatically giving opposing counsel possibly useful information is not to the benefit of zealous representation. See Lang, 70 Ind. L.J. at 670.

Summary of Pros and Cons

To review, the policy arguments in favor of the federal version of the rule governing supplemental interrogatories are the efficiency of less paperwork and the resultant cost reduction, the elimination of unfair surprises at trial, possibly speedier resolution of a case, and the promotion of a less adversarial pretrial relationship between opposing counsel. The policy arguments against imposing a duty to seasonably supplement interrogatories and other discovery requests are a possible increased burden on responding attorneys, the possible inefficiency of hearings over what should have been disclosed or whether it was disclosed seasonably, and an undesired decrease in the adversarial nature of pretrial discovery.

Recommendation

In my opinion, California should amend Section 2030 to be similar to Rule 26(e)'s mandate for supplemental responses to discovery requests "if the party 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." This approach should apply to interrogatories, requests for admission, and document requests. The amendment would promote both efficiency and fairness in the discovery process, without imposing unreasonable demands on the responding party. If requesting supplemental interrogatories is the standard practice in California, as discussed by Professor Weber and others at the Commission's May meeting, then automatic supplemental responses would increase efficiency without increasing the burden on the responding party. This is especially true because the federal approach only mandates supplementation in the case of *material* information pertaining to the previous interrogatory or discovery request.

Furthermore, it is unfair that an attorney who fails to request a supplemental response will miss material changes in the case that might hurt the attorney's client in trial. I would advocate a less adversarial environment for discovery purposes to create more civil relationships among opposing

counsel and promote a fair resolution of the case without prejudicial surprises. For settlement purposes, it may be helpful to put all of the information on the table as it unfolds, rather than saving the material developments for trial.

While it is important to consider the Joint Commission's fear that a duty to supplement may result in extra hearings over when the information was obtained and whether it was material, this fear is outweighed by the less speculative efficiency effects of amending Section 2030. For these reasons, I think that Section 2030 should be revised to conform with Federal Rule 26(e).

Presuit Discovery

Code of Civil Procedure Section 2035 (hereafter "Section 2035") allows a person who expects to be a party to a California lawsuit to engage in presuit discovery under specified circumstances, including depositions, inspection demands, and medical examinations. Presuit discovery is a "rarely used stage of discovery." 1986 Discovery Act Report at 121. Section 2035 basically restated the existing law regarding presuit discovery found in former Code of Civil Procedure Section 2017. *Id.* at 121-22.

Professor Weber has pointed out that the text of Section 2035 is "ambiguous and could be improved." Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 *McGeorge L. Rev.* 1051, 1071 (2001) (hereafter "Weber Study"). He mentions two potential improvements: (1) clarifying whether a deposition to perpetuate testimony must be taken under the laws of the state in which the deposition is held, and (2) clarifying whether a petitioner may take presuit discovery when the putative suit would be filed by the petitioner's heirs or representatives instead of by the petitioner.

I. Law Applicable to a Deposition to Perpetuate Testimony

Subdivision (g) of Section 2035 does not clarify whether a presuit deposition to perpetuate testimony must have been taken under the laws of the state in which it was taken, or just under the laws of another state, to be admissible in California. Weber Study at 1071. Section 2035(g) states:

(g) If a deposition to perpetuate testimony has been taken either under the provisions of this section, or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation, that deposition may be used, in any action

involving the same subject matter that is brought in a court of the State of California, in accordance with subdivision (u) of Section 2025 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

Professor Weber points out that the federal courts and several other states, such as Indiana, have clarified that presuit “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.’” Weber Study at 1071.

To determine whether such clarification is needed in California, it is helpful to understand the purpose of presuit discovery. Most analyses of presuit depositions are based on interpretation of Rule 27 of the Federal Rules of Civil Procedure (hereafter “Rule 27”). In general, “Rule 27 allows trial judges to provide prospective litigants access to a variety of discovery mechanisms if needed to ‘prevent a failure or delay of justice.’” Kronfeld, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 Geo. L.J. 593 (1990).

There are two principal “failures of justice” that may occur if no presuit discovery is allowed. First, due to passage of time, evidence may be lost or a witness may no longer be able to testify. *Id.* at 594; see *Ash v. Cort*, 512 F.2d 909, 911 (3rd Cir. 1975) (noting that Rule 27 provides for much narrower discovery than Rule 26, and that Rule 27 “properly applies only in that special category of cases where it is necessary to prevent testimony from being lost.”). The perpetuation of evidence rule allows the testimony to be available for use in future legal proceedings. *In re Hopson Marin Transp.*, 168 F.R.D. 560, 564 (1996).

The second potential failure of justice may occur when the petitioner lacks sufficient evidence to frame a complaint with sufficient particularity. *Id.* at 594. However, Rule 27 and Section 2035 specifically address only the perpetuation of testimony and the preservation of evidence. In fact, federal cases have determined that Rule 27 is not meant to be used for discovery of facts to frame a complaint. See, e.g., *In re Gary Construction, Inc.*, 96 F.R.D. 432, 433 (D. Colo. 1983). Similarly, Section 2035(a) explicitly warns against employing the provision “for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.”

Given the limited purposes of Section 2035 in perpetuating testimony and preserving evidence, it makes sense to clarify subdivision (g)’s ambiguous

phrase “under comparable provisions of the law of another state.” Although we are not aware of any litigation over this language in the California courts, it is conceivable that a petitioner would try to take a presuit deposition under the rules of state other than where the deposition is held, so as to avoid a limitation against discovery of facts to frame a complaint. Since Section 2035 is a rule of equity, such a strategy for attempting to expand the limited purpose of presuit discovery should be discouraged.

One way to achieve this would be to make a presuit deposition admissible in California only if it is taken under a presuit discovery law that, like California’s, precludes presuit discovery for the purpose of framing a complaint. A simpler approach would be to do as Professor Weber suggests: Specify that the deposition must be taken under the laws of the state in which it was taken. I prefer this approach because it eliminates the ambiguity and potential for gamesmanship in Section 2035 in a clear, easily-administered manner.

II. Suit to be Filed by Petitioner’s Heirs or Representatives

Professor Weber also mentions that Oklahoma and Ohio allow a petition to be made “even if it is not the petitioner but rather his or her heirs or representatives who will be parties to the action that cannot yet be brought.” Weber Study at 1072. This more liberal approach is not adopted in Rule 27. The rule provides, in part,

The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought . . .

Rule 27(a)(1). Thus, it is implied in Rule 27 that the petitioner must be the party to the putative suit, rather than the petitioner’s heirs or representatives.

In Ohio, there are no published decisions regarding the issue of an heir or representative of a petitioner who will not be the party to an action, nor has any law review article discussed this issue, most likely because Ohio Civil Rule 27 is a black letter, straight-forward rule. The same is true for the Oklahoma provision (Okla. Stat. tit. 12, § 3227 (2002)).

Recommendation

Since the terms of the Ohio and Oklahoma provisions are most readily identified as probate terms, most likely the policy behind the rule is to allow presuit discovery for cases that become ripe at the death of the petitioner. In the interest of keeping the rules for presuit discovery simple, and considering the lack of any pressing policy reason to adopt the expanded rule for petitioner identity (it has only been adopted in two states), I do not think that such an amendment of Section 2035 is necessary.

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PROPOSED LEGISLATION

1 **Heading of Title 3 (commencing with Section 1985) (amended).**

2 SEC. _____. The heading of Title 3 (commencing with Section 1985) of Part 4 of
3 the Code of Civil Procedure is amended to read:

4 TITLE 3. OF THE MEANS OF PRODUCTION OF EVIDENCE

5 **Heading of Chapter 2 (commencing with Section 1985) (repealed).**

6 SEC. _____. The heading of Chapter 2 (commencing with Section 1985) of Title 3
7 of Part 4 of the Code of Civil Procedure is repealed.

8 ~~CHAPTER 2. MEANS OF PRODUCTION~~

9 **Heading of Chapter 3 (commencing with Section 2002) (repealed).**

10 SEC. _____. The heading of Chapter 3 (commencing with Section 2002) of Title 3
11 of Part 4 of the Code of Civil Procedure is repealed.

12 ~~CHAPTER 3. MANNER OF PRODUCTION~~

13 **Heading of Title 4 (commencing with Section 2002) (added).**

14 SEC. _____. A heading is added immediately preceding Section 2002 of the Code
15 of Civil Procedure, to read:

16 TITLE 4. OF THE MANNER OF PRODUCTION OF
17 EVIDENCE

18 **Heading of Article 1 (commencing with Section 2002) (repealed).**

19 SEC. _____. The heading of Article 1 (commencing with Section 2002) of Chapter
20 3 of Title 3 of Part 4 of the Code of Civil Procedure is repealed.

21 ~~Article 1. Mode of Taking the Testimony of Witnesses~~

22 **Heading of Chapter 1 (commencing with Section 2002) (added).**

23 SEC. _____. A heading is added immediately preceding Section 2002 of the Code
24 of Civil Procedure, to read:

1 CHAPTER 1. MODE OF TAKING THE TESTIMONY OF
2 WITNESSES

3 **Heading of Article 2 (commencing with Section 2009) (repealed).**

4 SEC. _____. The heading of Article 2 (commencing with Section 2009) of Chapter
5 3 of Title 3 of Part 4 of the Code of Civil Procedure is repealed.

6 Article 2. Affidavits

7 **Heading of Chapter 2 (commencing with Section 2009) (added).**

8 SEC. _____. A heading is added immediately preceding Section 2009 of the Code
9 of Civil Procedure, to read:

10 CHAPTER 2. AFFIDAVITS

11 **Code Civ. Proc. §§ 2016-2036 (repealed). Discovery**

12 SEC. _____. Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of
13 Part 4 of the Code of Civil Procedure is repealed.

14 **Comment.** Sections 2016-2036 are repealed to facilitate nonsubstantive reorganization of the
15 rules governing civil discovery.

16 **Code Civ. Proc. §§ 2016.010-2036.050 (added). Discovery**

17 SEC. _____. Chapter 3 (commencing with Section 2016.010) is added to Title 4 of
18 Part 4 of the Code of Civil Procedure, to read:

19 CHAPTER 3. DISCOVERY

20 Article 1. General Provisions

21 **§ 2016.010. Short title**

22 2016.010. This chapter may be cited as the Civil Discovery Act of 1986.

23 **Comment.** Section 2016.010 continues former Section 2016(a) without substantive change.

24 **§ 2016.020. Definitions**

25 2016.020. As used in this chapter:

26 (a) “Action” includes a civil action and a special proceeding of a civil nature.

27 (b) “Court” means the trial court in which the action is pending, unless otherwise
28 specified.

29 (c) “Document” and “writing” mean a writing as defined in Section 250 of the
30 Evidence Code.

31 **Comment.** Section 2016.020 continues former Section 2016(b) without substantive change.

1 § 2016.030. **Written stipulations regarding depositions and discovery**

2 2016.030. Unless the court orders otherwise, the parties may by written
3 stipulation do either or both of the following:

4 (a) Provide that depositions may be taken before any person, at any time or
5 place, on any notice, and in any manner, and when so taken may be used like other
6 depositions.

7 (b) Modify the procedures provided by this chapter for other methods of
8 discovery.

9 **Comment.** Section 2016.030 continues former Section 2021 without substantive change.

10 § 2016.040. **Service by mail**

11 2016.040. Section 1013 applies to any method of discovery or service of a
12 motion for discovery provided for in this chapter.

13 **Comment.** Section 2016.040 continues former Section 2019(e) without substantive change.

14 ☞ **Staff Note.** Section 2019(e) refers to service of a motion for discovery, but not to service of a
15 motion for a protective order or a motion to compel. Perhaps this provision should be revised to
16 refer to “service of a motion provided for in this chapter.”

17 § 2016.050. **Computation of time when last day falls on Saturday, Sunday, or holiday**

18 2016.050. When the last day to perform or complete any act provided for in this
19 chapter falls on a Saturday, Sunday, or holiday as specified in Section 10, the time
20 limit is extended until the next day that is not a Saturday, Sunday, or holiday.

21 **Comment.** Section 2016.050 continues former Section 2024(g) without substantive change.

22 § 2016.060. **Application of chapter to discovery in aid of enforcement of money judgment**

23 2016.060. This chapter applies to discovery in aid of enforcement of a money
24 judgment only to the extent provided in Article 1 (commencing with Section
25 708.010) of Chapter 6 of Title 9 of Part 2.

26 **Comment.** Section 2016.060 continues former Section 2016(c) without substantive change.

27 Article 2. Scope of Discovery

28 § 2017.010. **Scope of discovery**

29 2017.010. Unless otherwise limited by order of the court in accordance with this
30 chapter, any party may obtain discovery regarding any matter, not privileged, that
31 is relevant to the subject matter involved in the pending action or to the
32 determination of any motion made in that action, if the matter either is itself
33 admissible in evidence or appears reasonably calculated to lead to the discovery of
34 admissible evidence. Discovery may relate to the claim or defense of the party
35 seeking discovery or of any other party to the action. Discovery may be obtained
36 of the identity and location of persons having knowledge of any discoverable
37 matter, as well as of the existence, description, nature, custody, condition, and
38 location of any document, tangible thing, or land or other property.

1 **Comment.** Section 2017.010 continues former Section 2017(a) without substantive change.

2 **§ 2017.020. Discovery of insurance coverage**

3 2017.020. A party may obtain discovery of the existence and contents of any
4 agreement under which any insurance carrier may be liable to satisfy in whole or
5 in part a judgment that may be entered in the action or to indemnify or reimburse
6 for payments made to satisfy the judgment. This discovery may include the
7 identity of the carrier and the nature and limits of the coverage. A party may also
8 obtain discovery as to whether that insurance carrier is disputing the agreement's
9 coverage of the claim involved in the action, but not as to the nature and substance
10 of that dispute. Information concerning the insurance agreement is not by reason
11 of disclosure admissible in evidence at trial.

12 **Comment.** Section 2017.020 continues former Section 2017(b) without change.

13 **§ 2017.030. Discovery concerning plaintiff's sexual conduct**

14 2017.030. (a) In any civil action alleging conduct that constitutes sexual
15 harassment, sexual assault, or sexual battery, any party seeking discovery
16 concerning the plaintiff's sexual conduct with individuals other than the alleged
17 perpetrator shall establish specific facts showing that good cause exists for that
18 discovery, and that the matter sought to be discovered is relevant to the subject
19 matter of the action and reasonably calculated to lead to the discovery of
20 admissible evidence. This showing shall be made by noticed motion and shall not
21 be made or considered by the court at an ex parte hearing. This motion shall be
22 accompanied by a declaration stating facts showing a good faith attempt at an
23 informal resolution of each issue presented by the motion.

24 (b) The court shall impose a monetary sanction under Article 7 against any party,
25 person, or attorney who unsuccessfully makes or opposes a motion for discovery,
26 unless it finds that the one subject to the sanction acted with substantial
27 justification or that other circumstances make the imposition of the sanction
28 unjust.

29 **Comment.** Section 2017.030 continues former Section 2017(d) without substantive change.

30 **§ 2017.040. Court order limiting scope of discovery**

31 2017.040. (a) The court shall limit the scope of discovery if it determines that the
32 burden, expense, or intrusiveness of that discovery clearly outweighs the
33 likelihood that the information sought will lead to the discovery of admissible
34 evidence. The court may make this determination pursuant to a motion for
35 protective order by a party or other affected person. This motion shall be
36 accompanied by a declaration stating facts showing a good faith attempt at an
37 informal resolution of each issue presented by the motion.

38 (b) The court shall impose a monetary sanction under Article 7 against any party,
39 person, or attorney who unsuccessfully makes or opposes a motion for a protective
40 order, unless it finds that the one subject to the sanction acted with substantial

1 justification or that other circumstances make the imposition of the sanction
2 unjust.

3 **Comment.** Section 2017.040 continues former Section 2017(c) without substantive change.

4 **Article. 3. Use of Technology in Conducting**
5 **Discovery in a Complex Case**

6 **§ 2017.110. “Technology” defined**

7 2017.110. Subject to the findings required by Section 2017.130 and the purpose
8 of permitting and encouraging cost-effective and efficient discovery,
9 “technology,” as used in this article, includes, but is not limited to, telephone, e-
10 mail, CD-ROM, Internet web sites, electronic documents, electronic document
11 depositories, Internet depositions and storage, videoconferencing, and other
12 electronic technology that may be used to improve communication and the
13 discovery process.

14 **Comment.** Section 2017.110 continues former Section 2017(e)(6) without substantive change.

15 **§ 2017.120. Effect of article**

16 2017.120. (a) Nothing in this article diminishes the rights and duties of the
17 parties regarding discovery, privileges, procedural rights, or substantive law.

18 (b) Nothing in this article modifies the requirement for use of a stenographic
19 court reporter as provided in Section 2025.170. The rules, standards, and
20 guidelines adopted pursuant to this subdivision shall be consistent with the
21 requirement of Section 2025.170 that deposition testimony be taken
22 stenographically unless the parties agree or the court orders otherwise.

23 (c) Nothing in this article modifies or affects in any way the process used for the
24 selection of a stenographic court reporter.

25 **Comment.** Subdivision (a) of Section 2017.120 continues former Section 2017(e)(4) without
26 substantive change.

27 Subdivision (b) continues former Section 2017(e)(7) without substantive change.

28 Subdivision (c) continues former Section 2017(e)(8) without substantive change.

29 **§ 2017.130. Use of technology in conducting discovery in complex case**

30 2017.130. (a) Pursuant to noticed motion, a court may enter an order authorizing
31 the use of technology in conducting discovery in any of the following:

32 (1) A case designated as complex pursuant to Section 19 of the Judicial
33 Administration Standards.

34 (2) Cases ordered to be coordinated pursuant to Chapter 3 (commencing with
35 Section 404) of Title 4 of Part 2.

36 (3) An exceptional case exempt from case disposition time goals pursuant to
37 Article 5 (commencing with Section 68600) of Chapter 2 of Title 8 of the
38 Government Code.

1 (4) A case assigned to Plan 3 pursuant to paragraph (3) of subdivision (b) of
2 Section 2105 of the California Rules of Court.

3 (b) In a case other than one listed in subdivision (a), the parties may stipulate to
4 the entry of an order authorizing the use of technology in conducting discovery.

5 (c) An order authorizing the use of technology in conducting discovery may be
6 made only upon the express findings of the court or stipulation of the parties that
7 the procedures adopted in the order meet all of the following criteria:

8 (1) They promote cost-effective and efficient discovery or motions relating
9 thereto.

10 (2) They do not impose or require an undue expenditure of time or money.

11 (3) They do not create an undue economic burden or hardship on any person.

12 (4) They promote open competition among vendors and providers of services in
13 order to facilitate the highest quality service at the lowest reasonable cost to the
14 litigants.

15 (5) They do not require the parties or counsel to purchase exceptional or
16 unnecessary services, hardware, or software.

17 (d) Pursuant to an order authorizing the use of technology in conducting
18 discovery, discovery may be conducted and maintained in electronic media and by
19 electronic communication. The court may enter orders prescribing procedures
20 relating to the use of electronic technology in conducting discovery, including
21 orders for service of discovery requests and responses, service and presentation of
22 motions, conduct of discovery in electronic media, and production, storage, and
23 access to information in electronic form.

24 (e) The Judicial Council may promulgate rules, standards, and guidelines
25 relating to electronic discovery and the use of electronic discovery data and
26 documents in court proceedings.

27 **Comment.** Subdivision (a) of Section 2017.130 continues the first sentence of former Section
28 2017(e)(1) without substantive change.

29 Subdivision (b) continues the second sentence of former Section 2017(e)(1) without substantive
30 change.

31 Subdivision (c) continues former Section 2017(e)(2) without substantive change.

32 Subdivision (d) continues the first two sentences of former Section 2017(e)(3) without
33 substantive change.

34 Subdivision (e) continues the third sentence of former Section 2017(e)(3) without substantive
35 change.

36 **§ 2017.140. Use of service provider**

37 2017.140. (a) If a service provider is to be used and compensated by the parties
38 in discovery under this article, the court shall appoint the person or organization
39 agreed on by the parties and approve the contract agreed on by the parties and the
40 service provider. If the parties do not agree on selection of a service provider, each
41 party shall submit to the court up to three nominees for appointment, together with
42 a contract acceptable to the nominee. The court shall appoint a service provider
43 from among the nominees. The court may condition this appointment on the

1 acceptance of modifications in the terms of the contract. If no nominations are
2 received from any of the parties, the court shall appoint one or more service
3 providers.

4 (b) Pursuant to noticed motion at any time and on a showing of good cause, the
5 court may order the removal of the service provider or vacate any agreement
6 between the parties and the service provider, or both, effective as of the date of the
7 order. The continued service of the service provider shall be subject to review
8 periodically, as agreed by the parties and the service provider, or annually if they
9 do not agree. Any disputes involving the contract or the duties, rights, and
10 obligations of the parties or service provider may be determined on noticed motion
11 in the action.

12 **Comment.** Subdivision (a) of Section 2017.140 continues the first four sentences of former
13 Section 2017(e)(5) without substantive change.

14 Subdivision (b) continues the fifth, sixth, and seventh sentences of former Section 2017(e)(5)
15 without substantive change.

16 Article 4. Attorney Work Product

17 § 2018.010. “Client” defined

18 2018.010. For purposes of this article, “client” means a client as defined in
19 Section 951 of the Evidence Code.

20 **Comment.** Section 2018.010 continues the second paragraph of former Section 2018(f) without
21 substantive change.

22 § 2018.020. Attorney work product

23 2018.020. (a) It is the policy of the state to do both of the following:

24 (1) Preserve the rights of attorneys to prepare cases for trial with that degree of
25 privacy necessary to encourage them to prepare their cases thoroughly and to
26 investigate not only the favorable but the unfavorable aspects of those cases.

27 (2) Prevent attorneys from taking undue advantage of their adversary’s industry
28 and efforts.

29 (b) A writing that reflects an attorney’s impressions, conclusions, opinions, or
30 legal research or theories is not discoverable under any circumstances.

31 (c) The work product of an attorney, other than a writing described in
32 subdivision (b), is not discoverable unless the court determines that denial of
33 discovery will unfairly prejudice the party seeking discovery in preparing that
34 party’s claim or defense or will result in an injustice.

35 (d) This section is intended to be a restatement of existing law relating to
36 protection of work product. It is not intended to expand or reduce the extent to
37 which work product is discoverable under existing law in any action.

38 (e) The State Bar may discover the work product of an attorney against whom
39 disciplinary charges are pending when it is relevant to issues of breach of duty by
40 the lawyer and requisite client approval has been obtained. Where requested and

1 for good cause, discovery under this subdivision shall be subject to a protective
2 order to ensure the confidentiality of the work product except for its use by the
3 State Bar in disciplinary investigations and its consideration under seal in State
4 Bar Court proceedings. For purposes of this subdivision, whenever a client has
5 initiated a complaint against an attorney, the requisite client approval shall be
6 deemed to have been obtained.

7 (f) In an action between an attorney and a client or a former client of the
8 attorney, no work product privilege under this section exists if the work product is
9 relevant to an issue of breach by the attorney of a duty to the client arising out of
10 the attorney-client relationship.

11 **Comment.** Subdivision (a) of Section 2018.020 continues former Section 2018(a) without
12 substantive change.

13 Subdivision (b) continues former Section 2018(c) without substantive change.

14 Subdivision (c) continues former Section 2018(b) without substantive change.

15 Subdivision (d) continues former Section 2018(d) without change.

16 Subdivision (e) continues former Section 2018(e) without substantive change.

17 Subdivision (f) continues the first paragraph of former Section 2018(f) without substantive
18 change.

19 Article 5. Methods and Sequence of Discovery

20 § 2019.010. Methods of discovery

21 2019.010. Any party may obtain discovery by one or more of the following
22 methods:

23 (a) Oral and written depositions.

24 (b) Interrogatories to a party.

25 (c) Inspections of documents, things, and places.

26 (d) Physical and mental examinations.

27 (e) Requests for admissions.

28 (f) Simultaneous exchanges of expert trial witness information.

29 **Comment.** Section 2019.010 continues former Section 2019(a) without change.

30 § 2019.020. Sequence of discovery

31 2019.020. (a) Except as otherwise provided by a rule of the Judicial Council, a
32 local court rule, or a local uniform written policy, the methods of discovery may
33 be used in any sequence, and the fact that a party is conducting discovery, whether
34 by deposition or another method, shall not operate to delay the discovery of any
35 other party.

36 (b) Notwithstanding subdivision (a), on motion and for good cause shown, the
37 court may establish the sequence and timing of discovery for the convenience of
38 parties and witnesses and in the interests of justice.

39 **Comment.** Subdivision (a) of Section 2019.020 continues the first sentence of former Section
40 2019(c) without substantive change.

41 Subdivision (b) continues the second sentence of former Section 2019(c) without substantive
42 change.

1 § 2019.030. **Timing of discovery relating to trade secret**

2 2019.030. In any action alleging the misappropriation of a trade secret under the
3 Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of
4 Division 4 of the Civil Code), before commencing discovery relating to the trade
5 secret, the party alleging the misappropriation shall identify the trade secret with
6 reasonable particularity subject to any orders that may be appropriate under
7 Section 3426.5 of the Civil Code.

8 **Comment.** Section 2019.030 continues former Section 2019(d) without change.

9 § 2019.040. **Restriction on use of discovery methods**

10 (a) The court shall restrict the frequency or extent of use of a discovery method
11 provided in Section 2019.010 if it determines either of the following:

12 (1) The discovery sought is unreasonably cumulative or duplicative, or is
13 obtainable from some other source that is more convenient, less burdensome, or
14 less expensive.

15 (2) The selected method of discovery is unduly burdensome or expensive, taking
16 into account the needs of the case, the amount in controversy, and the importance
17 of the issues at stake in the litigation.

18 (b) The court may make these determinations pursuant to a motion for a
19 protective order by a party or other affected person. This motion shall be
20 accompanied by a declaration stating facts showing a good faith attempt at an
21 informal resolution of each issue presented by the motion.

22 (c) The court shall impose a monetary sanction under Article 7 against any party,
23 person, or attorney who unsuccessfully makes or opposes a motion for a protective
24 order, unless it finds that the one subject to the sanction acted with substantial
25 justification or that other circumstances make the imposition of the sanction
26 unjust.

27 **Comment.** Section 2019.040 continues former Section 2019(b) without substantive change.

28 Article 6. Nonparty Discovery

29 § 2020.010. **Method and process for obtaining discovery from nonparty**

30 2020.010. (a) Any of the following methods may be used to obtain discovery
31 within the state from a person who is not a party to an action:

32 (1) An oral deposition under Article 9.

33 (2) A written deposition under Article 11.

34 (3) A deposition for production of business records and things under Section
35 2020.060 or 2020.100.

36 (b) Except as provided in subdivision (a) of Section 2025.100, the process by
37 which a nonparty is required to provide discovery is a deposition subpoena.

38 **Comment.** Subdivision (a) of Section 2020.010 continues the first sentence of former Section
39 2020(a) without substantive change.

1 Subdivision (b) continues the second sentence of former Section 2020(a) without substantive
2 change.

3 **§ 2020.020. Types of deposition subpoenas**

4 2020.020. A deposition subpoena may command any of the following:

5 (a) Only the attendance and the testimony of the deponent, under Section
6 2020.050.

7 (b) Only the production of business records for copying, under Section
8 2020.060.

9 (c) The attendance and the testimony of the deponent, as well as the production
10 of business records, other documents, and tangible things, under Section 2020.100.

11 **Comment.** Section 2020.020 continues the third sentence of former Section 2020(a) without
12 substantive change.

13 **§ 2020.030. Application of other code provisions**

14 2020.030. Except as modified in this article, the provisions of Title 3
15 (commencing with Section 1985), and of Article 4 (commencing with Section
16 1560) of Chapter 2 of Division 11 of the Evidence Code, apply to a deposition
17 subpoena.

18 **Comment.** Section 2020.030 continues the last paragraph of former Section 2020(a) without
19 substantive change.

20 **§ 2020.040. Issuance of deposition subpoena**

21 2020.040. (a) The clerk of the court in which an action is pending shall issue a
22 deposition subpoena signed and sealed, but otherwise in blank, to a party
23 requesting it, who shall fill it in before service.

24 (b) In lieu of a court-issued deposition subpoena, an attorney of record for any
25 party may sign and issue a deposition subpoena. A deposition subpoena issued
26 under this subdivision need not be sealed. A copy may be served on the nonparty,
27 and the attorney may retain the original.

28 **Comment.** Section 2020.040 continues former Section 2020(b) without substantive change.

29 ☞ **Staff Note.** Section 2020(b) provides that “a copy *may* be served on the nonparty, and the
30 attorney *may* retain the original.” (Emphasis added.) This draft tracks that permissive language. It
31 might be appropriate, however, to make the provision mandatory: “A copy *shall* be served on the
32 nonparty, and the attorney *shall* retain the original.” This would be a minor substantive change. If
33 the Commission is inclined to make such a change, it will need to be clearly identified as such.

34 **§ 2020.050. Deposition subpoena commanding only attendance and testimony of deponent**

35 2020.050. The following rules apply to a deposition subpoena that commands
36 only the attendance and the testimony of the deponent:

37 (a) The subpoena shall specify the time when and the place where the deponent
38 is commanded to attend the deposition.

39 (b) The subpoena shall set forth a summary of all of the following:

40 (1) The nature of a deposition.

1 (2) The rights and duties of the deponent.

2 (3) The penalties for disobedience of a deposition subpoena, as described in
3 Section 2020.120.

4 (c) If the deposition will be recorded by videotape under Section 2025.180, the
5 subpoena shall state that it will be recorded in that manner.

6 (d) If the deponent is an organization, the subpoena shall describe with
7 reasonable particularity the matters on which examination is requested. The
8 subpoena shall also advise the organization of its duty to make the designation of
9 employees or agents who will attend the deposition, as described in Section
10 2025.040.

11 **Comment.** Section 2020.050 continues former Section 2020(c) without substantive change.

12 **§ 2020.060. Deposition subpoena commanding only production of business records for**
13 **copying**

14 2020.060. (a) A deposition subpoena that commands only the production of
15 business records for copying shall designate the business records to be produced
16 either by specifically describing each individual item or by reasonably
17 particularizing each category of item.

18 (b) Notwithstanding subdivision (a), specific information identifiable only to a
19 deponent's records system, such as a policy number or the date when a consumer
20 interacted with the witness, is not required.

21 (c) A deposition subpoena that commands only the production of business
22 records need not be accompanied by an affidavit or declaration showing good
23 cause for the production of the business records designated in it. It shall be
24 directed to the custodian of those records or another person qualified to certify the
25 records. It shall command compliance in accordance with Section 2020.080 on a
26 date that is no earlier than 20 days after the issuance, or 15 days after the service,
27 of the deposition subpoena, whichever date is later.

28 (d) If, under Section 1985.3 or 1985.6, the one to whom the deposition subpoena
29 is directed is a witness, and the business records described in the deposition
30 subpoena are personal records pertaining to a consumer, the service of the
31 deposition subpoena shall be accompanied either by a copy of the proof of service
32 of the notice to the consumer described in subdivision (e) of Section 1985.3, or
33 subdivision (b) of Section 1985.6, as applicable, or by the consumer's written
34 authorization to release personal records described in paragraph (2) of subdivision
35 (c) of Section 1985.3, or paragraph (2) of subdivision (c) of Section 1985.6, as
36 applicable.

37 **Comment.** Subdivision (a) of Section 2020.060 continues the first clause of the first sentence
38 of former Section 2020(d)(1) without substantive change.

39 Subdivision (b) continues the second clause of the first sentence of former Section 2020(d)(1)
40 without substantive change.

41 Subdivision (c) continues the second, third, and fourth sentences of former Section 2020(d)(1)
42 without substantive change.

43 Subdivision (d) continues former Section 2020(d)(2) without change.

1 **§ 2020.070. Officer for deposition seeking only production of business records for copying**

2 2020.070. The officer for a deposition seeking discovery only of business
3 records for copying under Section 2020.060 shall be a professional photocopier
4 registered under Chapter 20 (commencing with Section 22450) of Division 8 of
5 the Business and Professions Code, or a person exempted from the registration
6 requirements of that chapter under Section 22451 of the Business and Professions
7 Code. This deposition officer shall not be financially interested in the action, or a
8 relative or employee of any attorney of the parties. Any objection to the
9 qualifications of the deposition officer is waived unless made before the date of
10 production or as soon thereafter as the ground for that objection becomes known
11 or could be discovered by reasonable diligence.

12 **Comment.** Section 2020.070 continues former Section 2020(d)(3) without substantive change.

13 **§ 2020.080. Compliance with deposition subpoena commanding only production of business**
14 **records for copying**

15 2020.080. (a) Except as provided in subdivision (e), if a deposition subpoena
16 commands only the production of business records for copying, the custodian of
17 the records or other qualified person shall, in person, by messenger, or by mail,
18 deliver both of the following to the deposition officer specified in the subpoena:

19 (1) A true, legible, and durable copy of the records.

20 (2) An affidavit in compliance with Section 1561 of the Evidence Code.

21 (b) If the delivery required by subdivision (a) is made to the office of the
22 deposition officer, the records shall be enclosed, sealed, and directed as described
23 in subdivision (c) of Section 1560 of the Evidence Code.

24 (c) If the delivery required by subdivision (a) is made at the office of the
25 business whose records are the subject of the deposition subpoena, the custodian
26 of those records or other qualified person shall do one of the following:

27 (1) Permit the deposition officer specified in the deposition subpoena to make a
28 copy of the originals of the designated business records during normal business
29 hours as defined in subdivision (e) of Section 1560 of the Evidence Code.

30 (2) Deliver to the deposition officer a true, legible, and durable copy of the
31 records on receipt of payment in cash or by check, by or on behalf of the party
32 serving the deposition subpoena, of the reasonable costs of preparing that copy,
33 together with an itemized statement of the cost of preparation, as determined under
34 subdivision (b) of Section 1563 of the Evidence Code. This copy need not be
35 delivered in a sealed envelope.

36 (d) Unless the parties, and if the records are those of a consumer as defined in
37 Section 1985.3 or 1985.6, the consumer, stipulate to an earlier date, the custodian
38 of the records shall not deliver to the deposition officer the records that are the
39 subject of the deposition subpoena before the date and time specified in the
40 deposition subpoena. The following legend shall appear in boldface type on the
41 deposition subpoena immediately following the date and time specified for

1 production: “ Do not release the requested records to the deposition officer before
2 the date and time stated above.”

3 (e) This section does not apply if the subpoena directs the deponent to make the
4 records available for inspection or copying by the subpoenaing party’s attorney or
5 a representative of that attorney at the witness’ business address under subdivision
6 (e) of Section 1560 of the Evidence Code.

7 (f) The provisions of Section 1562 of the Evidence Code concerning the
8 admissibility of the affidavit of the custodian or other qualified person apply to a
9 deposition subpoena served under Section 2020.060.

10 **Comment.** Subdivision (a) of Section 2020.080 continues the second clause of the first
11 sentence of former Section 2020(d)(4) without substantive change.

12 Subdivision (b) continues the second sentence of former Section 2020(d)(4) without substantive
13 change.

14 Subdivision (c) continues the third and fourth sentences of former Section 2020(d)(4) without
15 substantive change.

16 Subdivision (d) continues the fifth and sixth sentences of former Section 2020(d)(4) without
17 substantive change.

18 Subdivision (e) continues the first clause of the first sentence of former Section 2020(d)(4)
19 without substantive change.

20 Subdivision (f) continues former Section 2020(d)(6) without substantive change.

21 **§ 2020.090. Duties of deposition officer**

22 2020.090. Promptly on or after the deposition date and after the receipt or the
23 making of a copy of business records under Section 2020.080, the deposition
24 officer shall provide that copy to the party at whose instance the deposition
25 subpoena was served, and a copy of those records to any other party to the action
26 who then or subsequently, within a period of six months following the settlement
27 of the case, notifies the deposition officer that the party desires to purchase a copy
28 of those records.

29 **Comment.** Section 2020.090 continues former Section 2020(d)(5) without substantive change.

30 **§ 2020.100. Deposition subpoena commanding both production of business records and**
31 **attendance and testimony of deponent**

32 2020.100. (a) A deposition subpoena that commands the attendance and the
33 testimony of the deponent, as well as the production of business records,
34 documents, and tangible things, shall:

35 (1) Comply with the requirements of Section 2020.050.

36 (2) Designate the business records, documents, and tangible things to be
37 produced either by specifically describing each individual item or by reasonably
38 particularizing each category of item.

39 (3) Specify any testing or sampling that is being sought.

40 (b) A deposition subpoena under subdivision (a) need not be accompanied by an
41 affidavit or declaration showing good cause for the production of the documents
42 and things designated.

1 (c) Where, as described in Section 1985.3, the person to whom the deposition
2 subpoena is directed is a witness, and the business records described in the
3 deposition subpoena are personal records pertaining to a consumer, the service of
4 the deposition subpoena shall be accompanied either by a copy of the proof of
5 service of the notice to the consumer described in subdivision (e) of Section
6 1985.3, or by the consumer's written authorization to release personal records
7 described in paragraph (2) of subdivision (c) of Section 1985.3.

8 **Comment.** Subdivision (a) of Section 2020.100 continues the first sentence of former Section
9 2020(e) without substantive change.

10 Subdivision (b) continues the second sentence of former Section 2020(e) without substantive
11 change.

12 Subdivision (c) continues the second paragraph of former Section 2020(e) without change.

13 **§ 2020.110. Service of deposition subpoena**

14 2020.110. (a) Subject to subdivision (c) of Section 2020.060, service of a
15 deposition subpoena shall be effected a sufficient time in advance of the deposition
16 to provide the deponent a reasonable opportunity to locate and produce any
17 designated business records, documents, and tangible things, as described in
18 Sections 2020.060, 2020.070, 2020.080, and 2020.090, and, where personal
19 attendance is commanded, a reasonable time to travel to the place of deposition.

20 (b) Any person may serve the subpoena by personal delivery of a copy of it as
21 follows:

22 (1) If the deponent is a natural person, to that person.

23 (2) If the deponent is an organization, to any officer, director, custodian of
24 records, or to any agent or employee authorized by the organization to accept
25 service of a subpoena.

26 (c) Personal service of any deposition subpoena is effective to require all of the
27 following of any deponent who is a resident of California at the time of service:

28 (1) Personal attendance and testimony, if the subpoena so specifies.

29 (2) Any specified production, inspection, testing, and sampling.

30 (3) The deponent's attendance at a court session to consider any issue arising out
31 of the deponent's refusal to be sworn, or to answer any question, or to produce
32 specified items, or to permit inspection or photocopying, if the subpoena so
33 specifies, or specified testing and sampling of the items produced.

34 **Comment.** Subdivision (a) of Section 2020.110 continues the first sentence of former Section
35 2020(f) without substantive change.

36 Subdivision (b) continues the second sentence of former Section 2020(f) without substantive
37 change.

38 Subdivision (c) continues former Section 2020(g) without substantive change.

39 **§ 2020.120. Witness fees**

40 2020.120. (a) If a deposition subpoena requires the personal attendance of the
41 deponent, under Section 2020.050 or 2020.100, the party noticing the deposition
42 shall pay to the deponent in cash or by check the same witness fee and mileage

1 required by Chapter 1 (commencing with Section 68070) of Title 8 of the
2 Government Code for attendance and testimony before the court in which the
3 action is pending. This payment, whether or not demanded by the deponent, shall
4 be made, at the option of the party noticing the deposition, either at the time of
5 service of the deposition subpoena, or at the time the deponent attends for the
6 taking of testimony.

7 (b) Service of a deposition subpoena that does not require the personal
8 attendance of a custodian of records or other qualified person, under Section
9 2020.060, shall be accompanied, whether or not demanded by the deponent, by a
10 payment in cash or by check of the witness fee required by paragraph (6) of
11 subdivision (b) of Section 1563 of the Evidence Code.

12 **Comment.** Subdivision (a) of Section 2020.110 continues the second paragraph of former
13 Section 2020(f) without substantive change.

14 Subdivision (b) continues the third paragraph of former Section 2020(f) without substantive
15 change.

16 **§ 2020.120. Sanctions for disobedience of deposition subpoena**

17 2020.120. A deponent who disobeys a deposition subpoena in any manner
18 described in subdivision (c) of Section 2020.110 may be punished for contempt
19 under Article 7 without the necessity of a prior order of court directing compliance
20 by the witness. The deponent is also subject to the forfeiture and the payment of
21 damages set forth in Section 1992.

22 **Comment.** Section 2020.120 continues former Section 2020(h) without substantive change.

23 **Article 7. Sanctions**

24 **§ 2023.010. Misuses of discovery process**

25 2023.010. Misuses of the discovery process include, but are not limited to, the
26 following:

27 (a) Persisting, over objection and without substantial justification, in an attempt
28 to obtain information or materials that are outside the scope of permissible
29 discovery.

30 (b) Using a discovery method in a manner that does not comply with its
31 specified procedures.

32 (c) Employing a discovery method in a manner or to an extent that causes
33 unwarranted annoyance, embarrassment, or oppression, or undue burden and
34 expense.

35 (d) Failing to respond or to submit to an authorized method of discovery.

36 (e) Making, without substantial justification, an unmeritorious objection to
37 discovery.

38 (f) Making an evasive response to discovery.

39 (g) Disobeying a court order to provide discovery.

1 (h) Making or opposing, unsuccessfully and without substantial justification, a
2 motion to compel or to limit discovery.

3 (i) Failing to confer in person, by telephone, or by letter with an opposing party
4 or attorney in a reasonable and good faith attempt to resolve informally any
5 dispute concerning discovery, if the section governing a particular discovery
6 motion requires the filing of a declaration stating facts showing that such an
7 attempt has been made.

8 **Comment.** Section 2023.010 continues former Section 2023(a)(1)-(a)(8) and the first sentence
9 of former Section 2023(a)(9) without change.

10 **§ 2023.020. Sanctions for failure to confer as required**

11 2023.020. Notwithstanding the outcome of the particular discovery motion, the
12 court shall impose a monetary sanction ordering that any party or attorney who
13 fails to confer as required pay the reasonable expenses, including attorney's fees,
14 incurred by anyone as a result of that conduct.

15 **Comment.** Section 2023.020 continues the second sentence of former Section 2023(a)(9)
16 without change.

17 **§ 2023.030. Other sanctions for misuse of discovery**

18 2023.030. To the extent authorized by the section governing any particular
19 discovery method or any other provision of this chapter, the court, after notice to
20 any affected party, person, or attorney, and after opportunity for hearing, may
21 impose the following sanctions against anyone engaging in conduct that is a
22 misuse of the discovery process:

23 (a) The court may impose a monetary sanction ordering that one engaging in the
24 misuse of the discovery process, or any attorney advising that conduct, or both pay
25 the reasonable expenses, including attorney's fees, incurred by anyone as a result
26 of that conduct. The court may also impose this sanction on one unsuccessfully
27 asserting that another has engaged in the misuse of the discovery process, or on
28 any attorney who advised that assertion, or on both. If a monetary sanction is
29 authorized by any provision of this chapter, the court shall impose that sanction
30 unless it finds that the one subject to the sanction acted with substantial
31 justification or that other circumstances make the imposition of the sanction
32 unjust.

33 (b) The court may impose an issue sanction ordering that designated facts shall
34 be taken as established in the action in accordance with the claim of the party
35 adversely affected by the misuse of the discovery process. The court may also
36 impose an issue sanction by an order prohibiting any party engaging in the misuse
37 of the discovery process from supporting or opposing designated claims or
38 defenses.

39 (c) The court may impose an evidence sanction by an order prohibiting any party
40 engaging in the misuse of the discovery process from introducing designated
41 matters in evidence.

- 1 (d) The court may impose a terminating sanction by one of the following orders:
2 (1) An order striking out the pleadings or parts of the pleadings of any party
3 engaging in the misuse of the discovery process.
4 (2) An order staying further proceedings by that party until an order for
5 discovery is obeyed.
6 (3) An order dismissing the action, or any part of the action, of that party.
7 (4) An order rendering a judgment by default against that party.
8 (e) The court may impose a contempt sanction by an order treating the misuse of
9 the discovery process as a contempt of court.

10 **Comment.** The introductory clause of Section 2023.030 continues the introductory clause of
11 former Section 2023(b) without substantive change.

12 Subdivision (a) continues former Section 2023(b)(1) without change.

13 Subdivision (b) continues former Section 2023(b)(2) without change.

14 Subdivision (c) continues former Section 2023(b)(3) without change.

15 Subdivision (d) continues former Section 2023(b)(4) without change.

16 Subdivision (e) continues former Section 2023(b)(5) without change.

17 **§ 2023.040. Content of request for sanction**

18 2023.040. A request for a sanction shall, in the notice of motion, identify every
19 person, party, and attorney against whom the sanction is sought, and specify the
20 type of sanction sought. The notice of motion shall be supported by a
21 memorandum of points and authorities, and accompanied by a declaration setting
22 forth facts supporting the amount of any monetary sanction sought.

23 **Comment.** Section 2023.040 continues former Section 2023(c) without change.

24 **Article 8. Time for Completion of Discovery**

25 **§ 2024.010. Completion of discovery**

26 2024.010. As used in this article, discovery is considered completed on the day a
27 response is due or on the day a deposition begins.

28 **Comment.** Section 2024.010 continues the third sentence of former Section 2024(a) without
29 substantive change.

30 **§ 2024.020. Discovery cutoff**

31 2024.020. (a) Except as otherwise provided in this article, any party shall be
32 entitled as a matter of right to complete discovery proceedings on or before the
33 30th day, and to have motions concerning discovery heard on or before the 15th
34 day, before the date initially set for the trial of the action.

35 (b) If either of these dates falls on a Saturday, Sunday, or holiday as specified in
36 Section 10, the last day shall be the next successive court day.

37 (c) Except as provided in Section 2024.050, a continuance or postponement of
38 the trial date does not operate to reopen discovery proceedings.

39 **Comment.** Subdivision (a) of Section 2024.020 continues the first sentence of former Section
40 2024(a) without substantive change.

1 Subdivision (b) continues the second sentence of former Section 2024(a) without change.
2 Subdivision (c) continues the fourth sentence of former Section 2024(a) without substantive
3 change.

4 ☞ **Staff Note.** Section 2024(a) provides:

5 2024.(a) Except as otherwise provided in this section, any party shall be entitled as a matter
6 of right to complete discovery proceedings on or before the 30th day, and to have motions
7 concerning discovery heard on or before the 15th day, before the date initially set for the trial
8 of the action. *If either of these dates falls on a Saturday, Sunday, or holiday as specified in*
9 *Section 10, the last day shall be the next successive court day. ...*

10 (Emphasis added.) Section 2024(g) is a similar but more general provision:

11 (g) When the last day to perform or complete any act provided for in this article falls on a
12 Saturday, Sunday, or holiday as specified in Section 10, the time limit is extended until the
13 next day that is not a Saturday, Sunday, or holiday.

14 These provisions seem redundant.

15 This draft would continue the substance of Section 2024(g) in Section 2016.050, and would
16 continue the substance of the quoted portion of Section 2024(a) in Section 2024.020(b). The latter
17 provision does not seem necessary, however, and the staff is inclined to omit it. Does the
18 Commission agree?

19 **§ 2024.030. Discovery cutoff for expert witness**

20 2024.030. Any party shall be entitled as a matter of right to complete discovery
21 proceedings pertaining to a witness identified under Section 2034 on or before the
22 15th day, and to have motions concerning that discovery heard on or before the
23 10th day, before the date initially set for the trial of the action.

24 **Comment.** Section 2024.030 continues former Section 2024(d) without change.

25 ☞ **Staff Note.** The staff has not yet divided the substance of Section 2034 into a series of short
26 sections. When that step is taken, it will be necessary to conform the cross-reference to Section
27 2034 in this provision.

28 **§ 2024.040. Exceptions to discovery cutoff**

29 2024.040. (a) The time limit on completing discovery in an action to be
30 arbitrated under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part
31 3 is subject to Judicial Council Rule. After an award in a case ordered to judicial
32 arbitration, completion of discovery is limited by Section 1141.24.

33 (b) Sections 2024.020 and 2024.030 do not apply to either of the following:

34 (1) Summary proceedings for obtaining possession of real property governed by
35 Chapter 4 (commencing with Section 1159) of Title 3 of Part 3. Except as
36 provided in Sections 2024.050 and 2025.060, discovery in these proceedings shall
37 be completed on or before the fifth day before the date set for trial.

38 (2) Eminent domain proceedings governed by Title 7 (commencing with Section
39 1230.010) of Part 3.

40 **Comment.** Subdivision (a) of Section 2024.040 continues former Section 2024(b) without
41 change.

42 Subdivision (b) continues former Section 2024(c) without substantive change.

1 **§ 2024.050. Motion to extend or reopen discovery**

2 2024.050. (a) On motion of any party, the court may grant leave to complete
3 discovery proceedings, or to have a motion concerning discovery heard, closer to
4 the initial trial date, or to reopen discovery after a new trial date has been set. This
5 motion shall be accompanied by a declaration stating facts showing a reasonable
6 and good faith attempt at an informal resolution of each issue presented by the
7 motion.

8 (b) In exercising its discretion to grant or deny this motion, the court shall take
9 into consideration any matter relevant to the leave requested, including, but not
10 limited to, the following:

11 (1) The necessity and the reasons for the discovery.

12 (2) The diligence or lack of diligence of the party seeking the discovery or the
13 hearing of a discovery motion, and the reasons that the discovery was not
14 completed or that the discovery motion was not heard earlier.

15 (3) Any likelihood that permitting the discovery or hearing the discovery motion
16 will prevent the case from going to trial on the date set, or otherwise interfere with
17 the trial calendar, or result in prejudice to any other party.

18 (4) The length of time that has elapsed between any date previously set, and the
19 date presently set, for the trial of the action.

20 (c) The court shall impose a monetary sanction under Article 7 against any party,
21 person, or attorney who unsuccessfully makes or opposes a motion to extend or to
22 reopen discovery, unless it finds that the one subject to the sanction acted with
23 substantial justification or that other circumstances make the imposition of the
24 sanction unjust.

25 **Comment.** Subdivision (a) of Section 2024.050 continues the first paragraph of former Section
26 2024(e) without change.

27 Subdivision (b) continues former the second paragraph of former Section 2024(e) without
28 change.

29 Subdivision (c) continues the third paragraph of former Section 2024(e) without change.

30 **§ 2024.060. Agreement extending discovery cutoff**

31 2024.060. Parties to an action may, with the consent of any party affected by it,
32 enter into an agreement to extend the time for the completion of discovery
33 proceedings or for the hearing of motions concerning discovery, or to reopen
34 discovery after a new date for trial of the action has been set. This agreement may
35 be informal, but it shall be confirmed in a writing that specifies the extended date.
36 In no event shall this agreement require a court to grant a continuance or
37 postponement of the trial of the action.

38 **Comment.** Section 2024.060 continues former Section 2024(f) without change.

1 Article 9. Oral Deposition in California

2 **§ 2025.010. Oral deposition in California**

3 2025.010. Any party may obtain discovery within the scope delimited by Article
4 2, and subject to the restrictions set forth in Article 5, by taking in California the
5 oral deposition of any person, including any party to the action. The person
6 deposed may be a natural person, an organization such as a public or private
7 corporation, a partnership, an association, or a governmental agency.

8 **Comment.** Section 2025.010 continues former Section 2025(a) without substantive change.

9 **§ 2025.020. Time of service of deposition notice**

10 Subject to Sections 2025.080 and 2025.290, an oral deposition may be taken as
11 follows:

12 (a) The defendant may serve a deposition notice without leave of court at any
13 time after that defendant has been served or has appeared in the action, whichever
14 occurs first.

15 (b) The plaintiff may serve a deposition notice without leave of court on any date
16 that is 20 days after the service of the summons on, or appearance by, any
17 defendant. On motion with or without notice, the court, for good cause shown,
18 may grant to a plaintiff leave to serve a deposition notice on an earlier date.

19 **Comment.** Section 2025.020 continues former Section 2025(b) without substantive change.

20 **§ 2025.030. Content of deposition notice**

21 2025.030. (a) A party desiring to take the oral deposition of any person shall
22 give notice in writing. The deposition notice shall state all of the following:

23 (1) The address where the deposition will be taken.

24 (2) The date of the deposition, selected under Section 2025.808, and the time it
25 will commence.

26 (3) The name of each deponent, and the address and telephone number, if
27 known, of any deponent who is not a party to the action. If the name of the
28 deponent is not known, the deposition notice shall set forth instead a general
29 description sufficient to identify the person or particular class to which the person
30 belongs.

31 (4) The specification with reasonable particularity of any materials or category
32 of materials to be produced by the deponent.

33 (5) Any intention to record the testimony by audiotape or videotape, in addition
34 to recording the testimony by the stenographic method as required by Section
35 2025.170 and any intention to record the testimony by stenographic method,
36 through the instant visual display of the testimony. In the latter event, a copy of the
37 deposition notice shall also be given to the deposition officer. Any offer to provide
38 the instant visual display of the testimony or to provide rough draft transcripts to
39 any party which is accepted before, or offered at, the deposition shall also be made
40 by the deposition officer at the deposition to all parties in attendance.

1 (6) Any intention to reserve the right to use at trial a videotape deposition of a
2 treating or consulting physician or of any expert witness under subdivision (d) of
3 Section 2025.300. In this event, the operator of the videotape camera shall be a
4 person who is authorized to administer an oath, and shall not be financially
5 interested in the action or be a relative or employee of any attorney of any of the
6 parties.

7 (b) Notwithstanding subdivision (a), where under Section 2020.060 only the
8 production by a nonparty of business records for copying is desired, a copy of the
9 deposition subpoena shall serve as the notice of deposition.


10 **Comment.** Subdivision (a) of Section 2025.030 continues the first sentence of former Section
11 2025(c), former Section 2025(d)(1)-(d)(5), and the first paragraph of former Section 2025(d)(6)
12 without substantive change.

13 Subdivision (b) continues the second sentence of former Section 2025(c) without substantive
14 change.

15 **§ 2025.040. Notice to deponent other than natural person**

16 2025.040. If the deponent named is not a natural person, the deposition notice
17 shall describe with reasonable particularity the matters on which examination is
18 requested. In that event, the deponent shall designate and produce at the deposition
19 those of its officers, directors, managing agents, employees, or agents who are
20 most qualified to testify on its behalf as to those matters to the extent of any
21 information known or reasonably available to the deponent. A deposition
22 subpoena shall advise a nonparty deponent of its duty to make this designation,
23 and shall describe with reasonable particularity the matters on which examination
24 is requested.

25 **Comment.** Section 2025.040 continues the second paragraph of former Section 2025(d)(6)
26 without change.

27  **Staff Note.** The last sentence of this provision is redundant with the provisions governing
28 deposition subpoenas. See proposed Sections 2020.050(d) and 2020.100(a)(1), which derive from
29 Section 2020(c) and the first sentence of Section 2020(e), respectively. We are inclined to delete
30 this sentence from Section 2025.040 and revise the Comment accordingly.

31 **§ 2025.050. Service of deposition notice and related documents**

32 2025.050. (a) The party who prepares a notice of deposition shall give the notice
33 to every other party who has appeared in the action. The deposition notice, or the
34 accompanying proof of service, shall list all the parties or attorneys for parties on
35 whom it is served.

36 (b) Where, as defined in subdivision (a) of Section 1985.3, the party giving
37 notice of the deposition is a subpoenaing party, and the deponent is a witness
38 commanded by a deposition subpoena to produce personal records of a consumer,
39 the subpoenaing party shall serve on that consumer all of the following:

40 (1) A notice of the deposition.

41 (2) The notice of privacy rights specified in subdivision (e) of Section 1985.3
42 and in Section 1985.6.

1 (3) A copy of the deposition subpoena.

2 (c) If the attendance of the deponent is to be compelled by service of a
3 deposition subpoena under Article 6, an identical copy of that subpoena shall be
4 served with the deposition notice.

5 **Comment.** Subdivision (a) of Section 2025.050 continues the third and fourth sentences of
6 former Section 2025(c) without substantive change.

7 Subdivision (b) continues the second paragraph of former Section 2025(c) without substantive
8 change.

9 Subdivision (c) continues the third paragraph of former Section 2025(d)(6) without substantive
10 change.

11 **§ 2025.060. Place of deposition**

12 2025.060. (a) Unless the court orders otherwise under Section 2025.070, the
13 deposition of a natural person, whether or not a party to the action, shall be taken
14 at a place that is, at the option of the party giving notice of the deposition, either
15 within 75 miles of the deponent's residence, or within the county where the action
16 is pending and within 150 miles of the deponent's residence.

17 (b) The deposition of an organization that is a party to the action shall be taken at
18 a place that is, at the option of the party giving notice of the deposition, either
19 within 75 miles of the organization's principal executive or business office in
20 California, or within the county where the action is pending and within 150 miles
21 of that office.

22 (c) Unless the organization consents to a more distant place, the deposition of
23 any other organization shall be taken within 75 miles of the organization's
24 principal executive or business office in California. If the organization has not
25 designated a principal executive or business office in California, the deposition
26 shall be taken at a place that is, at the option of the party giving notice of the
27 deposition, either within the county where the action is pending, or within 75 miles
28 of any executive or business office in California of the organization.

29 **Comment.** Subdivision (a) of Section 2025.060 continues former Section 2025(e)(1) without
30 substantive change.

31 Subdivision (b) continues the first sentence of former Section 2025(e)(2) without change.

32 Subdivision (c) continues the second and third sentences of former Section 2025(e)(2) without
33 substantive change.

34 **§ 2025.070. Motion to require party to attend deposition at more distant place**

35 2025.070. (a) A party desiring to take the deposition of a natural person who is a
36 party to the action or an officer, director, managing agent, or employee of a party
37 may make a motion for an order that the deponent attend for deposition at a place
38 that is more distant than that permitted under Section 2025.060. This motion shall
39 be accompanied by a declaration stating facts showing a reasonable and good faith
40 attempt at an informal resolution of any issue presented by the motion.

41 (b) In exercising its discretion to grant or deny this motion, the court shall take
42 into consideration any factor tending to show whether the interests of justice will

1 be served by requiring the deponent's attendance at that more distant place,
2 including, but not limited to, the following:

3 (1) Whether the moving party selected the forum.

4 (2) Whether the deponent will be present to testify at the trial of the action.

5 (3) The convenience of the deponent.

6 (4) The feasibility of conducting the deposition by written questions under
7 Article 11, or of using a discovery method other than a deposition.

8 (5) The number of depositions sought to be taken at a place more distant than
9 that permitted under Section 2025.060.

10 (6) The expense to the parties of requiring the deposition to be taken within the
11 distance permitted under Section 2025.060.

12 (7) The whereabouts of the deponent at the time for which the deposition is
13 scheduled.

14 (c) The order may be conditioned on the advancement by the moving party of
15 the reasonable expenses and costs to the deponent for travel to the place of
16 deposition.

17 (d) The court shall impose a monetary sanction under Article 7 against any party,
18 person, or attorney who unsuccessfully makes or opposes a motion to increase
19 travel limits for party deponent, unless it finds that the one subject to the sanction
20 acted with substantial justification or that other circumstances make the imposition
21 of the sanction unjust.

22 **Comment.** Subdivision (a) of Section 2025.070 continues the first paragraph of former Section
23 2025(e)(3) without substantive change.

24 Subdivision (b) continues the second through ninth paragraphs of former Section 2025(e)(3)
25 without substantive change.

26 Subdivision (c) continues the tenth paragraph of former Section 2025(e)(3) without change.

27 Subdivision (d) continues the eleventh paragraph of former Section 2025(e)(3) without
28 substantive change.

29 **§ 2025.080. Time of taking oral deposition**

30 2025.080. (a) An oral deposition shall be scheduled for a date at least 10 days
31 after service of the deposition notice. If, as defined in subdivision (a) of Section
32 1985.3, the party giving notice of the deposition is a subpoenaing party, and the
33 deponent is a witness commanded by a deposition subpoena to produce personal
34 records of a consumer, the deposition shall be scheduled for a date at least 20 days
35 after issuance of that subpoena.

36 (b) Notwithstanding subdivision (a), in unlawful detainer actions, an oral
37 deposition shall be scheduled for a date at least five days after service of the
38 deposition notice, but not later than five days before trial.

39 (c) On motion or ex parte application of any party or deponent, for good cause
40 shown, the court may shorten or extend the time for scheduling a deposition, or
41 may stay its taking until the determination of a motion for a protective order under
42 Section 2025.120.

1 **Comment.** Subdivision (a) of Section 2025.080 continues the first and second sentences of
2 former Section 2025(f) without change.

3 Subdivision (b) continues the third sentence of former Section 2025(f) without substantive
4 change.

5 Subdivision (c) continues the second paragraph of former Section 2025(f) without substantive
6 change.

7 **§ 2025.090. Noncompliance with requirements for deposition notice**

8 2025.090. (a) Any party served with a deposition notice that does not comply
9 with Sections 2025.020 to 2025.080, inclusive, waives any error or irregularity
10 unless that party promptly serves a written objection specifying that error or
11 irregularity at least three calendar days before the date for which the deposition is
12 scheduled, on the party seeking to take the deposition and any other attorney or
13 party on whom the deposition notice was served.

14 (b) If an objection is made three calendar days before the deposition date, the
15 objecting party shall make personal service of that objection pursuant to Section
16 1011 on the party who gave notice of the deposition. Any deposition taken after
17 the service of a written objection shall not be used against the objecting party
18 under Section 2025.300 if the party did not attend the deposition and if the court
19 determines that the objection was a valid one.

20 (c) In addition to serving this written objection, a party may also move for an
21 order staying the taking of the deposition and quashing the deposition notice. This
22 motion shall be accompanied by a declaration stating facts showing a reasonable
23 and good faith attempt at an informal resolution of any issue presented by the
24 motion. The taking of the deposition is stayed pending the determination of this
25 motion.

26 (d) The court shall impose a monetary sanction under Article 7 against any party,
27 person, or attorney who unsuccessfully makes or opposes a motion to quash a
28 deposition notice, unless it finds that the one subject to the sanction acted with
29 substantial justification or that other circumstances make the imposition of the
30 sanction unjust.

31 **Comment.** Subdivision (a) of Section 2025.090 continues the first sentence of former Section
32 2025(g) without substantive change.

33 Subdivision (b) continues the second and third sentences of former Section 2025(g) without
34 substantive change.

35 Subdivision (c) continues the second paragraph of former Section 2025(g) without change.

36 Subdivision (d) continues the third paragraph of former Section 2025(g) without substantive
37 change.

38 **§ 2025.100. Effect of deposition notice**

39 2025.100. (a) The service of a deposition notice under Section 2025.050 is
40 effective to require any deponent who is a party to the action or an officer,
41 director, managing agent, or employee of a party to attend and to testify, as well as
42 to produce any document or tangible thing for inspection and copying.

1 (b) The attendance and testimony of any other deponent, as well as the
2 production by the deponent of any document or tangible thing for inspection and
3 copying, requires the service on the deponent of a deposition subpoena under
4 Article 6.

5 **Comment.** Subdivision (a) of Section 2025.100 continues former Section 2025(h)(1) without
6 substantive change.

7 Subdivision (b) continues former Section 2025(h)(2) without substantive change.

8 **§ 2025.110. Deposition by remote electronic means**

9 2025.110. (a) A person may take, and any person other than the deponent may
10 attend, a deposition by telephone or other remote electronic means.

11 (b) The court may expressly provide that a nonparty deponent may appear at the
12 deposition by telephone if it finds there is good cause and no prejudice to any
13 party. A party deponent must appear at the deposition in person and be in the
14 presence of the deposition officer.

15 (c) The procedures to implement this section shall be established by court order
16 in the specific action or proceeding or by the California Rules of Court.

17 **Comment.** Subdivision (a) of Section 2025.110 continues the first sentence of former Section
18 2025(h)(3) without change.

19 Subdivision (b) continues the second and third sentences of former Section 2025(h)(3) without
20 substantive change.

21 Substantive (c) continues the fourth sentence of former Section 2025(h)(3) without substantive
22 change.

23 **§ 2025.120. Motion for protective order**

24 2025.120. (a) Before, during, or after a deposition, any party, any deponent, or
25 any other affected natural person or organization may promptly move for a
26 protective order. The motion shall be accompanied by a declaration stating facts
27 showing a reasonable and good faith attempt at an informal resolution of each
28 issue presented by the motion.

29 (b) The court, for good cause shown, may make any order that justice requires to
30 protect any party, deponent, or other natural person or organization from
31 unwarranted annoyance, embarrassment, or oppression, or undue burden and
32 expense. This protective order may include, but is not limited to, one or more of
33 the following directions:

34 (1) That the deposition not be taken at all.

35 (2) That the deposition be taken at a different time.

36 (3) That a videotape deposition of a treating or consulting physician or of any
37 expert witness, intended for possible use at trial under subdivision (d) of Section
38 2025.300, be postponed until the moving party has had an adequate opportunity to
39 prepare, by discovery deposition of the deponent, or other means, for cross-
40 examination.

1 (4) That the deposition be taken at a place other than that specified in the
2 deposition notice, if it is within a distance permitted by Sections 2025.060 and
3 2025.070.

4 (5) That the deposition be taken only on certain specified terms and conditions.

5 (6) That the deponent's testimony be taken by written, instead of oral,
6 examination.

7 (7) That the method of discovery be interrogatories to a party instead of an oral
8 deposition.

9 (8) That the testimony be recorded in a manner different from that specified in
10 the deposition notice.

11 (9) That certain matters not be inquired into.

12 (10) That the scope of the examination be limited to certain matters.

13 (11) That all or certain of the writings or tangible things designated in the
14 deposition notice not be produced, inspected, or copied.

15 (12) That designated persons, other than the parties to the action and their
16 officers and counsel, be excluded from attending the deposition.

17 (13) That a trade secret or other confidential research, development, or
18 commercial information not be disclosed or be disclosed only to specified persons
19 or only in a specified way.

20 (14) That the parties simultaneously file specified documents enclosed in sealed
21 envelopes to be opened as directed by the court.

22 (15) That the deposition be sealed and thereafter opened only on order of the
23 court.

24 (c) If the motion for a protective order is denied in whole or in part, the court
25 may order that the deponent provide or permit the discovery against which
26 protection was sought on those terms and conditions that are just.

27 (d) The court shall impose a monetary sanction under Article 7 against any party,
28 person, or attorney who unsuccessfully makes or opposes a motion for a protective
29 order, unless it finds that the one subject to the sanction acted with substantial
30 justification or that other circumstances make the imposition of the sanction
31 unjust.

32 **Comment.** Subdivision (a) of Section 2025.120 continues the first paragraph of former Section
33 2025(i) without change.

34 Subdivision (b) continues the second through seventeenth paragraphs of former Section 2025(i)
35 without substantive change.

36 Subdivision (c) continues the eighteenth paragraph of former Section 2025(i) without change.

37 Subdivision (d) continues the nineteenth paragraph of former Section 2025(i) without
38 substantive change.

39 **§ 2025.130. Sanctions where party giving notice of deposition fails to attend or proceed**

40 2025.130. If the party giving notice of a deposition fails to attend or proceed
41 with it, the court shall impose a monetary sanction under Article 7 against that
42 party, or the attorney for that party, or both, and in favor of any party attending in
43 person or by attorney, unless it finds that the one subject to the sanction acted with

1 substantial justification or that other circumstances make the imposition of the
2 sanction unjust.

3 **Comment.** Section 2025.130 continues former Section 2025(j)(1) without substantive change.


4 **§ 2025.140. Sanctions where nonparty deponent fails to appear**

5 2025.140. (a) If a deponent does not appear for a deposition because the party
6 giving notice of the deposition failed to serve a required deposition subpoena, the
7 court shall impose a monetary sanction under Article 7 against that party, or the
8 attorney for that party, or both, in favor of any other party who, in person or by
9 attorney, attended at the time and place specified in the deposition notice in the
10 expectation that the deponent's testimony would be taken, unless the court finds
11 that the one subject to the sanction acted with substantial justification or that other
12 circumstances make the imposition of the sanction unjust.

13 (b) If a deponent on whom a deposition subpoena has been served fails to attend
14 a deposition or refuses to be sworn as a witness, the court may impose on the
15 deponent the sanctions described in Section 2020.120.

16 **Comment.** Subdivision (a) of Section 2025.140 continues the first paragraph of former Section
17 2025(j)(2) without substantive change.

18 Subdivision (b) continues the second paragraph of former Section 2025(j)(2) without
19 substantive change.

20  **Staff Note.** As stated in the Comment, subdivision (b) would continue language presently
21 found in Section 2025(j)(2). The provision is not strictly necessary, because Section 2020(h)
22 (proposed Section 2020.120) already states that a deponent who fails to comply with a deposition
23 subpoena is subject to specified sanctions. At this point, however, the staff is not inclined to
24 delete the language from Section 2025.140, as it might serve as a useful cross-reference for courts
25 and practitioners. In addition, Section 2025.140(b) makes clear that sanctions may be available
26 where a nonparty deponent refuses to be sworn as a witness. Section 2020(h) (proposed Section
27 2020.120) is less clear on this point.

28 **§ 2025.150. Sanctions where party deponent fails to appear**

29 2025.150. (a) If, after service of a deposition notice, a party to the action or an
30 officer, director, managing agent, or employee of a party, or a person designated
31 by an organization that is a party under Section 2025.040, without having served a
32 valid objection under Section 2025.090, fails to appear for examination, or to
33 proceed with it, or to produce for inspection any document or tangible thing
34 described in the deposition notice, the party giving the notice may move for an
35 order compelling the deponent's attendance and testimony, and the production for
36 inspection of any document or tangible thing described in the deposition notice.

37 (b) A motion under subdivision (a) shall comply with both of the following:

38 (1) The motion shall set forth specific facts showing good cause justifying the
39 production for inspection of any document or tangible thing described in the
40 deposition notice.

41 (2) The motion shall be accompanied by a declaration stating facts showing a
42 reasonable and good faith attempt at an informal resolution of each issue presented
43 by it or, when the deponent fails to attend the deposition and produce the

1 documents or things described in the deposition notice, by a declaration stating
2 that the petitioner has contacted the deponent to inquire about the nonappearance.

3 (c) If a motion under subdivision (a) is granted, the court shall also impose a
4 monetary sanction under Article 7 against the deponent or the party with whom the
5 deponent is affiliated, unless it finds that the one subject to the sanction acted with
6 substantial justification or that other circumstances make the imposition of the
7 sanction unjust. On motion of any other party who, in person or by attorney,
8 attended at the time and place specified in the deposition notice in the expectation
9 that the deponent's testimony would be taken, the court shall also impose a
10 monetary sanction under Article 7, unless it finds that the one subject to the
11 sanction acted with substantial justification or that other circumstances make the
12 imposition of the sanction unjust.

13 (d) If that party or party-affiliated deponent then fails to obey an order
14 compelling attendance, testimony, and production, the court may make those
15 orders that are just, including the imposition of an issue sanction, an evidence
16 sanction, or a terminating sanction under Article 7 against that party deponent or
17 against the party with whom the deponent is affiliated. In lieu of, or in addition to,
18 this sanction, the court may impose a monetary sanction under Article 7 against
19 that deponent or against the party with whom that party deponent is affiliated, and
20 in favor of any party who, in person or by attorney, attended in the expectation that
21 the deponent's testimony would be taken pursuant to that order.

22 **Comment.** Subdivision (a) of Section 2025.150 continues the first sentence of former Section
23 2025(j)(3) without substantive change.

24 Subdivision (b) continues the second sentence of former Section 2025(j)(3) without substantive
25 change.

26 Subdivision (c) continues the third and fourth sentences of former Section 2025(j)(3) without
27 substantive change.

28 Subdivision (d) continues the second paragraph of former Section 2025(j)(3) without
29 substantive change.

30 **§ 2025.160. Deposition officer**

31 2025.160. Except as provided in Section 2020.070, the deposition shall be
32 conducted under the supervision of an officer who is authorized to administer an
33 oath and is subject to all of the following requirements:

34 (a) The officer shall not be financially interested in the action and shall not be a
35 relative or employee of any attorney of the parties, or of any of the parties.

36 (b) Services and products offered or provided by the deposition officer or the
37 entity providing the services of the deposition officer to any party or to any party's
38 attorney or third party who is financing all or part of the action shall be offered to
39 all parties or their attorneys attending the deposition. No service or product may be
40 offered or provided by the deposition officer or by the entity providing the services
41 of the deposition officer to any party or any party's attorney or third party who is
42 financing all or part of the action unless the service or product is offered or
43 provided to all parties or their attorneys attending the deposition. All services and

1 products offered or provided shall be made available at the same time to all parties
2 or their attorneys.

3 (c) The deposition officer or the entity providing the services of the deposition
4 officer shall not provide to any party or any party's attorney or third party who is
5 financing all or part of the action any service or product consisting of the
6 deposition officer's notations or comments regarding the demeanor of any witness,
7 attorney, or party present at the deposition. The deposition officer or entity
8 providing the services of the deposition officer shall not collect any personal
9 identifying information about the witness as a service or product to be provided to
10 any party or third party who is financing all or part of the action.

11 (d) Upon the request of any party or any party's attorney attending a deposition,
12 any party or any party's attorney attending the deposition shall enter in the record
13 of the deposition all services and products made available to that party or party's
14 attorney or third party who is financing all or part of the action by the deposition
15 officer or by the entity providing the services of the deposition officer. A party in
16 the action who is not represented by an attorney shall be informed by the noticing
17 party or the party's attorney that the unrepresented party may request this
18 statement.

19 (e) Any objection to the qualifications of the deposition officer is waived unless
20 made before the deposition begins or as soon thereafter as the ground for that
21 objection becomes known or could be discovered by reasonable diligence.

22 (f) Violation of this section by any person may result in a civil penalty of up to
23 five thousand dollars (\$5,000) imposed by a court of competent jurisdiction.

24 **Comment.** The introductory clause of Section 2025.160 continues the introductory clause of
25 former Section 2025(k) without substantive change.

26 Subdivision (a) continues former Section 2025(k)(1) without change.

27 Subdivision (b) continues former Section 2025(k)(2) without change.

28 Subdivision (c) continues former Section 2025(k)(3) without change.

29 Subdivision (d) continues former Section 2025(k)(4) without change.

30 Subdivision (e) continues former Section 2025(k)(5) without substantive change.

31 Subdivision (f) continues former Section 2025(v) without substantive change.

32 **§ 2025.170. Conduct of deposition**

33 2025.170. (a) The deposition officer shall put the deponent under oath.

34 (b) Unless the parties agree or the court orders otherwise, the testimony, as well
35 as any stated objections, shall be taken stenographically.

36 (c) The party noticing the deposition may also record the testimony by audiotape
37 or videotape if the notice of deposition stated an intention also to record the
38 testimony by either of those methods, or if all the parties agree that the testimony
39 may also be recorded by either of those methods. Any other party, at that party's
40 expense, may make a simultaneous audiotape or videotape record of the
41 deposition, provided that other party promptly, and in no event less than three
42 calendar days before the date for which the deposition is scheduled, serves a
43 written notice of this intention to audiotape or videotape the deposition testimony

1 on the party or attorney who noticed the deposition, on all other parties or
2 attorneys on whom the deposition notice was served under Section 2025.050, and
3 on any deponent whose attendance is being compelled by a deposition subpoena
4 under Article 6. If this notice is given three calendar days before the deposition
5 date, it shall be made by personal service under Section 1011.

6 (d) Examination and cross-examination of the deponent shall proceed as
7 permitted at trial under the provisions of the Evidence Code.

8 (e) In lieu of participating in the oral examination, parties may transmit written
9 questions in a sealed envelope to the party taking the deposition for delivery to the
10 deposition officer, who shall unseal the envelope and propound them to the
11 deponent after the oral examination has been completed.

12 **Comment.** Subdivision (a) of Section 2025.170 continues the first sentence of former Section
13 2025(l)(1) without substantive change.

14 Subdivision (b) continues the second sentence of former Section 2025(l)(1) without substantive
15 change.

16 Subdivision (c) continues the third, fourth, and fifth sentences of former Section 2025(l)(1)
17 without substantive change.

18 Subdivision (d) continues the sixth sentence of former Section 2025(l)(1) without substantive
19 change.

20 Subdivision (e) continues former Section 2025(l)(3) without change.

21 **§ 2025.180. Deposition recorded by audiotape or videotape**

22 2025.180. If a deposition is being recorded by means of audiotape or videotape,
23 the following procedure shall be observed:

24 (a) The area used for recording the deponent's oral testimony shall be suitably
25 large, adequately lighted, and reasonably quiet.

26 (b) The operator of the recording equipment shall be competent to set up,
27 operate, and monitor the equipment in the manner prescribed in this section. The
28 operator may be an employee of the attorney taking the deposition unless the
29 operator is also the deposition officer. However, if a videotape of deposition
30 testimony is to be used under subdivision (d) of Section 2025.300, the operator of
31 the recording equipment shall be a person who is authorized to administer an oath,
32 and shall not be financially interested in the action or be a relative or employee of
33 any attorney of any of the parties, unless all parties attending the deposition agree
34 on the record to waive these qualifications and restrictions.

35 (c) Services and products offered or provided by the deposition officer or the
36 entity providing the services of the deposition officer to any party or to any party's
37 attorney or third party who is financing all or part of the action shall be offered or
38 provided to all parties or their attorneys attending the deposition. No service or
39 product may be offered or provided by the deposition officer or by the entity
40 providing the services of the deposition officer to any party or any party's attorney
41 or third party who is financing all or part of the action unless the service or product
42 is offered or provided to all parties or their attorneys attending the deposition. All

1 services and products offered or provided shall be made available at the same time
2 to all parties or their attorneys.

3 (d) The deposition officer or the entity providing the services of the deposition
4 officer shall not provide to any party or any other person or entity any service or
5 product consisting of the deposition officer's notations or comments regarding the
6 demeanor of any witness, attorney, or party present at the deposition. The
7 deposition officer or the entity providing the services of the deposition officer shall
8 not collect any personal identifying information about the witness as a service or
9 product to be provided to any party or third party who is financing all or part of the
10 action.

11 (e) Upon the request of any party or any party's attorney attending a deposition,
12 any party or any party's attorney attending the deposition shall enter in the record
13 of the deposition all services and products made available to that party or party's
14 attorney or third party who is financing all or part of the action by the deposition
15 officer or by the entity providing the services of the deposition officer. A party in
16 the action who is not represented by an attorney shall be informed by the noticing
17 party that the unrepresented party may request this statement.

18 (f) The operator shall not distort the appearance or the demeanor of participants
19 in the deposition by the use of camera or sound recording techniques.

20 (g) The deposition shall begin with an oral or written statement on camera or on
21 the audiotape that includes the operator's name and business address, the name
22 and business address of the operator's employer, the date, time, and place of the
23 deposition, the caption of the case, the name of the deponent, a specification of the
24 party on whose behalf the deposition is being taken, and any stipulations by the
25 parties.

26 (h) Counsel for the parties shall identify themselves on camera or on the
27 audiotape.

28 (i) The oath shall be administered to the deponent on camera or on the audiotape.

29 (j) If the length of a deposition requires the use of more than one unit of tape, the
30 end of each unit and the beginning of each succeeding unit shall be announced on
31 camera or on the audiotape.

32 (k) At the conclusion of a deposition, a statement shall be made on camera or on
33 the audiotape that the deposition is ended and shall set forth any stipulations made
34 by counsel concerning the custody of the audiotape or videotape recording and the
35 exhibits, or concerning other pertinent matters.

36 (l) A party intending to offer an audiotaped or videotaped recording of a
37 deposition in evidence under Section 2025.300 shall notify the court and all parties
38 in writing of that intent and of the parts of the deposition to be offered. That notice
39 shall be given within sufficient time for objections to be made and ruled on by the
40 judge to whom the case is assigned for trial or hearing, and for any editing of the
41 tape. Objections to all or part of the deposition shall be made in writing. The court
42 may permit further designations of testimony and objections as justice may
43 require. With respect to those portions of an audiotaped or videotaped deposition

1 that are not designated by any party or that are ruled to be objectionable, the court
2 may order that the party offering the recording of the deposition at the trial or
3 hearing suppress those portions, or that an edited version of the deposition tape be
4 prepared for use at the trial or hearing. The original audiotape or videotape of the
5 deposition shall be preserved unaltered. If no stenographic record of the deposition
6 testimony has previously been made, the party offering a videotape or an
7 audiotape recording of that testimony under Section 2025.300 shall accompany
8 that offer with a stenographic transcript prepared from that recording.

9 **Comment.** The introductory clause of Section 2025.180 continues the introductory clause of
10 former Section 2025(l)(2) without substantive change.

11 Subdivision (a) continues former Section 2025(l)(2)(A) without change.

12 Subdivision (b) continues the first, second, and third sentences of former Section 2025(l)(2)(B)
13 without substantive change.

14 Subdivision (c) continues the fourth, fifth, and sixth sentences of former Section 2025(l)(2)(B)
15 without change.

16 Subdivision (d) continues the seventh and eighth sentences of former Section 2025(l)(2)(B)
17 without change.

18 Subdivision (e) continues the ninth and tenth sentences of former Section 2025(l)(2)(B) without
19 change.

20 Subdivision (f) continues former Section 2025(l)(2)(C) without change.

21 Subdivision (g) continues former Section 2025(l)(2)(D) without change.

22 Subdivision (h) continues former Section 2025(l)(2)(E) without change.

23 Subdivision (i) continues former Section 2025(l)(2)(F) without change.

24 Subdivision (j) continues former Section 2025(l)(2)(G) without change.

25 Subdivision (k) continues former Section 2025(l)(2)(H) without change.

26 Subdivision (l) continues former Section 2025(l)(2)(I) without substantive change.

27 ☞ **Staff Note.** Section 2025.180(c)-(e) would continue language presently found in Section
28 2025(l)(2)(A), but there is substantial overlap between that language and the text of Section
29 2025(k)(2)-(k)(4) (proposed Section 2025.160(b)-(d)). The staff has not yet considered whether
30 and how to eliminate this redundancy.

31 § 2025.190. Waiver of error or irregularity

32 2025.190. (a) The protection of information from discovery on the ground that it
33 is privileged or that it is a protected work product under Article 4 is waived unless
34 a specific objection to its disclosure is timely made during the deposition.

35 (b) Errors and irregularities of any kind occurring at the oral examination that
36 might be cured if promptly presented are waived unless a specific objection to
37 them is timely made during the deposition. These errors and irregularities include,
38 but are not limited to, those relating to the manner of taking the deposition, to the
39 oath or affirmation administered, to the conduct of a party, attorney, deponent, or
40 deposition officer, or to the form of any question or answer. Unless the objecting
41 party demands that the taking of the deposition be suspended to permit a motion
42 for a protective order under Section 2025.200, the deposition shall proceed subject
43 to the objection.

44 (c) Objections to the competency of the deponent, or to the relevancy,
45 materiality, or admissibility at trial of the testimony or of the materials produced

1 are unnecessary and are not waived by failure to make them before or during the
2 deposition.

3 (d) If a deponent fails to answer any question or to produce any document or
4 tangible thing under the deponent's control that is specified in the deposition
5 notice or a deposition subpoena, the party seeking that answer or production may
6 adjourn the deposition or complete the examination on other matters without
7 waiving the right at a later time to move for an order compelling that answer or
8 production under Section 2025.210.

9 **Comment.** Subdivision (a) of Section 2025.190 continues former Section 2025(m)(1) without
10 substantive change.

11 Subdivision (b) continues former Section 2025(m)(2) without substantive change.

12 Subdivision (c) continues former Section 2025(m)(3) without change.

13 Subdivision (d) continues former Section 2025(m)(4) without substantive change.

14 § 2025.200. Motion for protective order

15 2025.200. (a) The deposition officer shall not suspend the taking of testimony
16 without stipulation of the party conducting the deposition and the deponent unless
17 any party attending the deposition or the deponent demands the taking of
18 testimony be suspended to enable that party or deponent to move for a protective
19 order on the ground that the examination is being conducted in bad faith or in a
20 manner that unreasonably annoys, embarrasses, or oppresses that deponent or
21 party.

22 (b) A motion under subdivision (a) shall be accompanied by a declaration stating
23 facts showing a reasonable and good faith attempt at an informal resolution of
24 each issue presented by the motion. The court, for good cause shown, may
25 terminate the examination or may limit the scope and manner of taking the
26 deposition as provided in Section 2025.120. If the order terminates the
27 examination, the deposition shall not thereafter be resumed, except on order of the
28 court.

29 (c) The court shall impose a monetary sanction under Article 7 against any party,
30 person, or attorney who unsuccessfully makes or opposes a motion for a protective
31 order under subdivision (a), unless it finds that the one subject to the sanction
32 acted with substantial justification or that other circumstances make the imposition
33 of the sanction unjust.

34 **Comment.** Subdivision (a) of Section 2025.200 continues the first sentence of former Section
35 2025(n) without change.

36 Subdivision (b) continues the second, third, and fourth sentences of former Section 2025(n)
37 without substantive change.

38 Subdivision (c) continues the second paragraph of former Section 2025(n) without substantive
39 change.

40 § 2025.210. Motion to compel

41 2025.210. (a) If a deponent fails to answer any question or to produce any
42 document or tangible thing under the deponent's control that is specified in the

1 deposition notice or a deposition subpoena, the party seeking discovery may move
2 the court for an order compelling that answer or production.

3 (b) This motion shall be made no later than 60 days after the completion of the
4 record of the deposition, and shall be accompanied by a declaration stating facts
5 showing a reasonable and good faith attempt at an informal resolution of each
6 issue presented by the motion.

7 (c) Notice of this motion shall be given to all parties, and to the deponent either
8 orally at the examination, or by subsequent service in writing. If the notice of the
9 motion is given orally, the deposition officer shall direct the deponent to attend a
10 session of the court at the time specified in the notice.

11 (d) Not less than five days before the hearing on this motion, the moving party
12 shall lodge with the court a certified copy of any parts of the stenographic
13 transcript of the deposition that are relevant to the motion. If a deposition is
14 recorded by audiotape or videotape, the moving party is required to lodge a
15 certified copy of a transcript of any parts of the deposition that are relevant to the
16 motion.

17 (e) If the court determines that the answer or production sought is subject to
18 discovery, it shall order that the answer be given or the production be made on the
19 resumption of the deposition.

20 (f) The court shall impose a monetary sanction under Article 7 against any party,
21 person, or attorney who unsuccessfully makes or opposes a motion to compel
22 answer or production, unless it finds that the one subject to the sanction acted with
23 substantial justification or that other circumstances make the imposition of the
24 sanction unjust.

25 (g) If a deponent fails to obey an order entered under this section, the failure may
26 be considered a contempt of court. In addition, if the disobedient deponent is a
27 party to the action or an officer, director, managing agent, or employee of a party,
28 the court may make those orders that are just against the disobedient party, or
29 against the party with whom the disobedient deponent is affiliated, including the
30 imposition of an issue sanction, an evidence sanction, or a terminating sanction
31 under Article 7. In lieu of, or in addition to, this sanction, the court may impose a
32 monetary sanction under Article 7 against that party deponent or against any party
33 with whom the deponent is affiliated.

34 **Comment.** Subdivision (a) of Section 2025.210 continues the first sentence of former Section
35 2025(o) without change.

36 Subdivision (b) continues the second sentence of former Section 2025(o) without change.

37 Subdivision (c) continues the third and fourth sentences of former Section 2025(o) without
38 change.

39 Subdivision (d) continues the fifth and sixth sentences of former Section 2025(o) without
40 substantive change.

41 Subdivision (e) continues the seventh sentence of former Section 2025(o) without change.

42 Subdivision (f) continues the second paragraph of former Section 2025(o) without change.

43 Subdivision (g) continues the third paragraph of former Section 2025(o) without substantive
44 change.

1 § 2025.220. **Transcription of testimony**

2 2025.220. (a) Unless the parties agree otherwise, the testimony at any deposition
3 recorded by stenographic means shall be transcribed.

4 (b) The party noticing the deposition shall bear the cost of that transcription,
5 unless the court, on motion and for good cause shown, orders that the cost be
6 borne or shared by another party.

7 (c) Notwithstanding subdivision (b) of Section 2025.160, any other party, at that
8 party's expense, may obtain a copy of the transcript.

9 (d) If the deposition officer receives a request from a party for an original or a
10 copy of the deposition transcript, or any portion thereof, and the document will be
11 available to that party before the time the original or copy would be available to
12 any other party, the deposition officer shall immediately notify all other parties
13 attending the deposition of the request, and shall, upon request by any party other
14 than the party making the original request, make that copy of the full or partial
15 deposition transcript available to all parties at the same time.

16 (e) Stenographic notes of depositions shall be retained by the reporter for a
17 period of not less than eight years from the date of the deposition, where no
18 transcript is produced, and not less than one year from the date on which the
19 transcript is produced. Those notes may be either on paper or electronic media, as
20 long as it allows for satisfactory production of a transcript at any time during the
21 periods specified.

22 (f) At the request of any other party to the action, including a party who did not
23 attend the taking of the deposition testimony, any party who records or causes the
24 recording of that testimony by means of audiotape or videotape shall promptly do
25 both of the following:

26 (1) Permit that other party to hear the audiotape or to view the videotape.

27 (2) Furnish a copy of the audiotape or videotape to that other party on receipt of
28 payment of the reasonable cost of making that copy of the tape.

29 (g) If the testimony at the deposition is recorded both stenographically, and by
30 audiotape or videotape, the stenographic transcript is the official record of that
31 testimony for the purpose of the trial and any subsequent hearing or appeal.

32 **Comment.** Subdivision (a) of Section 2025.220 continues the first sentence of former Section
33 2025(p) without change.

34 Subdivision (b) continues the second sentence of former Section 2025(p) without change.

35 Subdivision (c) continues the third sentence of former Section 2025(p) without change, except
36 to conform the cross-reference.

37 Subdivision (d) continues the fourth sentence of former Section 2025(p) without substantive
38 change.

39 Subdivision (e) continues the fifth and sixth sentences of former Section 2025(p) without
40 change.

41 Subdivision (f) continues the seventh sentence of former Section 2025(p) without substantive
42 change.

43 Subdivision (g) continues the second paragraph of former Section 2025(p) without change.

1 **§ 2025.230. Deponent’s review of transcript**

2 2025.230. (a) If the deposition testimony is stenographically recorded, the
3 deposition officer shall send written notice to the deponent and to all parties
4 attending the deposition when the original transcript of the testimony for each
5 session of the deposition is available for reading, correcting, and signing, unless
6 the deponent and the attending parties agree on the record that the reading,
7 correcting, and signing of the transcript of the testimony will be waived or that the
8 reading, correcting, and signing of a transcript of the testimony will take place
9 after the entire deposition has been concluded or at some other specific time.

10 (b) For 30 days following each notice under subdivision (a), unless the attending
11 parties and the deponent agree on the record or otherwise in writing to a longer or
12 shorter time period, the deponent may change the form or the substance of the
13 answer to a question, and may either approve the transcript of the deposition by
14 signing it, or refuse to approve the transcript by not signing it.

15 (c) Alternatively, within this same period, the deponent may change the form or
16 the substance of the answer to any question and may approve or refuse to approve
17 the transcript by means of a letter to the deposition officer signed by the deponent
18 which is mailed by certified or registered mail with return receipt requested. A
19 copy of that letter shall be sent by first-class mail to all parties attending the
20 deposition.

21 (d) For good cause shown, the court may shorten the 30-day period for making
22 changes, approving, or refusing to approve the transcript.

23 (e) The deposition officer shall indicate on the original of the transcript, if the
24 deponent has not already done so at the office of the deposition officer, any action
25 taken by the deponent and indicate on the original of the transcript, the deponent’s
26 approval of, or failure or refusal to approve, the transcript. The deposition officer
27 shall also notify in writing the parties attending the deposition of any changes
28 which the deponent timely made in person.

29 (f) If the deponent fails or refuses to approve the transcript within the allotted
30 period, the deposition shall be given the same effect as though it had been
31 approved, subject to any changes timely made by the deponent.

32 (g) Notwithstanding subdivision (f), on a seasonable motion to suppress the
33 deposition, accompanied by a declaration stating facts showing a reasonable and
34 good faith attempt at an informal resolution of each issue presented by the motion,
35 the court may determine that the reasons given for the failure or refusal to approve
36 the transcript require rejection of the deposition in whole or in part.

37 (h) The court shall impose a monetary sanction under Article 7 against any party,
38 person, or attorney who unsuccessfully makes or opposes a motion to suppress a
39 deposition, unless it finds that the one subject to the sanction acted with substantial
40 justification or that other circumstances make the imposition of the sanction
41 unjust.

42 **Comment.** Subdivision (a) of Section 2025.230 continues the first sentence of former Section
43 2025(q)(1) without change.

1 Subdivision (b) continues the second sentence of former Section 2025(q)(1) without substantive
2 change.

3 Subdivision (c) continues the first and second sentences of the second paragraph of former
4 Section 2025(q)(1) without change.

5 Subdivision (d) continues the third sentence of the second paragraph of former Section
6 2025(q)(1) without change.

7 Subdivision (e) continues the first and second sentences of the third paragraph of former
8 Section 2025(q)(1) without change.

9 Subdivision (f) continues the third sentence of the third paragraph of former Section 2025(q)(1)
10 without change.

11 Subdivision (g) continues the fourth sentence of the third paragraph of former Section
12 2025(q)(1) without substantive change.

13 Subdivision (h) continues the fourth paragraph of former Section 2025(q)(1) without change,
14 except to conform the cross-reference.

15 **§ 2025.240. Deponent's review of recording**

16 2025.240. (a) If there is no stenographic transcription of the deposition, the
17 deposition officer shall send written notice to the deponent and to all parties
18 attending the deposition that the recording is available for review, unless the
19 deponent and all these parties agree on the record to waive the hearing or viewing
20 of an audiotape or videotape recording of the testimony.

21 (b) For 30 days following a notice under subdivision (a), the deponent, either in
22 person or by signed letter to the deposition officer, may change the substance of
23 the answer to any question.

24 (c) The deposition officer shall set forth in a writing to accompany the recording
25 any changes made by the deponent, as well as either the deponent's signature
26 identifying the deposition as the deponent's own, or a statement of the deponent's
27 failure to supply the signature, or to contact the officer within the allotted period.

28 (d) When a deponent fails to contact the officer within the allotted period, or
29 expressly refuses by a signature to identify the deposition as the deponent's own,
30 the deposition shall be given the same effect as though signed.

31 (e) Notwithstanding subdivision (d), on a reasonable motion to suppress the
32 deposition, accompanied by a declaration stating facts showing a reasonable and
33 good faith attempt at an informal resolution of each issue presented by the motion,
34 the court may determine that the reasons given for the refusal to sign require
35 rejection of the deposition in whole or in part.

36 (f) The court shall impose a monetary sanction under Article 7 against any party,
37 person, or attorney who unsuccessfully makes or opposes a motion to suppress a
38 deposition, unless it finds that the one subject to the sanction acted with substantial
39 justification or that other circumstances make the imposition of the sanction
40 unjust.

41 **Comment.** Subdivision (a) of Section 2025.240 continues the first sentence of former Section
42 2025(q)(2) without change.

43 Subdivision (b) continues the second sentence of former Section 2025(q)(2) without substantive
44 change.

45 Subdivision (c) continues the first sentence of the second paragraph of former Section
46 2025(q)(2) without substantive change.

1 Subdivision (d) continues the second sentence of the second paragraph of former Section
2 2025(q)(2) without substantive change.

3 Subdivision (e) continues the third sentence of the second paragraph of former Section
4 2025(q)(2) without substantive change.

5 Subdivision (f) continues the third paragraph of former Section 2025(q)(2) without substantive
6 change, except to conform the cross-reference.

7 **§ 2025.250. Certification of transcript**

8 2025.250. (a) The deposition officer shall certify on the transcript of the
9 deposition, or in a writing accompanying an audiotaped or videotaped deposition
10 as described in subdivision (b) of Section 2025.300, that the deponent was duly
11 sworn and that the transcript or recording is a true record of the testimony given.

12 (b) When prepared as a rough draft transcript, the transcript of the deposition
13 may not be certified and may not be used, cited, or transcribed as the certified
14 transcript of the deposition proceedings. The rough draft transcript may not be
15 cited or used in any way or at any time to rebut or contradict the certified transcript
16 of deposition proceedings as provided by the deposition officer.

17 **Comment.** Subdivision (a) of Section 2025.250 continues former Section 2025(r)(1) without
18 change, except to conform the cross-reference.

19 Subdivision (b) continues former Section 2025(r)(2) without change.

20 **§ 2025.260. Sealing of transcript**

21 2025.260. (a) The certified transcript of a deposition shall not be filed with the
22 court. Instead, the deposition officer shall securely seal that transcript in an
23 envelope or package endorsed with the title of the action and marked: “ Deposition
24 of (here insert name of deponent),” and shall promptly transmit it to the attorney
25 for the party who noticed the deposition. This attorney shall store it under
26 conditions that will protect it against loss, destruction, or tampering.

27 (b) The attorney to whom the transcript of a deposition is transmitted shall retain
28 custody of it until six months after final disposition of the action. At that time, the
29 transcript may be destroyed, unless the court, on motion of any party and for good
30 cause shown, orders that the transcript be preserved for a longer period.

31 **Comment.** Subdivision (a) of Section 2025.260 continues the first paragraph of former Section
32 2025(s)(1) without change.

33 Subdivision (b) continues the second paragraph of former Section 2025(s)(1) without change.

34 **§ 2025.270. Sealing of audiotape or videotape record**

35 2025.270. (a) An audiotape or videotape record of deposition testimony,
36 including a certified tape made by an operator qualified under subdivision (b) of
37 Section 2025.180, shall not be filed with the court. Instead, the operator shall
38 retain custody of that record and shall store it under conditions that will protect it
39 against loss, destruction, or tampering, and preserve as far as practicable the
40 quality of the tape and the integrity of the testimony and images it contains.

1 (b) At the request of any party to the action, including a party who did not attend
2 the taking of the deposition testimony, or at the request of the deponent, that
3 operator shall promptly do both of the following:

4 (1) Permit the one making the request to hear or to view the tape on receipt of
5 payment of a reasonable charge for providing the facilities for hearing or viewing
6 the tape.

7 (2) Furnish a copy of the audiotape or the videotape recording to the one making
8 the request on receipt of payment of the reasonable cost of making that copy of the
9 tape.

10 (c) The attorney or operator who has custody of an audiotape or videotape record
11 of deposition testimony shall retain custody of it until six months after final
12 disposition of the action. At that time, the audiotape or videotape may be
13 destroyed or erased, unless the court, on motion of any party and for good cause
14 shown, orders that the tape be preserved for a longer period.

15 **Comment.** Subdivision (a) of Section 2025.270 continues the first paragraph of former Section
16 2025(s)(2) without change, except to conform the cross-reference.

17 Subdivision (b) continues the second paragraph of former Section 2025(s)(2) without
18 substantive change.

19 Subdivision (c) continues the third paragraph of former Section 2025(s)(2) without change.

20 **§ 2025.280. Copy of transcript, videotape, or other recording for nonparty**

21 2025.280. (a) Notwithstanding subdivision (b) of Section 2025.160, unless the
22 court issues an order to the contrary, a copy of the transcript, videotape, or other
23 recording of testimony at the deposition, if still in the possession of the deposition
24 officer, shall be made available by the deposition officer to any person requesting
25 a copy, on payment of a reasonable charge set by the deposition officer.

26 (b) If a copy is requested from the deposition officer, the deposition officer shall
27 mail a notice to all parties attending the deposition and to the deponent at the
28 deponent's last known address advising them of all of the following:

29 (1) The copy is being sought.

30 (2) The name of the person requesting the copy.

31 (3) The right to seek a protective order pursuant to Section 2025.120.

32 (c) If a protective order is not served on the deposition officer within 30 days of
33 the mailing of the notice, the deposition officer shall make the copy available to
34 the person requesting the copy.

35 (d) This section shall apply only to recorded testimony taken at depositions
36 occurring on or after January 1, 1998.

37 **Comment.** Subdivision (a) of Section 2025.270 continues former Section 2025.5(a) without
38 substantive change.

39 Subdivision (b) continues the first sentence of former Section 2025.5(b) without substantive
40 change.

41 Subdivision (c) continues the second sentence of former Section 2025.5(b) without change.

42 Subdivision (d) continues former Section 2025.5(c) without change.

1 **§ 2025.290. Subsequent deposition of same deponent**

2 2025.290. (a) Once any party has taken the deposition of any natural person,
3 including that of a party to the action, neither the party who gave, nor any other
4 party who has been served with a deposition notice pursuant to Section 2025.030
5 may take a subsequent deposition of that deponent.

6 (b) Notwithstanding subdivision (a), for good cause shown, the court may grant
7 leave to take a subsequent deposition, and the parties, with the consent of any
8 deponent who is not a party, may stipulate that a subsequent deposition be taken.

9 (c) This section does not preclude taking one subsequent deposition of a natural
10 person who has previously been examined (1) as a result of that person's
11 designation to testify on behalf of an organization under subdivision (d), or (2),
12 pursuant to a court order under Section 485.230, for the limited purpose of
13 discovering pursuant to Section 485.230 the identity, location, and value of
14 property in which the deponent has an interest.

15 (d) This section does not authorize the taking of more than one subsequent
16 deposition for the limited purpose of Section 485.230.

17 **Comment.** Subdivision (a) of Section 2025.290 continues the first sentence of former Section
18 2025(t) without change, except to conform the cross-reference.

19 Subdivision (b) continues the second sentence of former Section 2025(t) without substantive
20 change.

21 Subdivision (c) continues the third sentence of former Section 2025(t) without substantive
22 change.

23 Subdivision (d) continues the fourth sentence of former Section 2025(t) without substantive
24 change.

25 **§ 2025.300. Use of deposition testimony**

26 2025.300. At the trial or any other hearing in the action, any part or all of a
27 deposition may be used against any party who was present or represented at the
28 taking of the deposition, or who had due notice of the deposition and did not serve
29 a valid objection under Section 2025.090, so far as admissible under the rules of
30 evidence applied as though the deponent were then present and testifying as a
31 witness, in accordance with the following provisions:

32 (a) Any party may use a deposition for the purpose of contradicting or
33 impeaching the testimony of the deponent as a witness, or for any other purpose
34 permitted by the Evidence Code.

35 (b) An adverse party may use for any purpose, a deposition of a party to the
36 action, or of anyone who at the time of taking the deposition was an officer,
37 director, managing agent, employee, agent, or designee under Section 2025.040 of
38 a party. It is not ground for objection to the use of a deposition of a party under
39 this paragraph by an adverse party that the deponent is available to testify, has
40 testified, or will testify at the trial or other hearing.

41 (c) Any party may use for any purpose the deposition of any person or
42 organization, including that of any party to the action, if the court finds any of the
43 following:

1 (1) The deponent resides more than 150 miles from the place of the trial or other
2 hearing.

3 (2) The deponent, without the procurement or wrongdoing of the proponent of
4 the deposition for the purpose of preventing testimony in open court, will not to
5 testify in court for one or more of the following reasons:

6 (A) The deponent is exempted or precluded on the ground of privilege from
7 testifying concerning the matter to which the deponent's testimony is relevant.

8 (B) The deponent is disqualified from testifying.

9 (C) The deponent is dead or unable to attend or testify because of existing
10 physical or mental illness or infirmity.

11 (D) The deponent is absent from the trial or other hearing and the court is unable
12 to compel the deponent's attendance by its process.

13 (E) The deponent is absent from the trial or other hearing and the proponent of
14 the deposition has exercised reasonable diligence but has been unable to procure
15 the deponent's attendance by the court's process.

16 (3) Exceptional circumstances exist that make it desirable to allow the use of any
17 deposition in the interests of justice and with due regard to the importance of
18 presenting the testimony of witnesses orally in open court.

19 (d) Any party may use a videotape deposition of a treating or consulting
20 physician or of any expert witness even though the deponent is available to testify
21 if the deposition notice under Section 2025.030 reserved the right to use the
22 deposition at trial, and if that party has complied with subdivision (l) of Section
23 2025.180.

24 (e) Subject to the requirements of this article, a party may offer in evidence all or
25 any part of a deposition, and if the party introduces only part of the deposition, any
26 other party may introduce any other parts that are relevant to the parts introduced.

27 (f) Substitution of parties does not affect the right to use depositions previously
28 taken.

29 (g) When an action has been brought in any court of the United States or of any
30 state, and another action involving the same subject matter is subsequently brought
31 between the same parties or their representatives or successors in interest, all
32 depositions lawfully taken and duly filed in the initial action may be used in the
33 subsequent action as if originally taken in that subsequent action. A deposition
34 previously taken may also be used as permitted by the Evidence Code.

35 **Comment.** The introductory clause of Section 2025.300 continues the first paragraph of former
36 Section 2025(u) without change, except to conform the cross-reference.

37 Subdivision (a) continues former Section 2025(u)(1) without change.

38 Subdivision (b) continues former Section 2025(u)(2) without change, except to conform the
39 cross-reference.

40 Subdivision (c) continues former Section 2025(u)(3) without substantive change.

41 Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the
42 cross-reference.

43 Subdivision (e) continues former Section 2025(u)(5) without substantive change.

44 Subdivision (f) continues former Section 2025(u)(6) without change.

45 Subdivision (g) continues former Section 2025(u)(7) without change.

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Article 10. Oral Deposition Outside California

§ 2026.010. Oral deposition in another state or territory of the United States

2026.010. (a) Any party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in another state of the United States, or in a territory or an insular possession subject to its jurisdiction. Except as modified in this section, the procedures for taking oral depositions in California set forth in Article 9 apply to an oral deposition taken in another state of the United States, or in a territory or an insular possession subject to its jurisdiction.

(b) If a deponent is a party to the action or an officer, director, managing agent, or employee of a party, the service of the deposition notice is effective to compel that deponent to attend and to testify, as well as to produce any document or tangible thing for inspection and copying. The deposition notice shall specify a place in the state, territory, or insular possession of the United States that is within 75 miles of the residence or a business office of a deponent.

(c) If the deponent is not a party to the action or an officer, director, managing agent, or employee of a party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document or tangible thing for inspection, copying, and any related activity.

(d) A deposition taken under this section shall be conducted in either of the following ways:

(1) Under the supervision of a person who is authorized to administer oaths by the laws of the United States or those of the place where the examination is to be held, and who is not otherwise disqualified under Section 2025.160 and subdivision (b) of Section 2025.180.

(2) Before a person appointed by the court.

(e) An appointment under subdivision (d) is effective to authorize that person to administer oaths and to take testimony.

(f) On request, the clerk of the court shall issue a commission authorizing the deposition in another state or place. The commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions. The commission shall be issued by the clerk to any party in any action pending in its venue without a noticed motion or court order. The commission may contain such terms as are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application.

Comment. Subdivision (a) of Section 2026.010 continues former Section 2026(a) without change, except to conform the cross-references.

Subdivision (b) continues former Section 2026(b)(1) without change.

Subdivision (c) continues former Section 2026(b)(2) without change.

1 Subdivision (d) continues the first sentence of former Section 2026(c) without substantive
2 change.

3 Subdivision (e) continues the second sentence of former Section 2026(c) without substantive
4 change.

5 Subdivision (f) continues the third, fourth, fifth, sixth, and seventh sentences of former Section
6 2026(c) without change.

7 **§ 2026.020. Oral deposition in foreign nation**

8 2026.020 (a) Any party may obtain discovery by taking an oral deposition, as
9 described in Section 2025.010, in a foreign nation. Except as modified in this
10 section, the procedures for taking oral depositions in California set forth in Article
11 9 apply to an oral deposition taken in a foreign nation.

12 (b) If a deponent is a party to the action or an officer, director, managing agent,
13 or employee of a party, the service of the deposition notice is effective to compel
14 the deponent to attend and to testify, as well as to produce any document or
15 tangible thing for inspection and copying.

16 (c) If a deponent is not a party to the action or an officer, director, managing
17 agent or employee of a party, a party serving a deposition notice under this section
18 shall use any process and procedures required and available under the laws of the
19 foreign nation where the deposition is to be taken to compel the deponent to attend
20 and to testify, as well as to produce any document or tangible thing for inspection,
21 copying, and any related activity.

22 (d) A deposition taken under this section shall be conducted under the
23 supervision of any of the following:

24 (1) A person who is authorized to administer oaths or their equivalent by the
25 laws of the United States or of the foreign nation, and who is not otherwise
26 disqualified under Section 2025.160 and subdivision (b) of Section 2025.180.

27 (2) A person or officer appointed by commission or under letters rogatory.

28 (3) Any person agreed to by all the parties.

29 (e) On motion of the party seeking to take an oral deposition in a foreign nation,
30 the court in which the action is pending shall issue a commission, letters rogatory,
31 or a letter of request, if it determines that one is necessary or convenient. The
32 commission, letters rogatory, or letter of request may include any terms and
33 directions that are just and appropriate. The deposition officer may be designated
34 by name or by descriptive title in the deposition notice and in the commission.
35 Letters rogatory or a letter of request may be addressed: "To the Appropriate
36 Judicial Authority in [name of foreign nation]."

37 **Comment.** Subdivision (a) of Section 2026.020 continues former Section 2027(a) without
38 change, except to conform the cross-references.

39 Subdivision (b) continues former Section 2027(b)(1) without change.

40 Subdivision (c) continues former Section 2027(b)(2) without change.

41 Subdivision (d) continues the first paragraph of former Section 2027(c) without substantive
42 change.

43 Subdivision (e) continues the second paragraph of former Section 2027(c) without change.

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Article 11. Deposition By Written Questions

§ 2028.010. Deposition by written questions

2028. Any party may obtain discovery by taking a deposition by written questions instead of by oral examination. Except as modified in this article, the procedures for taking oral depositions set forth in Articles 9 and 10 apply to written depositions.

Comment. Section 2028.010 continues former Section 2028(a) without substantive change.

§ 2028.020. Notice of written deposition

2028.020. The notice of a written deposition shall comply with Sections 2025.030 and 2025.040, except as follows:

(a) The name or descriptive title, as well as the address, of the deposition officer shall be stated.

(b) The date, time, and place for commencement of the deposition may be left to future determination by the deposition officer.

Comment. Section 2028.020 continues former Section 2028(b) without substantive change.

§ 2028.030. Direct, cross, redirect, and recross questions

2028.030. (a) The questions to be propounded to the deponent by direct examination shall accompany the notice of a written deposition.

(b) Within 30 days after the deposition notice and questions are served, a party shall serve any cross questions on all other parties entitled to notice of the deposition.

(c) Within 15 days after being served with cross questions, a party shall serve any redirect questions on all other parties entitled to notice of the deposition.

(d) Within 15 days after being served with redirect questions, a party shall serve any recross questions on all other parties entitled to notice of the deposition.

(e) The court may, for good cause shown, extend or shorten the time periods for the interchange of cross, redirect, and recross questions.

Comment. Subdivision (a) of Section 2028.030 continues the first paragraph of former Section 2028(c) without change.

Subdivision (b) continues the second paragraph of former Section 2028(c) without change.

Subdivision (c) continues the third paragraph of former Section 2028(c) without change.

Subdivision (d) continues the fourth paragraph of former Section 2028(c) without change.

Subdivision (e) continues the fifth paragraph of former Section 2028(c) without change.

§ 2028.040. Objections

2028.040. (a) A party who objects to the form of any question shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question. A party who fails to timely serve an objection to the form of a question waives it.

(b) The objecting party shall promptly move the court to sustain the objection. This motion shall be accompanied by a declaration stating facts showing a

1 reasonable and good faith attempt at an informal resolution of each issue presented
2 by the objection and motion. Unless the court has sustained that objection, the
3 deposition officer shall propound to the deponent that question subject to that
4 objection as to its form.

5 (c) The court shall impose a monetary sanction under Article 7 against any party,
6 person, or attorney who unsuccessfully makes or opposes a motion to sustain an
7 objection, unless it finds that the one subject to the sanction acted with substantial
8 justification or that other circumstances make the imposition of the sanction
9 unjust.

10 **Comment.** Subdivision (a) of Section 2028.040 continues the first and second sentences of
11 former Section 2028(d)(1) without change.

12 Subdivision (b) continues the third, fourth, and fifth sentences of former Section 2028(d)(1)
13 without change.

14 Subdivision (c) continues the second paragraph of former Section 2028(d)(1) without change,
15 except to conform the cross-reference.

16 § 2028.050. Objection based on privilege

17 2028.050. (a) A party who objects to any question on the ground that it calls for
18 information that is privileged or is protected work product under Article 4 shall
19 serve a specific objection to that question on all parties entitled to notice of the
20 deposition within 15 days after service of the question. A party who fails to timely
21 serve that objection waives it.

22 (b) The party propounding any question to which an objection is made on those
23 grounds may then move the court for an order overruling that objection. This
24 motion shall be accompanied by a declaration stating facts constituting a
25 reasonable and good faith attempt at an informal resolution of each issue presented
26 by the objection and motion. The deposition officer shall not propound to the
27 deponent any question to which a written objection on those grounds has been
28 served unless the court has overruled that objection.

29 (c) The court shall impose a monetary sanction under Article 7 against any party,
30 person, or attorney who unsuccessfully makes or opposes a motion to overrule an
31 objection, unless it finds that the one subject to the sanction acted with substantial
32 justification or that other circumstances make the imposition of the sanction
33 unjust.

34 **Comment.** Subdivision (a) of Section 2028.050 continues the first and second sentences of
35 former Section 2028(d)(2) without change.

36 Subdivision (b) continues the third, fourth, and fifth sentences of former Section 2028(d)(2)
37 without change.

38 Subdivision (c) continues the second paragraph of former Section 2028(d)(2) without change,
39 except to conform the cross-reference.

40 § 2028.060. Preview of questions

41 2028.060. (a) The party taking a written deposition may forward to the deponent
42 a copy of the questions on direct examination for study prior to the deposition.

1 (b) No party or attorney shall permit the deponent to preview the form or the
2 substance of any cross, redirect, or recross questions.

3 **Comment.** Subdivision (a) of Section 2028.060 continues the first sentence of former Section
4 2028(e) without change.

5 Subdivision (b) continues the second sentence of former Section 2028(e) without change.

6 **§ 2028.070. Court orders**

7 2028.070. In addition to any appropriate order listed in Section 2025.120, the
8 court may order any of the following:

9 (a) That the deponent's testimony be taken by oral, instead of written,
10 examination.

11 (b) That one or more of the parties receiving notice of the written deposition be
12 permitted to attend in person or by attorney and to propound questions to the
13 deponent by oral examination.

14 (c) That objections under Sections 2028.040 and 2028.050 be sustained or
15 overruled.

16 (d) That the deposition be taken before an officer other than the one named or
17 described in the deposition notice.

18 **Comment.** Section 2028.070 continues former Section 2028(f) without change, except to
19 conform the cross-references.

20 **§ 2028.080. Duties of deposition officer**

21 2028.080. The party taking a written deposition shall deliver to the officer
22 designated in the deposition notice a copy of that notice and of all questions served
23 under Section 2028.030. The deposition officer shall proceed promptly to
24 propound the questions and to take and record the testimony of the deponent in
25 response to the questions.


26 **Comment.** Section 2028.080 continues former Section 2028(g) without substantive change.

27 **Article 12. Deposition in Action Pending Outside California**

28 **2029.010. Deposition in action pending outside California**

29 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
30 commission is issued out of any court of record in any other state, territory, or
31 district of the United States, or in a foreign nation, or whenever, on notice or
32 agreement, it is required to take the oral or written deposition of a natural person in
33 California, the deponent may be compelled to appear and testify, and to produce
34 documents and things, in the same manner, and by the same process as may be
35 employed for the purpose of taking testimony in actions pending in California.

36 **Comment.** Section 2029.010 continues former Section 2029 without change.

37  **Staff Note.** The staff is not certain that this provision should be located here, in a separate
38 article. We are considering possible alternatives. Suggestions on this point would be appreciated.

1 Article 13. Written Interrogatories

2 ☞ **Staff Note.** The staff has not yet divided the substance of Section 2030 into a series of short
3 sections. The provision is shown here in its present form. Cross-references to other discovery
4 provisions are left intact, but brackets are used to indicate the corresponding sections in this draft.

5 **§ 2030. Written interrogatories to parties**

6 2030. (a) Any party may obtain discovery within the scope delimited by Section
7 2017 [Articles 2 and 3], and subject to the restrictions set forth in Section 2019
8 [Article 5], by propounding to any other party to the action written interrogatories
9 to be answered under oath.

10 (b) A defendant may propound interrogatories to a party to the action without
11 leave of court at any time. A plaintiff may propound interrogatories to a party
12 without leave of court at any time that is 10 days after the service of the summons
13 on, or in unlawful detainer actions five days after service of the summons on or
14 appearance by, that party, whichever occurs first. However, on motion with or
15 without notice, the court, for good cause shown, may grant leave to a plaintiff to
16 propound interrogatories at an earlier time.

17 (c) (1) A party may propound to another party (1) 35 specially prepared
18 interrogatories, and (2) any additional number of official form interrogatories, as
19 described in Section 2033.5 [Article 17], that are relevant to the subject matter of
20 the pending action. Except as provided in paragraph (8), no party shall, as a matter
21 of right, propound to any other party more than 35 specially prepared
22 interrogatories. If the initial set of interrogatories does not exhaust this limit, the
23 balance may be propounded in subsequent sets. Unless a declaration as described
24 in paragraph (3) has been made, a party need only respond to the first 35 specially
25 prepared interrogatories served, if that party states an objection to the balance,
26 under paragraph (3) of subdivision (f), on the ground that the limit has been
27 exceeded.

28 (2) Subject to the right of the responding party to seek a protective order under
29 subdivision (e), any party who attaches a supporting declaration as described in
30 paragraph (3) may propound a greater number of specially prepared interrogatories
31 to another party if this greater number is warranted because of any of the
32 following:

33 (A) The complexity or the quantity of the existing and potential issues in the
34 particular case.

35 (B) The financial burden on a party entailed in conducting the discovery by oral
36 deposition.

37 (C) The expedience of using this method of discovery to provide to the
38 responding party the opportunity to conduct an inquiry, investigation, or search of
39 files or records to supply the information sought.

40 If the responding party seeks a protective order on the ground that the number of
41 specially prepared interrogatories is unwarranted, the propounding party shall have
42 the burden of justifying the number of these interrogatories.

1 (3) Any party who is propounding or has propounded more than 35 specially
2 prepared interrogatories to any other party shall attach to each set of those
3 interrogatories a declaration containing substantially the following:

4
5 DECLARATION FOR ADDITIONAL DISCOVERY

6
7 I, _____, declare:

8 1. I am (a party to this action or proceeding appearing in propria persona)
9 (presently the attorney for _____, a party to this action or proceeding).

10 2. I am propounding to _____ the attached set of interrogatories.

11 3. This set of interrogatories will cause the total number of specially prepared
12 interrogatories propounded to the party to whom they are directed to exceed the
13 number of specially prepared interrogatories permitted by paragraph (1) of
14 subdivision (c) of Section 2030 of the Code of Civil Procedure.

15 4. I have previously propounded a total of _____ interrogatories to this
16 party, of which _____ interrogatories were not official form interrogatories.

17 5. This set of interrogatories contains a total of _____ specially prepared
18 interrogatories.

19 6. I am familiar with the issues and the previous discovery conducted by all of
20 the parties in the case.

21 7. I have personally examined each of the questions in this set of interrogatories.

22 8. This number of questions is warranted under paragraph (2) of subdivision (c)
23 of Section 2030 of the Code of Civil Procedure because _____. (Here state
24 each factor described in paragraph (2) of subdivision (c) that is relied on, as well
25 as the reasons why any factor relied on is applicable to the instant lawsuit.)

26 9. None of the questions in this set of interrogatories is being propounded for
27 any improper purpose, such as to harass the party, or the attorney for the party, to
28 whom it is directed, or to cause unnecessary delay or needless increase in the cost
29 of litigation.

30 I declare under penalty of perjury under the laws of California that the foregoing
31 is true and correct, and that this declaration was executed on _____.

32
33 _____
34 (Signature)

35 Attorney for _____
36

37 (4) A party propounding interrogatories shall number each set of interrogatories
38 consecutively. In the first paragraph immediately below the title of the case, there
39 shall appear the identity of the propounding party, the set number, and the identity
40 of the responding party. Each interrogatory in a set shall be separately set forth and
41 identified by number or letter.

42 (5) Each interrogatory shall be full and complete in and of itself. No preface or
43 instruction shall be included with a set of interrogatories unless it has been

1 approved under Section 2033.5 [Article 17]. Any term specially defined in a set of
2 interrogatories shall be typed with all letters capitalized wherever that term
3 appears. No specially prepared interrogatory shall contain subparts, or a
4 compound, conjunctive, or disjunctive question.

5 (6) An interrogatory may relate to whether another party is making a certain
6 contention, or to the facts, witnesses, and writings on which a contention is based.
7 An interrogatory is not objectionable because an answer to it involves an opinion
8 or contention that relates to fact or the application of law to fact, or would be
9 based on information obtained or legal theories developed in anticipation of
10 litigation or in preparation for trial.

11 (7) An interrogatory may not be made a continuing one so as to impose on the
12 party responding to it a duty to supplement an answer to it that was initially correct
13 and complete with later acquired information.

14 (8) In addition to the number of interrogatories permitted by paragraphs (1) and
15 (2), a party may propound a supplemental interrogatory to elicit any later acquired
16 information bearing on all answers previously made by any party in response to
17 interrogatories (1) twice prior to the initial setting of a trial date, and (2) subject to
18 the time limits on discovery proceedings and motions provided in Section 2024
19 [Article 8], once after the initial setting of a trial date. However, on motion, for
20 good cause shown, the court may grant leave to a party to propound an additional
21 number of supplemental interrogatories.

22 (d) The party propounding interrogatories shall serve a copy of them (1) on the
23 party to whom they are directed, and (2) on all other parties who have appeared in
24 the action, unless the court on motion with or without notice has relieved that party
25 from this requirement on its determination that service on all other parties would
26 be unduly expensive or burdensome.

27 (e) When interrogatories have been propounded, the responding party, and any
28 other party or affected natural person or organization may promptly move for a
29 protective order. This motion shall be accompanied by a declaration stating facts
30 showing a reasonable and good faith attempt at an informal resolution of each
31 issue presented by the motion.

32 The court, for good cause shown, may make any order that justice requires to
33 protect any party or other natural person or organization from unwarranted
34 annoyance, embarrassment, or oppression, or undue burden and expense. This
35 protective order may include, but is not limited to, one or more of the following
36 directions:

37 (1) That the set of interrogatories, or particular interrogatories in the set, need
38 not be answered.

39 (2) That, contrary to the representations made in a declaration submitted under
40 paragraph (3) of subdivision (c), the number of specially prepared interrogatories
41 is unwarranted.

42 (3) That the time specified in subdivision (h) to respond to the set of
43 interrogatories, or to particular interrogatories in the set, be extended.

1 (4) That the response be made only on specified terms and conditions.

2 (5) That the method of discovery be an oral deposition instead of interrogatories
3 to a party.

4 (6) That a trade secret or other confidential research, development, or
5 commercial information not be disclosed or be disclosed only in a certain way.

6 (7) That some or all of the answers to interrogatories be sealed and thereafter
7 opened only on order of the court.

8 If the motion for a protective order is denied in whole or in part, the court may
9 order that the party provide or permit the discovery against which protection was
10 sought on terms and conditions that are just.

11 The court shall impose a monetary sanction under Section 2023 [Article 7]
12 against any party, person, or attorney who unsuccessfully makes or opposes a
13 motion for a protective order, unless it finds that the one subject to the sanction
14 acted with substantial justification or that other circumstances made the imposition
15 of the sanction unjust.

16 (f) The party to whom interrogatories have been propounded shall respond in
17 writing under oath separately to each interrogatory by (1) an answer containing the
18 information sought to be discovered, (2) an exercise of the party's option to
19 produce writings, or (3) an objection to the particular interrogatory. In the first
20 paragraph of the response immediately below the title of the case, there shall
21 appear the identity of the responding party, the set number, and the identity of the
22 propounding party. Each answer, exercise of option, or objection in the response
23 shall bear the same identifying number or letter and be in the same sequence as the
24 corresponding interrogatory, but the text of that interrogatory need not be repeated.

25 (1) Each answer in the response shall be as complete and straightforward as the
26 information reasonably available to the responding party permits. If an
27 interrogatory cannot be answered completely, it shall be answered to the extent
28 possible. If the responding party does not have personal knowledge sufficient to
29 respond fully to an interrogatory, that party shall so state, but shall make a
30 reasonable and good faith effort to obtain the information by inquiry to other
31 natural persons or organizations, except where the information is equally available
32 to the propounding party.

33 (2) If the answer to an interrogatory would necessitate the preparation or the
34 making of a compilation, abstract, audit, or summary of or from the documents of
35 the party to whom the interrogatory is directed, and if the burden or expense of
36 preparing or making it would be substantially the same for the party propounding
37 the interrogatory as for the responding party, it is a sufficient answer to that
38 interrogatory to refer to this subdivision and to specify the writings from which the
39 answer may be derived or ascertained. This specification shall be in sufficient
40 detail to permit the propounding party to locate and to identify, as readily as the
41 responding party can, the documents from which the answer may be ascertained.
42 The responding party shall then afford to the propounding party a reasonable

1 opportunity to examine, audit, or inspect these documents and to make copies,
2 compilations, abstracts, or summaries of them.

3 (3) If only a part of an interrogatory is objectionable, the remainder of the
4 interrogatory shall be answered. If an objection is made to an interrogatory or to a
5 part of an interrogatory, the specific ground for the objection shall be set forth
6 clearly in the response. If an objection is based on a claim of privilege, the
7 particular privilege invoked shall be clearly stated. If an objection is based on a
8 claim that the information sought is protected work product under Section 2018
9 [Article 4], that claim shall be expressly asserted.

10 (g) The party to whom the interrogatories are directed shall sign the response
11 under oath unless the response contains only objections. If that party is a public or
12 private corporation, or a partnership, association, or governmental agency, one of
13 its officers or agents shall sign the response under oath on behalf of that party. If
14 the officer or agent signing the response on behalf of that party is an attorney
15 acting in that capacity for the party, that party waives any lawyer-client privilege
16 and any protection for work product under Section 2018 [Article 4] during any
17 subsequent discovery from that attorney concerning the identity of the sources of
18 the information contained in the response. The attorney for the responding party
19 shall sign any responses that contain an objection.

20 (h) Within 30 days after service of interrogatories, or in unlawful detainer
21 actions within five days after service of interrogatories the party to whom the
22 interrogatories are propounded shall serve the original of the response to them on
23 the propounding party, unless on motion of the propounding party the court has
24 shortened the time for response, or unless on motion of the responding party the
25 court has extended the time for response. In unlawful detainer actions, the party to
26 whom the interrogatories are propounded shall have five days from the date of
27 service to respond unless on motion of the propounding party the court has
28 shortened the time for response. The party to whom the interrogatories are
29 propounded shall also serve a copy of the response on all other parties who have
30 appeared in the action, unless the court on motion with or without notice has
31 relieved that party from this requirement on its determination that service on all
32 other parties would be unduly expensive or burdensome.

33 (i) The party propounding interrogatories and the responding party may agree to
34 extend the time for service of a response to a set of interrogatories, or to particular
35 interrogatories in a set, to a date beyond that provided in subdivision (h). This
36 agreement may be informal, but it shall be confirmed in a writing that specifies the
37 extended date for service of a response. Unless this agreement expressly states
38 otherwise, it is effective to preserve to the responding party the right to respond to
39 any interrogatory to which the agreement applies in any manner specified in
40 subdivision (f).

41 (j) The interrogatories and the response thereto shall not be filed with the court.
42 The propounding party shall retain both the original of the interrogatories, with the
43 original proof of service affixed to them, and the original of the sworn response

1 until six months after final disposition of the action. At that time, both originals
2 may be destroyed, unless the court on motion of any party and for good cause
3 shown orders that the originals be preserved for a longer period.

4 (k) If a party to whom interrogatories have been directed fails to serve a timely
5 response, that party waives any right to exercise the option to produce writings
6 under subdivision (f), as well as any objection to the interrogatories, including one
7 based on privilege or on the protection for work product under Section 2018
8 [Article 4]. However, the court, on motion, may relieve that party from this waiver
9 on its determination that (1) the party has subsequently served a response that is in
10 substantial compliance with subdivision (f), and (2) the party's failure to serve a
11 timely response was the result of mistake, inadvertence, or excusable neglect.

12 The party propounding the interrogatories may move for an order compelling
13 response to the interrogatories. The court shall impose a monetary sanction under
14 Section 2023 [Article 7] against any party, person, or attorney who unsuccessfully
15 makes or opposes a motion to compel a response to interrogatories, unless it finds
16 that the one subject to the sanction acted with substantial justification or that other
17 circumstances make the imposition of the sanction unjust. If a party then fails to
18 obey an order compelling answers, the court may make those orders that are just,
19 including the imposition of an issue sanction, an evidence sanction, or a
20 terminating sanction under Section 2023 [Article 7]. In lieu of or in addition to that
21 sanction, the court may impose a monetary sanction under Section 2023 [Article
22 7].

23 (l) If the propounding party, on receipt of a response to interrogatories, deems
24 that (1) an answer to a particular interrogatory is evasive or incomplete, (2) an
25 exercise of the option to produce documents under paragraph (2) of subdivision (f)
26 is unwarranted or the required specification of those documents is inadequate, or
27 (3) an objection to an interrogatory is without merit or too general, that party may
28 move for an order compelling a further response. This motion shall be
29 accompanied by a declaration stating facts showing a reasonable and good faith
30 attempt at an informal resolution of each issue presented by the motion.

31 Unless notice of this motion is given within 45 days of the service of the
32 response, or any supplemental response, or on or before any specific later date to
33 which the propounding party and the responding party have agreed in writing, the
34 propounding party waives any right to compel a further response to the
35 interrogatories.

36 The court shall impose a monetary sanction under Section 2023 [Article 7]
37 against any party, person, or attorney who unsuccessfully makes or opposes a
38 motion to compel a further response to interrogatories, unless it finds that the one
39 subject to the sanction acted with substantial justification or that other
40 circumstances make the imposition of the sanction unjust.

41 If a party then fails to obey an order compelling further response to
42 interrogatories, the court may make those orders that are just, including the
43 imposition of an issue sanction, an evidence sanction, or a terminating sanction

1 under Section 2023 [Article 7]. In lieu of or in addition to that sanction, the court
2 may impose a monetary sanction under Section 2023 [Article 7].


3 (m) Without leave of court, a party may serve an amended answer to any
4 interrogatory that contains information subsequently discovered, inadvertently
5 omitted, or mistakenly stated in the initial interrogatory. At the trial of the action,
6 the propounding party or any other party may use the initial answer under
7 subdivision (n), and the responding party may then use the amended answer.

8 The party who propounded an interrogatory to which an amended answer has
9 been served may move for an order that the initial answer to that interrogatory be
10 deemed binding on the responding party for the purpose of the pending action.
11 This motion shall be accompanied by a declaration stating facts showing a
12 reasonable and good faith attempt at an informal resolution of each issue presented
13 by the motion. The court shall grant this motion if it determines that (1) the initial
14 failure of the responding party to answer the interrogatory correctly has
15 substantially prejudiced the party who propounded the interrogatory, (2) the
16 responding party has failed to show substantial justification for the initial answer
17 to that interrogatory, and (3) the prejudice to the propounding party cannot be
18 cured either by a continuance to permit further discovery or by the use of the
19 initial answer under subdivision (n).

20 The court shall impose a monetary sanction under Section 2023 [Article 7]
21 against any party, person, or attorney who unsuccessfully makes or opposes a
22 motion to deem binding an initial answer to an interrogatory, unless it finds that
23 the one subject to the sanction acted with substantial justification or that other
24 circumstances make the imposition of the sanction unjust.

25 (n) At the trial or any other hearing in the action, so far as admissible under the
26 rules of evidence, the propounding party or any party other than the responding
27 party may use any answer or part of an answer to an interrogatory only against the
28 responding party. It is not ground for objection to the use of an answer to an
29 interrogatory that the responding party is available to testify, has testified, or will
30 testify at the trial or other hearing.

31 Article 14. Inspection and Production of Documents, Tangible
32 Things, Land, and Other Property

33  **Staff Note.** The staff has not yet divided the substance of Section 2031 into a series of short
34 sections. The provision is shown here in its present form, as is Section 2031.5, which relates to
35 the same subject and thus should be incorporated into the same portion of the code. Cross-
36 references to other discovery provisions are left intact, but brackets are used to indicate the
37 corresponding sections in this draft.

38 **§ 2031. Inspection and production of documents, tangible things, land, and other property**

39 2031. (a) Any party may obtain discovery within the scope delimited by Section
40 2017 [Articles 2 and 3], and subject to the restrictions set forth in Section 2019

1 [Article 5], by inspecting documents, tangible things, and land or other property
2 that are in the possession, custody, or control of any other party to the action.

3 (1) A party may demand that any other party produce and permit the party
4 making the demand, or someone acting on that party's behalf, to inspect and to
5 copy a document that is in the possession, custody, or control of the party on
6 whom the demand is made.

7 (2) A party may demand that any other party produce and permit the party
8 making the demand, or someone acting on that party's behalf, to inspect and to
9 photograph, test, or sample any tangible things that are in the possession, custody,
10 or control of the party on whom the demand is made.

11 (3) A party may demand that any other party allow the party making the
12 demand, or someone acting on that party's behalf, to enter on any land or other
13 property that is in the possession, custody, or control of the party on whom the
14 demand is made, and to inspect and to measure, survey, photograph, test, or
15 sample the land or other property, or any designated object or operation on it.

16 (b) A defendant may make a demand for inspection without leave of court at any
17 time. A plaintiff may make a demand for inspection without leave of court at any
18 time that is 10 days after the service of the summons on, or in unlawful detainer
19 actions within five days after service of the summons on or appearance by, the
20 party to whom the demand is directed, whichever occurs first. However, on motion
21 with or without notice, the court, for good cause shown, may grant leave to a
22 plaintiff to make an inspection demand at an earlier time.

23 (c) A party demanding an inspection shall number each set of demands
24 consecutively. In the first paragraph immediately below the title of the case, there
25 shall appear the identity of the demanding party, the set number, and the identity
26 of the responding party. Each demand in a set shall be separately set forth,
27 identified by number or letter, and shall do all of the following:

28 (1) Designate the documents, tangible things, or land or other property to be
29 inspected either by specifically describing each individual item or by reasonably
30 particularizing each category of item.

31 (2) Specify a reasonable time for the inspection that is at least 30 days after
32 service of the demand, or in unlawful detainer actions at least five days after
33 service of the demand, unless the court for good cause shown has granted leave to
34 specify an earlier date.

35 (3) Specify a reasonable place for making the inspection, copying, and
36 performing any related activity.

37 (4) Specify any related activity that is being demanded in addition to an
38 inspection and copying, as well as the manner in which that related activity will be
39 performed, and whether that activity will permanently alter or destroy the item
40 involved.

41 (d) The party demanding an inspection shall serve a copy of the inspection
42 demand on the party to whom it is directed and on all other parties who have
43 appeared in the action.

1 (e) In addition to the inspection demands permitted by this section, a party may
2 propound a supplemental demand to inspect any later acquired or discovered
3 documents, tangible things, or land or other property that are in the possession,
4 custody, or control of the party on whom the demand is made (1) twice prior to the
5 initial setting of a trial date, and (2) subject to the time limits on discovery
6 proceedings and motions provided in Section 2024 [Article 8], once after the
7 initial setting of a trial date. However, on motion, for good cause shown, the court
8 may grant leave to a party to propound an additional number of supplemental
9 demands for inspection.

10 (f) When an inspection of documents, tangible things or places has been
11 demanded, the party to whom the demand has been directed, and any other party
12 or affected person or organization, may promptly move for a protective order. This
13 motion shall be accompanied by a declaration stating facts showing a reasonable
14 and good faith attempt at an informal resolution of each issue presented by the
15 motion.

16 The court, for good cause shown, may make any order that justice requires to
17 protect any party or other natural person or organization from unwarranted
18 annoyance, embarrassment, or oppression, or undue burden and expense. This
19 protective order may include, but is not limited to, one or more of the following
20 directions:

21 (1) That all or some of the items or categories of items in the inspection demand
22 need not be produced or made available at all.

23 (2) That the time specified in subdivision (i) to respond to the set of inspection
24 demands, or to a particular item or category in the set, be extended.

25 (3) That the place of production be other than that specified in the inspection
26 demand.

27 (4) That the inspection be made only on specified terms and conditions.

28 (5) That a trade secret or other confidential research, development, or
29 commercial information not be disclosed, or be disclosed only to specified persons
30 or only in a specified way.

31 (6) That the items produced be sealed and thereafter opened only on order of the
32 court.

33 If the motion for a protective order is denied in whole or in part, the court may
34 order that the party to whom the demand was directed provide or permit the
35 discovery against which protection was sought on terms and conditions that are
36 just.

37 The court shall impose a monetary sanction under Section 2023 [Article 7]
38 against any party, person, or attorney who unsuccessfully makes or opposes a
39 motion for a protective order, unless it finds that the one subject to the sanction
40 acted with substantial justification or that other circumstances make the imposition
41 of the sanction unjust.

42 (g) The party to whom an inspection demand has been directed shall respond
43 separately to each item or category of item by a statement that the party will

1 comply with the particular demand for inspection and any related activities, a
2 representation that the party lacks the ability to comply with the demand for
3 inspection of a particular item or category of item, or an objection to the particular
4 demand.

5 In the first paragraph of the response immediately below the title of the case,
6 there shall appear the identity of the responding party, the set number, and the
7 identity of the demanding party. Each statement of compliance, each
8 representation, and each objection in the response shall bear the same number and
9 be in the same sequence as the corresponding item or category in the demand, but
10 the text of that item or category need not be repeated.

11 (1) A statement that the party to whom an inspection demand has been directed
12 will comply with the particular demand shall state that the production, inspection,
13 and related activity demanded will be allowed either in whole or in part, and that
14 all documents or things in the demanded category that are in the possession,
15 custody, or control of that party and to which no objection is being made will be
16 included in the production.

17 Any documents demanded shall either be produced as they are kept in the usual
18 course of business, or be organized and labeled to correspond with the categories
19 in the demand. If necessary, the responding party at the reasonable expense of the
20 demanding party shall, through detection devices, translate any data compilations
21 included in the demand into reasonably usable form.

22 (2) A representation of inability to comply with the particular demand for
23 inspection shall affirm that a diligent search and a reasonable inquiry has been
24 made in an effort to comply with that demand. This statement shall also specify
25 whether the inability to comply is because the particular item or category has
26 never existed, has been destroyed, has been lost, misplaced, or stolen, or has never
27 been, or is no longer, in the possession, custody, or control of the responding
28 party. The statement shall set forth the name and address of any natural person or
29 organization known or believed by that party to have possession, custody, or
30 control of that item or category of item.

31 (3) If only part of an item or category of item in an inspection demand is
32 objectionable, the response shall contain a statement of compliance, or a
33 representation of inability to comply with respect to the remainder of that item or
34 category. If the responding party objects to the demand for inspection of an item or
35 category of item, the response shall (A) identify with particularity any document,
36 tangible thing, or land falling within any category of item in the demand to which
37 an objection is being made, and (B) set forth clearly the extent of, and the specific
38 ground for, the objection. If an objection is based on a claim of privilege, the
39 particular privilege invoked shall be stated. If an objection is based on a claim that
40 the information sought is protected work product under Section 2018 [Article 4],
41 that claim shall be expressly asserted.

42 (h) The party to whom the demand for inspection is directed shall sign the
43 response under oath unless the response contains only objections. If that party is a

1 public or private corporation or a partnership or association or governmental
2 agency, one of its officers or agents shall sign the response under oath on behalf of
3 that party. If the officer or agent signing the response on behalf of that party is an
4 attorney acting in that capacity for a party, that party waives any lawyer-client
5 privilege and any protection for work product under Section 2018 [Article 4]
6 during any subsequent discovery from that attorney concerning the identity of the
7 sources of the information contained in the response. The attorney for the
8 responding party shall sign any responses that contain an objection.

9 (i) Within 30 days after service of an inspection demand, or in unlawful detainer
10 actions within five days of an inspection demand, the party to whom the demand is
11 directed shall serve the original of the response to it on the party making the
12 demand, and a copy of the response on all other parties who have appeared in the
13 action, unless on motion of the party making the demand the court has shortened
14 the time for response, or unless on motion of the party to whom the demand has
15 been directed, the court has extended the time for response. In unlawful detainer
16 actions, the party to whom the demand is directed shall have at least five days
17 from the date of service of the demand to respond unless on motion of the party
18 making the demand the court has shortened the time for the response.

19 (j) The party demanding an inspection and the responding party may agree to
20 extend the time for service of a response to a set of inspection demands, or to
21 particular items or categories of items in a set, to a date beyond that provided in
22 subdivision (i). This agreement may be informal, but it shall be confirmed in a
23 writing that specifies the extended date for service of a response. Unless this
24 agreement expressly states otherwise, it is effective to preserve to the responding
25 party the right to respond to any item or category of item in the demand to which
26 the agreement applies in any manner specified in subdivision (g).

27 (k) The inspection demand and the response to it shall not be filed with the court.
28 The party demanding an inspection shall retain both the original of the inspection
29 demand, with the original proof of service affixed to it, and the original of the
30 sworn response until six months after final disposition of the action. At that time,
31 both originals may be destroyed, unless the court, on motion of any party and for
32 good cause shown, orders that the originals be preserved for a longer period.

33 (l) If a party to whom an inspection demand has been directed fails to serve a
34 timely response to it, that party waives any objection to the demand, including one
35 based on privilege or on the protection for work product under Section 2018
36 [Article 4]. However, the court, on motion, may relieve that party from this waiver
37 on its determination that (1) the party has subsequently served a response that is in
38 substantial compliance with subdivision (g), and (2) the party's failure to serve a
39 timely response was the result of mistake, inadvertence, or excusable neglect.

40 The party making the demand may move for an order compelling response to the
41 inspection demand. The court shall impose a monetary sanction under Section
42 2023 [Article 7] against any party, person, or attorney who unsuccessfully makes
43 or opposes a motion to compel a response to an inspection demand, unless it finds

1 that the one subject to the sanction acted with substantial justification or that other
2 circumstances make the imposition of the sanction unjust. If a party then fails to
3 obey the order compelling a response, the court may make those orders that are
4 just, including the imposition of an issue sanction, an evidence sanction, or a
5 terminating sanction under Section 2023 [Article 7]. In lieu of or in addition to that
6 sanction, the court may impose a monetary sanction under Section 2023 [Article
7 7].

8 (m) If the party demanding an inspection, on receipt of a response to an
9 inspection demand, deems that (1) a statement of compliance with the demand is
10 incomplete, (2) a representation of inability to comply is inadequate, incomplete,
11 or evasive, or (3) an objection in the response is without merit or too general, that
12 party may move for an order compelling further response to the demand. This
13 motion (A) shall set forth specific facts showing good cause justifying the
14 discovery sought by the inspection demand, and (B) shall be accompanied by a
15 declaration stating facts showing a reasonable and good faith attempt at an
16 informal resolution of any issue presented by it.

17 Unless notice of this motion is given within 45 days of the service of the
18 response, or any supplemental response, or on or before any specific later date to
19 which the demanding party and the responding party have agreed in writing, the
20 demanding party waives any right to compel a further response to the inspection
21 demand.

22 The court shall impose a monetary sanction under Section 2023 [Article 7]
23 against any party, person, or attorney who unsuccessfully makes or opposes a
24 motion to compel further response to an inspection demand, unless it finds that the
25 one subject to the sanction acted with substantial justification or that other
26 circumstances make the imposition of the sanction unjust.

27 If a party fails to obey an order compelling further response, the court may make
28 those orders that are just, including the imposition of an issue sanction, an
29 evidence sanction, or a terminating sanction under Section 2023 [Article 7]. In lieu
30 of or in addition to that sanction, the court may impose a monetary sanction under
31 Section 2023 [Article 7].

32 (n) If a party filing a response to a demand for inspection under subdivision (g)
33 thereafter fails to permit the inspection in accordance with that party's statement of
34 compliance, the party demanding the inspection may move for an order
35 compelling compliance.

36 The court shall impose a monetary sanction under Section 2023 [Article 7]
37 against any party, person, or attorney who unsuccessfully makes or opposes a
38 motion to compel compliance with an inspection demand, unless it finds that the
39 one subject to the sanction acted with substantial justification or that other
40 circumstances make the imposition of the sanction unjust.


41 If a party then fails to obey an order compelling inspection, the court may make
42 those orders that are just, including the imposition of an issue sanction, an
43 evidence sanction, or a terminating sanction under Section 2023 [Article 7]. In lieu

1 of or in addition to that sanction, the court may impose a monetary sanction under
2 Section 2023 [Article 7].

3 **§ 2031.5. Disclosure of written evidence relating to land boundary or validity of state patent**
4 **or grant**

5 2031.5. In any action, regardless of who is the moving party, where (a) the
6 boundary of land patented or otherwise granted by the state is in dispute, or (b) the
7 validity of any state patent or grant dated prior to 1950 is in dispute, all parties
8 shall have the duty to disclose to all opposing parties all nonprivileged relevant
9 written evidence then known and available, including evidence against interest,
10 relating to the above issues. This evidence shall be disclosed within 120 days after
11 the filing with the court of proof of service upon all named defendants. Thereafter,
12 the parties shall have the continuing duty to make all subsequently discovered
13 relevant and nonprivileged written evidence available to the opposing parties.

14 **Article 15. Physical or Mental Examination**

15  **Staff Note.** The staff has not yet divided the substance of Section 2032 into a series of short
16 sections. The provision is shown here in its present form. Cross-references to other discovery
17 provisions are left intact, but brackets are used to indicate the corresponding sections in this draft.

18 **§ 2032. Physical or mental examination**

19 2032. (a) Any party may obtain discovery, subject to the restrictions set forth in
20 Section 2019 [Article 5], by means of a physical or mental examination of (1) a
21 party to the action, (2) an agent of any party, or (3) a natural person in the custody
22 or under the legal control of a party, in any action in which the mental or physical
23 condition (including the blood group) of that party or other person is in
24 controversy in the action.

25 (b) A physical examination conducted under this section shall be performed only
26 by a licensed physician or other appropriate licensed health care practitioner. A
27 mental examination conducted under this section shall be performed only by a
28 licensed physician, or by a licensed clinical psychologist who holds a doctoral
29 degree in psychology and has had at least five years of postgraduate experience in
30 the diagnosis of emotional and mental disorders. Nothing in this section affects
31 tests under the Uniform Act on Blood Tests to Determine Paternity (Chapter 2
32 (commencing with Section 7550) of Part 2 of Division 12 of the Family Code).

33 (c)(1) As used in this subdivision, plaintiff includes a cross-complainant, and
34 defendant includes a cross-defendant.

35 (2) In any case in which a plaintiff is seeking recovery for personal injuries, any
36 defendant may demand one physical examination of the plaintiff, provided the
37 examination does not include any diagnostic test or procedure that is painful,
38 protracted, or intrusive, and is conducted at a location within 75 miles of the
39 residence of the examinee. A defendant may make this demand without leave of
40 court after that defendant has been served or has appeared in the action, whichever

1 occurs first. This demand shall specify the time, place, manner, conditions, scope,
2 and nature of the examination, as well as the identity and the specialty, if any, of
3 the physician who will perform the examination.

4 (3) A physical examination demanded under this subdivision shall be scheduled
5 for a date that is at least 30 days after service of the demand for it unless on motion
6 of the party demanding the examination the court has shortened this time.

7 (4) The defendant shall serve a copy of the demand for this physical examination
8 on the plaintiff and on all other parties who have appeared in the action.

9 (5) The plaintiff to whom this demand for a physical examination has been
10 directed shall respond to the demand by a written statement that the examinee will
11 comply with the demand as stated, will comply with the demand as specifically
12 modified by the plaintiff, or will refuse, for reasons specified in the response, to
13 submit to the demanded physical examination. Within 20 days after service of the
14 demand the plaintiff to whom the demand is directed shall serve the original of the
15 response to it on the defendant making the demand, and a copy of the response on
16 all other parties who have appeared in the action, unless on motion of the
17 defendant making the demand the court has shortened the time for response, or
18 unless on motion of the plaintiff to whom the demand has been directed, the court
19 has extended the time for response.

20 (6) If a plaintiff to whom this demand for a physical examination has been
21 directed fails to serve a timely response to it, that plaintiff waives any objection to
22 the demand. However, the court, on motion, may relieve that plaintiff from this
23 waiver on its determination that (A) the plaintiff has subsequently served a
24 response that is in substantial compliance with paragraph (5), and (B) the
25 plaintiff's failure to serve a timely response was the result of mistake,
26 inadvertence, or excusable neglect.

27 The defendant may move for an order compelling response and compliance with
28 a demand for a physical examination. The court shall impose a monetary sanction
29 under Section 2023 [Article 7] against any party, person, or attorney who
30 unsuccessfully makes or opposes a motion to compel response and compliance
31 with a demand for a physical examination, unless it finds that the one subject to
32 the sanction acted with substantial justification or that other circumstances make
33 the imposition of the sanction unjust.

34 If a plaintiff then fails to obey the order compelling response and compliance,
35 the court may make those orders that are just, including the imposition of an issue
36 sanction, an evidence sanction, or a terminating sanction under Section 2023
37 [Article 7]. In lieu of or in addition to that sanction the court may impose a
38 monetary sanction under Section 2023 [Article 7].

39 (7) If a defendant who has demanded a physical examination under this
40 subdivision, on receipt of the plaintiff's response to that demand, deems that any
41 modification of the demand, or any refusal to submit to the physical examination
42 is unwarranted, that defendant may move for an order compelling compliance with
43 the demand. This motion shall be accompanied by a declaration stating facts

1 showing a reasonable and good faith attempt at an informal resolution of each
2 issue presented by the motion.

3 The court shall impose a monetary sanction under Section 2023 [Article 7]
4 against any party, person, or attorney who unsuccessfully makes or opposes a
5 motion to compel compliance with a demand for a physical examination, unless it
6 finds that the one subject to the sanction acted with substantial justification or that
7 other circumstances make the imposition of the sanction unjust.

8 (8) The demand for a physical examination and the response to it shall not be
9 filed with the court. The defendant shall retain both the original of the demand,
10 with the original proof of service affixed to it, and the original response until six
11 months after final disposition of the action. At that time, the original may be
12 destroyed, unless the court, on motion of any party and for good cause shown,
13 orders that the originals be preserved for a longer period.

14 (d) If any party desires to obtain discovery by a physical examination other than
15 that described in subdivision (c), or by a mental examination, the party shall obtain
16 leave of court. The motion for the examination shall specify the time, place,
17 manner, conditions, scope, and nature of the examination, as well as the identity
18 and the specialty, if any, of the person or persons who will perform the
19 examination. The motion shall be accompanied by a declaration stating facts
20 showing a reasonable and good faith attempt to arrange for the examination by an
21 agreement under subdivision (e). Notice of the motion shall be served on the
22 person to be examined and on all parties who have appeared in the action.

23 The court shall grant a motion for a physical or mental examination only for
24 good cause shown. If a party stipulates that (1) no claim is being made for mental
25 and emotional distress over and above that usually associated with the physical
26 injuries claimed, and (2) no expert testimony regarding this usual mental and
27 emotional distress will be presented at trial in support of the claim for damages, a
28 mental examination of a person for whose personal injuries a recovery is being
29 sought shall not be ordered except on a showing of exceptional circumstances. The
30 order granting a physical or mental examination shall specify the person or persons
31 who may perform the examination, and the time, place, manner, diagnostic tests
32 and procedures, conditions, scope, and nature of the examination. If the place of
33 the examination is more than 75 miles from the residence of the person to be
34 examined, the order to submit to it shall be (1) made only on the court's
35 determination that there is good cause for the travel involved, and (2) conditioned
36 on the advancement by the moving party of the reasonable expenses and costs to
37 the examinee for travel to the place of examination.

38 (e) In lieu of the procedures and restrictions specified in subdivisions (c) and (d),
39 any physical or mental examination may be arranged by, and carried out under, a
40 written agreement of the parties.

41 (f) If a party required by subdivision (c), (d), or (e) to submit to a physical or
42 mental examination fails to do so, the court, on motion of the party entitled to the
43 examination, may make those orders that are just, including the imposition of an

1 issue sanction, an evidence sanction, or a terminating sanction under Section 2023
2 [Article 7]. In lieu of or in addition to that sanction, the court may, on motion of
3 the party, impose a monetary sanction under Section 2023 [Article 7].

4 If a party required by subdivision (c), (d), or (e) to produce another for a
5 physical or mental examination fails to do so, the court, on motion of the party
6 entitled to the examination, may make those orders that are just, including the
7 imposition of an issue sanction, an evidence sanction, or a terminating sanction
8 under Section 2023 [Article 7], unless the party failing to comply demonstrates an
9 inability to produce that person for examination. In lieu of or in addition to that
10 sanction, the court may impose a monetary sanction under Section 2023 [Article
11 7].

12 (g)(1) The attorney for the examinee or for a party producing the examinee, or
13 that attorney's representative, shall be permitted to attend and observe any
14 physical examination conducted for discovery purposes, and to record
15 stenographically or by audiotape any words spoken to or by the examinee during
16 any phase of the examination. This observer may monitor the examination, but
17 shall not participate in or disrupt it. If an attorney's representative is to serve as the
18 observer, the representative shall be authorized to so act by a writing subscribed by
19 the attorney which identifies the representative.

20 If in the judgment of the observer the examiner becomes abusive to the
21 examinee or undertakes to engage in unauthorized diagnostic tests and procedures,
22 the observer may suspend it to enable the party being examined or producing the
23 examinee to make a motion for a protective order. If the observer begins to
24 participate in or disrupt the examination, the person conducting the physical
25 examination may suspend the examination to enable the party at whose instance it
26 is being conducted to move for a protective order.

27 The court shall impose a monetary sanction under Section 2023 [Article 7]
28 against any party, person, or attorney who unsuccessfully makes or opposes a
29 motion for a protective order, unless it finds that the one subject to the sanction
30 acted with substantial justification or that other circumstances make the imposition
31 of the sanction unjust.

32 If the examinee submits or authorizes access to X-rays of any area of his or her
33 body for inspection by the examining physician, no additional X-rays of that area
34 may be taken by the examining physician except with consent of the examinee or
35 on order of the court for good cause shown.

36 (2) The examiner and examinee shall have the right to record a mental
37 examination on audio tape [sic]. However, nothing in this article [chapter] shall be
38 construed to alter, amend, or affect existing case law with respect to the presence
39 of the attorney for the examinee or other persons during the examination by
40 agreement or court order.

41 (h) If a party submits to, or produces another for, a physical or mental
42 examination in compliance with a demand under subdivision (c), an order of court
43 under subdivision (d), or an agreement under subdivision (e), that party has the

1 option of making a written demand that the party at whose instance the
2 examination was made deliver to the demanding party (1) a copy of a detailed
3 written report setting out the history, examinations, findings, including the results
4 of all tests made, diagnoses, prognoses, and conclusions of the examiner, and (2) a
5 copy of reports of all earlier examinations of the same condition of the examinee
6 made by that or any other examiner. If this option is exercised, a copy of these
7 reports shall be delivered within 30 days after service of the demand, or within 15
8 days of trial, whichever is earlier. The protection for work product under Section
9 2018 [Article 4] is waived, both for the examiner's writings and reports and to the
10 taking of the examiner's testimony.

11 If the party at whose instance the examination was made fails to make a timely
12 delivery of the reports demanded, the demanding party may move for an order
13 compelling their delivery. This motion shall be accompanied by a declaration
14 stating facts showing a reasonable and good faith attempt at an informal resolution
15 of any issue presented by the motion.

16 The court shall impose a monetary sanction under Section 2023 [Article 7]
17 against any party, person, or attorney who unsuccessfully makes or opposes a
18 motion to compel delivery of medical reports, unless it finds that the one subject to
19 the sanction acted with substantial justification or that other circumstances make
20 the imposition of the sanction unjust.

21 If a party then fails to obey an order compelling delivery of demanded medical
22 reports, the court may make those orders that are just, including the imposition of
23 an issue sanction, an evidence sanction, or a terminating sanction under Section
24 2023 [Article 7]. In lieu of or in addition to those sanctions, the court may impose
25 a monetary sanction under Section 2023 [Article 7]. The court shall exclude at trial
26 the testimony of any examiner whose report has not been provided by a party.

27 (i) By demanding and obtaining a report of a physical or mental examination
28 under subdivision (h), or by taking the deposition of the examiner, other than
29 under subdivision (i) of Section 2034, the party who submitted to, or produced
30 another for, a physical or mental examination waives in the pending action, and in
31 any other action involving the same controversy, any privilege, as well as any
32 protection for work product under Section 2018 [Article 4], that the party or other
33 examinee may have regarding reports and writings as well as the testimony of
34 every other physician, psychologist, or licensed health care practitioner who has
35 examined or may thereafter examine the party or other examinee in respect of the
36 same physical or mental condition.

37 (j) A party receiving a demand for a report under subdivision (h) is entitled at the
38 time of compliance to receive in exchange a copy of any existing written report of
39 any examination of the same condition by any other physician, psychologist, or
40 licensed health care practitioner. In addition, that party is entitled to receive
41 promptly any later report of any previous or subsequent examination of the same
42 condition, by any physician, psychologist, or licensed health care practitioner.


1 If a party who has demanded and received delivery of medical reports under
2 subdivision (h) fails to deliver existing or later reports of previous or subsequent
3 examinations, a party who has complied with subdivision (h) may move for an
4 order compelling delivery of medical reports. This motion shall be accompanied
5 by a declaration stating facts showing a reasonable and good faith attempt at an
6 informal resolution of each issue presented by the motion.

7 The court shall impose a monetary sanction under Section 2023 [Article 7]
8 against any party, person, or attorney who unsuccessfully makes or opposes a
9 motion to compel delivery of medical reports, unless it finds that the one subject to
10 the sanction acted with substantial justification or that other circumstances make
11 the imposition of the sanction unjust.

12 If a party then fails to obey an order compelling delivery of medical reports, the
13 court may make those orders that are just, including the imposition of an issue
14 sanction, an evidence sanction, or a terminating sanction under Section 2023
15 [Article 7]. In lieu of or in addition to the sanction, the court may impose a
16 monetary sanction under Section 2023 [Article 7]. The court shall exclude at trial
17 the testimony of any health care practitioner whose report has not been provided
18 by a party ordered to do so by the court.

19 (k) Nothing in this section shall require the disclosure of the identity of an expert
20 consulted by an attorney in order to make the certification required in an action for
21 professional negligence under Sections 411.30 and 411.35.

22 Article 16. Requests for Admission

23  **Staff Note.** The staff has not yet divided the substance of Section 2033 into a series of short
24 sections. The provision is shown here in its present form. Cross-references to other discovery
25 provisions are left intact, but brackets are used to indicate the corresponding sections in this draft.

26 § 2033. Requests for admission

27 2033. (a) Any party may obtain discovery within the scope delimited by Section
28 2017, and subject to the restrictions set forth in Section 2019 [Article 5], by a
29 written request that any other party to the action admit the genuineness of
30 specified documents, or the truth of specified matters of fact, opinion relating to
31 fact, or application of law to fact. A request for admission may relate to a matter
32 that is in controversy between the parties.

33 (b) A defendant may make requests for admission by a party without leave of
34 court at any time. A plaintiff may make requests for admission by a party without
35 leave of court at any time that is 10 days after the service of the summons on, or,
36 in unlawful detainer actions, five days after the service of the summons on, or
37 appearance by, that party, whichever occurs first. However, on motion with or
38 without notice, the court, for good cause shown, may grant leave to a plaintiff to
39 make requests for admission at an earlier time.

40 (c) (1) No party shall request, as a matter of right, that any other party admit
41 more than 35 matters that do not relate to the genuineness of documents. If the

1 initial set of admission requests does not exhaust this limit, the balance may be
2 requested in subsequent sets. Unless a declaration as described in paragraph (3)
3 has been made, a party need only respond to the first 35 admission requests served
4 that do not relate to the genuineness of documents, if that party states an objection
5 to the balance under paragraph (2) of subdivision (f) on the ground that the limit
6 has been exceeded.

7 The number of requests for admission of the genuineness of documents is not
8 limited except as justice requires to protect the responding party from unwarranted
9 annoyance, embarrassment, oppression, or undue burden and expense.

10 (2) Subject to the right of the responding party to seek a protective order under
11 subdivision (e), any party who attaches a supporting declaration as described in
12 paragraph (3) may request a greater number of admissions by another party if the
13 greater number is warranted by the complexity or the quantity of the existing and
14 potential issues in the particular case.

15 If the responding party seeks a protective order on the ground that the number of
16 requests for admission is unwarranted, the propounding party shall have the
17 burden of justifying the number of requests for admission.

18 (3) Any party who is requesting or who has already requested more than 35
19 admissions not relating to the genuineness of documents by any other party shall
20 attach to each set of requests for admissions a declaration containing substantially
21 the following words:

22
23 **DECLARATION FOR ADDITIONAL DISCOVERY**

24
25 I, _____, declare:

26 1. I am (a party to this action or proceeding appearing in propria persona)
27 (presently the attorney for _____, a party to this action or proceeding).

28 2. I am propounding to _____ the attached set of requests for admission.

29 3. This set of requests for admission will cause the total number of requests
30 propounded to the party to whom they are directed to exceed the number of
31 requests permitted by paragraph (1) of subdivision (c) of Section 2033 of the Code
32 of Civil Procedure.

33 4. I have previously propounded a total of _____ requests for admission to
34 this party.

35 5. This set of requests for admission contains a total of _____ requests.

36 6. I am familiar with the issues and the previous discovery conducted by all of
37 the parties in this case.

38 7. I have personally examined each of the requests in this set of requests for
39 admission.

40 8. This number of requests for admission is warranted under paragraph (2) of
41 subdivision (c) of Section 2033 of the Code of Civil Procedure because
42 _____. (Here state the reasons why the complexity or the quantity of issues
43 in the instant lawsuit warrant this number of requests for admission.)

1 9. None of the requests in this set of requests is being propounded for any
2 improper purpose, such as to harass the party, or the attorney for the party, to
3 whom it is directed, or to cause unnecessary delay or needless increase in the cost
4 of litigation.

5 I declare under penalty of perjury under the laws of California that the foregoing
6 is true and correct, and that this declaration was executed on _____.

7
8 _____
9 (Signature)
10 Attorney for _____

11
12 (4) A party requesting admissions shall number each set of requests
13 consecutively. In the first paragraph immediately below the title of the case, there
14 shall appear the identity of the party requesting the admissions, the set number,
15 and the identity of the requesting party, the set number, and the identity of the
16 responding party. [sic] Each request for admission in a set shall be separately set
17 forth and identified by letter or number.

18 (5) Each request for admission shall be full and complete in and of itself. No
19 preface or instruction shall be included with a set of admission requests unless it
20 has been approved under Section 2033.5 [Article 17]. Any term specially defined
21 in a request for admission shall be typed with all letters capitalized whenever the
22 term appears. No request for admission shall contain subparts, or a compound,
23 conjunctive, or disjunctive request unless it has been approved under Section
24 2033.5 [Article 17].

25 (6) A party requesting an admission of the genuineness of any documents shall
26 attach copies of those documents to the requests, and shall make the original of
27 those documents available for inspection on demand by the party to whom the
28 requests for admission are directed.

29 (7) No party shall combine in a single document requests for admission with any
30 other method of discovery.

31 (d) The party requesting admissions shall serve a copy of them on the party to
32 whom they are directed and on all other parties who have appeared in the action.

33 (e) When requests for admission have been made, the responding party may
34 promptly move for a protective order. This motion shall be accompanied by a
35 declaration stating facts showing a reasonable and good faith attempt at an
36 informal resolution of each issue presented by the motion.

37 The court, for good cause shown, may make any order that justice requires to
38 protect any party from unwarranted annoyance, embarrassment, oppression, or
39 undue burden and expense. This protective order may include, but is not limited
40 to, one or more of the following directions:

41 (1) That the set of admission requests, or particular requests in the set, need not
42 be answered at all.

1 (2) That, contrary to the representations made in a declaration submitted under
2 paragraph (3) of subdivision (c), the number of admission requests is unwarranted.

3 (3) That the time specified in subdivision (h) to respond to the set of admission
4 requests, or to particular requests in the set, be extended.

5 (4) That a trade secret or other confidential research, development, or
6 commercial information not be admitted or be admitted only in a certain way.

7 (5) That some or all of the answers to requests for admission be sealed and
8 thereafter opened only on order of the court.

9 If the motion for a protective order is denied in whole or in part, the court may
10 order that the responding party provide or permit the discovery against which
11 protection was sought on terms and conditions that are just.

12 The court shall impose a monetary sanction under Section 2023 [Article 7]
13 against any party, person, or attorney who unsuccessfully makes or opposes a
14 motion for a protective order, unless it finds that the one subject to the sanction
15 acted with substantial justification or that other circumstances make the imposition
16 of the sanction unjust.

17 (f) The party to whom requests for admission have been directed shall respond in
18 writing under oath separately to each request. Each response shall answer the
19 substance of the requested admission, or set forth an objection to the particular
20 request. In the first paragraph of the response immediately below the title of the
21 case, there shall appear the identity of the responding party, the set number, and
22 the identity of the requesting party. Each answer or objection in the response shall
23 bear the same identifying number or letter and be in the same sequence as the
24 corresponding request, but the text of the particular request need not be repeated.

25 (1) Each answer in the response shall be as complete and straightforward as the
26 information reasonably available to the responding party permits. Each answer
27 shall (A) admit so much of the matter involved in the request as is true, either as
28 expressed in the request itself or as reasonably and clearly qualified by the
29 responding party, (B) deny so much of the matter involved in the request as is
30 untrue, and (C) specify so much of the matter involved in the request as to the
31 truth of which the responding party lacks sufficient information or knowledge. If a
32 responding party gives lack of information or knowledge as a reason for a failure
33 to admit all or part of a request for admission, that party shall state in the answer
34 that a reasonable inquiry concerning the matter in the particular request has been
35 made, and that the information known or readily obtainable is insufficient to
36 enable that party to admit the matter.

37 (2) If only a part of a request for admission is objectionable, the remainder of the
38 request shall be answered. If an objection is made to a request or to a part of a
39 request, the specific ground for the objection shall be set forth clearly in the
40 response. If an objection is based on a claim of privilege, the particular privilege
41 invoked shall be clearly stated. If an objection is based on a claim that the matter
42 as to which an admission is requested is protected work product under Section
43 2018 [Article 4], that claim shall be expressly asserted.

1 (g) The party to whom the requests for admission are directed shall sign the
2 response under oath, unless the response contains only objections. If that party is a
3 public or private corporation, or a partnership or association or governmental
4 agency, one of its officers or agents shall sign the response under oath on behalf of
5 that party. If the officer or agent signing the response on behalf of that party is an
6 attorney acting in that capacity for the party, that party waives any lawyer-client
7 privilege and any protection for work product under Section 2018 [Article 4]
8 during any subsequent discovery from that attorney concerning the identity of the
9 sources of the information contained in the response. The attorney for the
10 responding party shall sign any response that contains an objection.

11 (h) Within 30 days after service of requests for admission, or in unlawful
12 detainer actions within five days after service of requests for admission, the party
13 to whom the requests are directed shall serve the original of the response to them
14 on the requesting party, and a copy of the response on all other parties who have
15 appeared, unless on motion of the requesting party the court has shortened the time
16 for response, or unless on motion of the responding party the court has extended
17 the time for response. In unlawful detainer actions, the party to whom the request
18 is directed shall have at least five days from the date of service to respond unless
19 on motion of the requesting party the court has shortened the time for response.

20 (i) The party requesting admissions and the responding party may agree to
21 extend the time for service of a response to a set of admission requests, or to
22 particular requests in a set, to a date beyond that provided in subdivision (h). This
23 agreement may be informal, but it shall be confirmed in a writing that specifies the
24 extended date for service of a response. Unless this agreement expressly states
25 otherwise, it is effective to preserve to the responding party the right to respond to
26 any request for admission to which the agreement applies in any manner specified
27 in subdivision (f). Notice of this agreement shall be given by the responding party
28 to all other parties who were served with a copy of the request.

29 (j) The requests for admission and the response to them shall not be filed with
30 the court. The party requesting admissions shall retain both the original of the
31 requests for admission, with the original proof of service affixed to them, and the
32 original of the sworn response until six months after final disposition of the action.
33 At that time, both originals may be destroyed, unless the court, on motion of any
34 party and for good cause shown, orders that the originals be preserved for a longer
35 period.

36 (k) If a party to whom requests for admission have been directed fails to serve a
37 timely response, that party thereby waives any objection to the requests, including
38 one based on privilege or on the protection for work product under Section 2018
39 [Article 4]. However, the court, on motion, may relieve that party from this waiver
40 on its determination that (1) the party has subsequently served a response that is in
41 substantial compliance with subdivision (f), and (2) the party's failure to serve a
42 timely response was the result of mistake, inadvertence, or excusable neglect.

1 The requesting party may move for an order that the genuineness of any
2 documents and the truth of any matters specified in the requests be deemed
3 admitted, as well as for a monetary sanction under Section 2023 [Article 7]. The
4 court shall make this order, unless it finds that the party to whom the requests for
5 admission have been directed has served, before the hearing on the motion, a
6 proposed response to the requests for admission that is in substantial compliance
7 with paragraph (1) of subdivision (f). It is mandatory that the court impose a
8 monetary sanction under Section 2023 [Article 7] on the party or attorney, or both,
9 whose failure to serve a timely response to requests for admission necessitated this
10 motion.

11 (l) If the party requesting admissions, on receipt of a response to the requests,
12 deems that (1) an answer to a particular request is evasive or incomplete, or (2) an
13 objection to a particular request is without merit or too general, that party may
14 move for an order compelling a further response. The motion shall be
15 accompanied by a declaration stating facts showing a reasonable and good faith
16 attempt at an informal resolution of each issue presented by the motion.

17 Unless notice of this motion is given within 45 days of the service of the
18 response, or any supplemental response, or any specific later date to which the
19 requesting party and the responding party have agreed in writing, the requesting
20 party waives any right to compel further response to the requests for admission.

21 The court shall impose a monetary sanction under Section 2023 [Article 7]
22 against any party, person, or attorney who unsuccessfully makes or opposes a
23 motion to compel further response, unless it finds that the one subject to the
24 sanction acted with substantial justification or that other circumstances make the
25 imposition of the sanction unjust.

26 If a party then fails to obey an order compelling further response to requests for
27 admission, the court may order that the matters involved in the requests be deemed
28 admitted. In lieu of or in addition to this order, the court may impose a monetary
29 sanction under Section 2023 [Article 7].

30 (m) A party may withdraw or amend an admission made in response to a request
31 for admission only on leave of court granted after notice to all parties. The court
32 may permit withdrawal or amendment of an admission only if it determines that
33 the admission was the result of mistake, inadvertence, or excusable neglect, and
34 that the party who obtained the admission will not be substantially prejudiced in
35 maintaining that party's action or defense on the merits. The court may impose
36 conditions on the granting of the motion that are just, including, but not limited to,
37 an order that (1) the party who obtained the admission be permitted to pursue
38 additional discovery related to the matter involved in the withdrawn or amended
39 admission, and (2) the costs of any additional discovery be borne in whole or in
40 part by the party withdrawing or amending the admission.

41 (n) Any matter admitted in response to a request for admission is conclusively
42 established against the party making the admission in the pending action, unless
43 the court has permitted withdrawal or amendment of that admission under

1 subdivision (m). However, any admission made by a party under this section is (1)
2 binding only on that party, and (2) made for the purpose of the pending action
3 only. It is not an admission by that party for any other purpose, and it shall not be
4 used in any manner against that party in any other proceeding.

5 (o) If a party fails to admit the genuineness of any document or the truth of any
6 matter when requested to do so under this section, and if the party requesting that
7 admission thereafter proves the genuineness of that document or the truth of that
8 matter, the party requesting the admission may move the court for an order
9 requiring the party to whom the request was directed to pay the reasonable
10 expenses incurred in making that proof, including reasonable attorney's fees. The
11 court shall make this order unless it finds that (1) an objection to the request was
12 sustained or a response to it was waived under subdivision (l), (2) the admission
13 sought was of no substantial importance, (3) the party failing to make the
14 admission had reasonable ground to believe that that party would prevail on the
15 matter, or (4) there was other good reason for the failure to admit.

16 Article 17. Form Interrogatories and Requests for Admission

17 § 2033.510. Judicial Council to develop form interrogatories and requests for admission

18 2033.510. The Judicial Council shall develop and approve official form
19 interrogatories and requests for admission of the genuineness of any relevant
20 documents or of the truth of any relevant matters of fact for use in any civil action
21 in a state court based on personal injury, property damage, wrongful death,
22 unlawful detainer, breach of contract, family law, or fraud and for any other civil
23 actions the Judicial Council deems appropriate.

24 **Comment.** Section 2033.510 continues the first sentence of former Section 2033.5(a) without
25 change.

26 § 2033.520. Form interrogatories for use by victim who has not received complete payment 27 of restitution order

28 2033.520. (a) The Judicial Council shall develop and approve official form
29 interrogatories for use by a victim who has not received complete payment of a
30 restitution order made pursuant to Section 1202.4 of the Penal Code.

31 (b) Notwithstanding whether a victim initiates or maintains an action to satisfy
32 the unpaid restitution order, a victim may propound the form interrogatories
33 approved pursuant to this section once each calendar year. The defendant subject
34 to the restitution order shall, in responding to the interrogatories propounded,
35 provide current information regarding the nature, extent, and location of any
36 assets, income, and liabilities in which the defendant claims a present or future
37 interest.

38 **Comment.** Subdivision (a) of Section 2033.520 continues former Section 2033.5(d) without
39 change.

40 Subdivision (b) continues former Section 2033.5(e) without change.

1 **§ 2033.530. Procedures for development of form interrogatories and requests for admission**

2 (a) In developing the form interrogatories and requests for admission required by
3 Sections 2033.510 and 2033.520, the Judicial Council shall consult with a
4 representative advisory committee which shall include, but not be limited to,
5 representatives of all of the following:

- 6 (1) The plaintiff’s bar.
- 7 (2) The defense bar.
- 8 (3) The public interest bar.
- 9 (4) Court administrators.
- 10 (5) The public.

11 (b) The form interrogatories and requests for admission shall be drafted in
12 nontechnical language.

13 **Comment.** Subdivision (a) of Section 2033.530 continues the first sentence of former Section
14 2033.5(b) without substantive change.

15 Subdivision (b) continues the first clause of the second sentence of former Section 2033.5(b)
16 without substantive change.

17 **§ 2044.540. Procedures for use of form interrogatories and requests for admission**

18 (a) Use of the form interrogatories and requests for admission approved by the
19 Judicial Council shall be optional.

20 (b) The form interrogatories and requests for admission shall be made available
21 through the office of the clerk of the appropriate trial court.

22 (c) The Judicial Council shall promulgate any necessary rules to govern the use
23 of the form interrogatories and requests for admission.

24 **Comment.** Subdivision (a) of Section 2033.540 continues the second sentence of former
25 Section 2033.5(a) without substantive change.

26 Subdivision (b) continues the second clause of the second sentence of former Section 2033.5(b)
27 without substantive change.

28 Subdivision (c) continues former Section 2033.5(c) without substantive change.

29 ☞ **Staff Note.** Section 2033.5(f) states: “This section shall become operative on January 1,
30 2000.” That language appears to be obsolete, so it would not be continued in this draft.

31 **Article 18. Simultaneous Exchange of Expert Witness Information**

32 ☞ **Staff Note.** The staff has not yet divided the substance of Section 2034 into a series of short
33 sections. The provision is shown here in its present form. Cross-references to other discovery
34 provisions are left intact, but brackets are used to indicate the corresponding sections in this draft.

35 **§ 2034. Simultaneous exchange of information concerning expert trial witnesses**

36 2034. (a) After the setting of the initial trial date for the action, any party may
37 obtain discovery by demanding that all parties simultaneously exchange
38 information concerning each other’s expert trial witnesses to the following extent:

- 39 (1) Any party may demand a mutual and simultaneous exchange by all parties of
40 a list containing the name and address of any natural person, including one who is

1 a party, whose oral or deposition testimony in the form of an expert opinion any
2 party expects to offer in evidence at the trial.

3 (2) If any expert designated by a party under paragraph (1) is a party or an
4 employee of a party, or has been retained by a party for the purpose of forming
5 and expressing an opinion in anticipation of the litigation or in preparation for the
6 trial of the action, the designation of that witness shall include or be accompanied
7 by an expert witness declaration under paragraph (2) of subdivision (f).

8 (3) Any party may also include a demand for the mutual and simultaneous
9 production for inspection and copying of all discoverable reports and writings, if
10 any, made by any expert described in paragraph (2) in the course of preparing that
11 expert's opinion.

12 This section does not apply to exchanges of lists of experts and valuation data in
13 eminent domain proceedings under Chapter 7 (commencing with Section
14 1258.010) of Title 7 of Part 3.

15 (b) Any party may make a demand for an exchange of information concerning
16 expert trial witnesses without leave of court. A party shall make this demand no
17 later than the 10th day after the initial trial date has been set, or 70 days before that
18 trial date, whichever is closer to the trial date.

19 (c) A demand for an exchange of information concerning expert trial witnesses
20 shall be in writing and shall identify, below the title of the case, the party making
21 the demand. The demand shall state that it is being made under this section.

22 The demand shall specify the date for the exchange of lists of expert trial
23 witnesses, expert witness declarations, and any demanded production of writings.
24 The specified date of exchange shall be 50 days before the initial trial date, or 20
25 days after service of the demand, whichever is closer to the trial date, unless the
26 court, on motion and a showing of good cause, orders an earlier or later date of
27 exchange.

28 (d) The party demanding an exchange of information concerning expert trial
29 witnesses shall serve the demand on all parties who have appeared in the action.

30 (e) A party who has been served with a demand to exchange information
31 concerning expert trial witnesses may promptly move for a protective order. This
32 motion shall be accompanied by a declaration stating facts showing a reasonable
33 and good faith attempt at an informal resolution of each issue presented by the
34 motion.

35 The court, for good cause shown, may make any order that justice requires to
36 protect any party from unwarranted annoyance, embarrassment, oppression, or
37 undue burden and expense. The protective order may include, but is not limited to,
38 one or more of the following directions:

39 (1) That the demand be quashed because it was not timely served.

40 (2) That the date of exchange be earlier or later than that specified in the
41 demand.

42 (3) That the exchange be made only on specified terms and conditions.

1 (4) That the production and exchange of any reports and writings of experts be
2 made at a different place or at a different time than specified in the demand.

3 (5) That some or all of the parties be divided into sides on the basis of their
4 identity of interest in the issues in the action, and that the designation of any
5 experts as described in paragraph (2) of subdivision (a) be made by any side so
6 created.

7 (6) That a party or a side reduce the list of employed or retained experts
8 designated by that party or side under paragraph (2) of subdivision (a).

9 If the motion for a protective order is denied in whole or in part, the court may
10 order that the parties against whom the motion is brought, provide or permit the
11 discovery against which the protection was sought on those terms and conditions
12 that are just.

13 The court shall impose a monetary sanction under Section 2023 [Article 7]
14 against any party, person, or attorney who unsuccessfully makes or opposes a
15 motion for a protective order, unless it finds that the one subject to the sanction
16 acted with substantial justification or that other circumstances make the imposition
17 of the sanction unjust.

18 (f) All parties who have appeared in the action shall exchange information
19 concerning expert witnesses in writing on or before the date of exchange specified
20 in the demand. The exchange of information may occur at a meeting of the
21 attorneys for the parties involved or by a mailing on or before the date of
22 exchange.

23 (1) The exchange of expert witness information shall include either of the
24 following:

25 (A) A list setting forth the name and address of any person whose expert opinion
26 that party expects to offer in evidence at the trial.

27 (B) A statement that the party does not presently intend to offer the testimony of
28 any expert witness.

29 (2) If any witness on the list is an expert as described in paragraph (2) of
30 subdivision (a), the exchange shall also include or be accompanied by an expert
31 witness declaration signed only by the attorney for the party designating the
32 expert, or by that party if that party has no attorney. This declaration shall be under
33 penalty of perjury and shall contain:

34 (A) A brief narrative statement of the qualifications of each expert.

35 (B) A brief narrative statement of the general substance of the testimony that the
36 expert is expected to give.

37 (C) A representation that the expert has agreed to testify at the trial.

38 (D) A representation that the expert will be sufficiently familiar with the pending
39 action to submit to a meaningful oral deposition concerning the specific testimony,
40 including any opinion and its basis, that the expert is expected to give at trial.

41 (E) A statement of the expert's hourly and daily fee for providing deposition
42 testimony and for consulting with the retaining attorney.

1 (g) If a demand for an exchange of information concerning expert trial witnesses
2 includes a demand for production of reports and writings as described in paragraph
3 (3) of subdivision (a), all parties shall produce and exchange, at the place and on
4 the date specified in the demand, all discoverable reports and writings, if any,
5 made by any designated expert described in paragraph (2) of subdivision (a).

6 (h) Within 20 days after the exchange described in subdivision (f), any party
7 who engaged in the exchange may submit a supplemental expert witness list
8 containing the name and address of any experts who will express an opinion on a
9 subject to be covered by an expert designated by an adverse party to the exchange,
10 if the party supplementing an expert witness list has not previously retained an
11 expert to testify on that subject. This supplemental list shall be accompanied by an
12 expert witness declaration under paragraph (2) of subdivision (f) concerning those
13 additional experts, and by all discoverable reports and writings, if any, made by
14 those additional experts. The party shall also make those experts available
15 immediately for a deposition under subdivision (i), which deposition may be taken
16 even though the time limit for discovery under Section 2024 [Article 8] has
17 expired.

18 (i) On receipt of an expert witness list from a party, any other party may take the
19 deposition of any person on the list. The procedures for taking oral and written
20 depositions set forth in Sections 2025, 2026, 2027, and 2028 [Articles 9, 10, and
21 11] apply to a deposition of a listed trial expert witness except as follows:

22 (1) The deposition of any expert described in paragraph (2) of subdivision (a)
23 shall be taken at a place that is within 75 miles of the courthouse where the action
24 is pending. However, on motion for a protective order by the party designating an
25 expert witness, and on a showing of exceptional hardship, the court may order that
26 the deposition be taken at a more distant place from the courthouse.

27 (2) A party desiring to depose any expert witness, other than a party or employee
28 of a party, who is either (A) an expert described in paragraph (2) of subdivision (a)
29 except one who is a party or an employee of a party, (B) a treating physician and
30 surgeon or other treating health care practitioner who is to be asked during the
31 deposition to express opinion testimony, including opinion or factual testimony
32 regarding the past or present diagnosis or prognosis made by the practitioner or the
33 reasons for a particular treatment decision made by the practitioner, but not
34 including testimony requiring only the reading of words and symbols contained in
35 the relevant medical record or, if those words and symbols are not legible to the
36 deponent, the approximation by the deponent of what those words or symbols are,
37 or (C) an architect, professional engineer, or licensed land surveyor, who was
38 involved with the original project design or survey for which he or she is asked to
39 express an opinion within his or her expertise and relevant to the action or
40 proceeding, shall pay the expert's reasonable and customary hourly or daily fee for
41 any time spent at the deposition from the time noticed in the deposition subpoena
42 or from the time of the arrival of the expert witness should that time be later than
43 the time noticed in the deposition subpoena, until the time the expert witness is

1 dismissed from the deposition, whether or not the expert is actually deposed by
2 any party attending the deposition. If any counsel representing the expert or a
3 nonnoticing party is late to the deposition, the expert's reasonable and customary
4 hourly or daily fee for the time period determined from the time noticed in the
5 deposition subpoena until the counsel's late arrival, shall be paid by that tardy
6 counsel. However, the hourly or daily fee shall not exceed the fee charged the
7 party who retained the expert except where the expert donated his or her services
8 to a charitable or other nonprofit organization. A daily fee shall only be charged
9 for a full day of attendance at a deposition or where the expert was required by the
10 deposing party to be available for a full day and the expert necessarily had to
11 forego all business he or she would have otherwise conducted that day but for the
12 request that he or she be available all day for the scheduled deposition. In a
13 worker's compensation case arising under Division 4 (commencing with Section
14 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party
15 desiring to depose any expert on another party's expert witness list shall pay this
16 fee.

17 The party taking the deposition shall either accompany the service of the
18 deposition notice with a tender of the expert's fee based on the anticipated length
19 of the deposition or tender that fee at the commencement of the deposition. The
20 expert's fee shall be delivered to the attorney for the party designating the expert.
21 If the deposition of the expert takes longer than anticipated, the party giving notice
22 of the deposition shall pay the balance of the expert's fee within five days of
23 receipt of an itemized statement from the expert. The party designating the expert
24 is responsible for any fee charged by the expert for preparing for the deposition
25 and for traveling to the place of the deposition, as well as for any travel expenses
26 of the expert.

27 (3) The service of a proper deposition notice accompanied by the tender of the
28 expert witness fee described in paragraph (2) is effective to require the party
29 employing or retaining the expert to produce the expert for the deposition. If the
30 party noticing the deposition fails to tender the expert's fee under paragraph (2),
31 the expert shall not be deposed at that time unless the parties stipulate otherwise.

32 (4) If a party desiring to take the deposition of an expert witness under this
33 subdivision deems that the hourly or daily fee of that expert for providing
34 deposition testimony is unreasonable, that party may move for an order setting the
35 compensation of that expert. This motion shall be accompanied by a declaration
36 stating facts showing a reasonable and good faith attempt at an informal resolution
37 of each issue presented by the motion. Notice of this motion shall also be given to
38 the expert. In any such attempt at an informal resolution, either the party or the
39 expert shall provide the other with (A) proof of the ordinary and customary fee
40 actually charged and received by that expert for similar services provided outside
41 the subject litigation, (B) the total number of times the presently demanded fee has
42 ever been charged and received by that expert, and (C) the frequency and

1 regularity with which the presently demanded fee has been charged and received
2 by that expert within the two-year period preceding the hearing on the motion.

3 In addition to any other facts or evidence, the expert or the party designating the
4 expert shall provide, and the court's determination as to the reasonableness of the
5 fee shall be based upon (A) proof of the ordinary and customary fee actually
6 charged and received by that expert for similar services provided outside the
7 subject litigation, (B) the total number of times the presently demanded fee has
8 ever been charged and received by that expert, and (C) the frequency and
9 regularity with which the presently demanded fee has been charged and received
10 by that expert within the two-year period preceding the hearing on the motion.
11 Provisions (B) and (C) shall apply to actions filed after January 1, 1994. The court
12 may also consider the ordinary and customary fees charged by similar experts for
13 similar services within the relevant community and any other factors the court
14 deems necessary or appropriate to make its determination.

15 Upon a determination that the fee demanded by that expert is unreasonable, and
16 based upon the evidence and factors considered, the court shall set the fee of the
17 expert providing testimony.

18 The court shall impose a monetary sanction under Section 2023 [Article 7]
19 against any party, person, or attorney who unsuccessfully makes or opposes a
20 motion to set the expert witness fee, unless it finds that the one subject to the
21 sanction acted with substantial justification or that other circumstances make the
22 imposition of the sanction unjust.

23 (j) Except as provided in subdivisions (k), (l), and (m), on objection of any party
24 who has made a complete and timely compliance with subdivision (f), the trial
25 court shall exclude from evidence the expert opinion of any witness that is offered
26 by any party who has unreasonably failed to do any of the following:

27 (1) List that witness as an expert under subdivision (f).

28 (2) Submit an expert witness declaration.

29 (3) Produce reports and writings of expert witnesses under subdivision (g).

30 (4) Make that expert available for a deposition under subdivision (i).

31 (k) On motion of any party who has engaged in a timely exchange of expert
32 witness information, the court may grant leave to (1) augment that party's expert
33 witness list and declaration by adding the name and address of any expert witness
34 whom that party has subsequently retained, or (2) amend that party's expert
35 witness declaration with respect to the general substance of the testimony that an
36 expert previously designated is expected to give. This motion shall be made at a
37 sufficient time in advance of the time limit for the completion of discovery under
38 Section 2024 [Article 8] to permit the deposition of any expert to whom the
39 motion relates to be taken within that time limit. However, under exceptional
40 circumstances, the court may permit the motion to be made at a later time. This
41 motion shall be accompanied by a declaration stating facts showing a reasonable
42 and good faith attempt at an informal resolution of each issue presented by the
43 motion. The demand, and all expert witness lists and declarations exchanged in

1 response to it, shall be lodged with the court when their contents become relevant
2 to an issue in any pending matter in the action. The court shall grant leave to
3 augment or amend an expert witness list or declaration only after taking into
4 account the extent to which the opposing party has relied on the list of expert
5 witnesses, and after determining that any party opposing the motion will not be
6 prejudiced in maintaining that party's action or defense on the merits, and that the
7 moving party either (1) would not in the exercise of reasonable diligence have
8 determined to call that expert witness or have decided to offer the different or
9 additional testimony of that expert witness, or (2) failed to determine to call that
10 expert witness, or to offer the different or additional testimony of that expert
11 witness as a result of mistake, inadvertence, surprise, or excusable neglect,
12 provided that the moving party (1) has sought leave to augment or amend
13 promptly after deciding to call the expert witness or to offer the different or
14 additional testimony, and (2) has promptly thereafter served a copy of the
15 proposed expert witness information concerning the expert or the testimony
16 described in subdivision (f) on all other parties who have appeared in the action.
17 Leave shall be conditioned on the moving party making the expert available
18 immediately for a deposition under subdivision (i), and on such other terms as may
19 be just, including, but not limited to, leave to any party opposing the motion to
20 designate additional expert witnesses or to elicit additional opinions from those
21 previously designated, a continuance of the trial for a reasonable period of time,
22 and the awarding of costs and litigation expenses to any party opposing the
23 motion.

24 The court shall impose a monetary sanction under Section 2023 [Article 7]
25 against any party, person, or attorney who unsuccessfully makes or opposes a
26 motion to augment or amend expert witness information, unless it finds that the
27 one subject to the sanction acted with substantial justification or that other
28 circumstances made the imposition of the sanction unjust.

29 (l) On motion of any party who has failed to submit expert witness information
30 on the date specified in a demand for that exchange, the court may grant leave to
31 submit that information on a later date. This motion shall be made a sufficient time
32 in advance of the time limit for the completion of discovery under Section 2024
33 [Article 8] to permit the deposition of any expert to whom the motion relates to be
34 taken within that time limit. However, under exceptional circumstances, the court
35 may permit the motion to be made at a later time. This motion shall be
36 accompanied by a declaration stating facts showing a reasonable and good faith
37 attempt at an informal resolution of each issue presented by the motion.

38 The court shall grant leave to submit tardy expert witness information only after
39 taking into account the extent to which the opposing party has relied on the
40 absence of a list of expert witnesses, and determining that any party opposing the
41 motion will not be prejudiced in maintaining that party's action or defense on the
42 merits, and that the moving party (1) failed to submit that information as the result
43 of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave

1 promptly after learning of the mistake, inadvertence, surprise, or excusable
2 neglect, and (3) has promptly thereafter served a copy of the proposed expert
3 witness information described in subdivision (f) on all other parties who have
4 appeared in the action. This order shall be conditioned on the moving party
5 making that expert available immediately for a deposition under subdivision (i),
6 and on such other terms as may be just, including, but not limited to, leave to any
7 party opposing the motion to designate additional expert witnesses or to elicit
8 additional opinions from those previously designated, a continuance of the trial for
9 a reasonable period of time, and the awarding of costs and litigation expenses to
10 any party opposing the motion.

11 The court shall impose a monetary sanction under Section 2023 [Article 7]
12 against any party, person, or attorney who unsuccessfully makes or opposes a
13 motion to submit tardy expert witness information, unless it finds that the one
14 subject to the sanction acted with substantial justification or that other
15 circumstances make the imposition of the sanction unjust.

16 (m) A party may call as a witness at trial an expert not previously designated by
17 that party if: (1) that expert has been designated by another party and has thereafter
18 been deposed under subdivision (i), or (2) that expert is called as a witness to
19 impeach the testimony of an expert witness offered by any other party at the trial.
20 This impeachment may include testimony to the falsity or nonexistence of any fact
21 used as the foundation for any opinion by any other party's expert witness, but
22 may not include testimony that contradicts the opinion.

23 (n) The demand for an exchange of information concerning expert trial
24 witnesses, and any expert witness lists and declarations exchanged shall not be
25 filed with the court. The party demanding the exchange shall retain both the
26 original of the demand, with the original proof of service affixed, and the original
27 of all expert witness lists and declarations exchanged in response to the demand
28 until six months after final disposition of the action. At that time, all originals may
29 be destroyed unless the court, on motion of any party and for good cause shown,
30 orders that the originals be preserved for a longer period.

31 Article 19. Perpetuation of Testimony or Preservation of Evidence
32 Before Filing Action

33 **§ 2035.010. Perpetuation of testimony or preservation of evidence before filing action**

34 2035.010. (a) One who expects to be a party to any action that may be
35 cognizable in any court of the State of California, whether as a plaintiff, or as a
36 defendant, or in any other capacity, may obtain discovery within the scope
37 delimited by Articles 2 and 3, and subject to the restrictions set forth in Article 5,
38 for the purpose of perpetuating that party's own testimony or that of another
39 natural person or organization, or of preserving evidence for use in the event an
40 action is subsequently filed.

1 (b) One shall not employ the procedures of this article for the purpose either of
2 ascertaining the possible existence of a cause of action or a defense to it, or of
3 identifying those who might be made parties to an action not yet filed.

4 **Comment.** Subdivision (a) of Section 2035.010 continues the first sentence of former Section
5 2035(a) without change, except to conform the cross-references.

6 Subdivision (b) continues the second sentence of former Section 2035(a) without substantive
7 change.

8 **§ 2035.020. Methods of discovery**

9 2035.020. The methods available for discovery conducted for the purposes set
10 forth in Section 2035.010 are all of the following:

- 11 (a) Oral and written depositions.
- 12 (b) Inspections of documents, things, and places.
- 13 (c) Physical and mental examinations.

14 **Comment.** Section 2035.020 continues former Section 2035(b) without substantive change.

15 **§ 2035.030. Petition**

16 2035.030. (a) One who desires to perpetuate testimony or preserve evidence for
17 the purposes set forth in Section 2035.010 shall file a verified petition in the
18 superior court of the county of the residence of at least one expected adverse party,
19 or, if no expected adverse party is a resident of the State of California, in the
20 superior court of a county where the action or proceeding may be filed.

21 (b) The petition shall be titled in the name of the one who desires the
22 perpetuation of testimony or the preservation of evidence. The petition shall set
23 forth all of the following:

24 (1) The expectation that the petitioner will be a party to an action cognizable in a
25 court of the State of California.

26 (2) The present inability of the petitioner either to bring that action or to cause it
27 to be brought.

28 (3) The subject matter of the expected action and the petitioner's involvement.

29 (4) The particular discovery methods described in Section 2035.020 that the
30 petitioner desires to employ.

31 (5) The facts that the petitioner desires to establish by the proposed discovery.

32 (6) The reasons for desiring to perpetuate or preserve these facts before an action
33 has been filed.

34 (7) The name or a description of those whom the petitioner expects to be adverse
35 parties so far as known.

36 (8) The name and address of those from whom the discovery is to be sought.

37 (9) The substance of the information expected to be elicited from each of those
38 from whom discovery is being sought.

39 (c) The petition shall request the court to enter an order authorizing the petitioner
40 to engage in discovery by the described methods for the purpose of perpetuating
41 the described testimony or preserving the described evidence.

1 **Comment.** Subdivision (a) of Section 2035.030 continues former Section 2035(c) without
2 change, except to conform the cross-reference.

3 The introductory clause of subdivision (b) continues the introductory clause of former Section
4 2035(d) without change. Paragraphs (b)(1)-(b)(9) continue former Section 2035(d)(1)-(d)(9)
5 without change, except to conform the cross-reference.

6 Subdivision (c) continues the last paragraph of former Section 2035(d) without change.

7 **§ 2035.040. Service of notice of petition**

8 2035.040. (a) The petitioner shall cause service of a notice of the petition under
9 Section 2035.030 to be made on each natural person or organization named in the
10 petition as an expected adverse party. This service shall be made in the same
11 manner provided for the service of a summons.

12 (b) The service of the notice shall be accompanied by a copy of the petition. The
13 notice shall state that the petitioner will apply to the court at a time and place
14 specified in the notice for the order requested in the petition.

15 (c) This service shall be effected at least 20 days before the date specified in the
16 notice for the hearing on the petition.

17 (d) If after the exercise of due diligence, the petitioner is unable to cause service
18 to be made on any expected adverse party named in the petition, the court in which
19 the petition is filed shall make an order for service by publication.

20 (e) If any expected adverse party served by publication does not appear at the
21 hearing, the court shall appoint an attorney to represent that party for all purposes,
22 including the cross-examination of any person whose testimony is taken by
23 deposition. The court shall order that the petitioner pay the reasonable fees and
24 expenses of any attorney so appointed.

25 **Comment.** Subdivision (a) of Section 2035.040 continues the first and second sentences of
26 former Section 2035(e) without substantive change.

27 Subdivision (b) continues the third and fourth sentences of former Section 2035(e) without
28 change.

29 Subdivision (c) continues the fifth sentence of former Section 2035(e) without substantive
30 change.

31 **§ 2035.050. Court order**

32 2035.050. (a) If the court determines that all or part of the discovery requested
33 under this article may prevent a failure or delay of justice, it shall make an order
34 authorizing that discovery.

35 (b) The order shall identify any witness whose deposition may be taken, and any
36 documents, things, or places that may be inspected, and any person whose physical
37 or mental condition may be examined.

38 (c) Any authorized depositions, inspections, and physical or mental
39 examinations shall then be conducted in accordance with the provisions of this
40 chapter relating to those methods of discovery in actions that have been filed.

41 **Comment.** Subdivision (a) of Section 2035.050 continues the first sentence of former Section
42 2035(f) without substantive change.

43 Subdivision (b) continues the second sentence of former Section 2035(f) without change.

1 Subdivision (c) continues the third sentence of former Section 2035(f) without substantive
2 change.

3 **§ 2035.060. Use of presuit deposition to perpetuate testimony**

4 2035.060. If a deposition to perpetuate testimony has been taken either under the
5 provisions of this article, or under comparable provisions of the laws of another
6 state, or the federal courts, or a foreign nation, that deposition may be used, in any
7 action involving the same subject matter that is brought in a court of the State of
8 California, in accordance with Section 2025.300 against any party, or the
9 successor in interest of any party, named in the petition as an expected adverse
10 party.

11 **Comment.** Section 2035.060 continues former Section 2035(g) without substantive change.

12 Article 20. Perpetuation of Testimony or Preservation of Information
13 Pending Appeal

14 **§ 2036.010. Perpetuation of testimony or preservation of information pending appeal**

15 2036.010. If an appeal has been taken from a judgment entered by any court of
16 the State of California, or if the time for taking an appeal has not expired, a party
17 may obtain discovery within the scope delimited by Articles 2 and 3, and subject
18 to the restrictions set forth in Article 5, for the purpose of perpetuating testimony
19 or preserving information for use in the event of further proceedings in that court.

20 **Comment.** Section 2036.010 continues former Section 2036(a) without change, except to
21 conform the cross-references.

22 **§ 2036.020. Methods of discovery**

23 2036.020. The methods available for discovery for the purpose set forth in
24 Section 2036.010 are all of the following:

- 25 (a) Oral and written depositions.
26 (b) Inspections of documents, things, and places.
27 (c) Physical and mental examinations.

28 **Comment.** Section 2036.020 continues former Section 2036(b) without substantive change.

29 **§ 2036.030. Motion for leave to conduct discovery pending appeal**

30 2036.030. (a) A party who desires to obtain discovery pending appeal shall
31 obtain leave of the court that entered the judgment. This motion shall be made on
32 the same notice to and service of parties as is required for discovery sought in an
33 action pending in that court.

34 (b) The motion for leave to conduct discovery pending appeal shall set forth all
35 of the following:

36 (1) The names and addresses of the natural persons or organizations from whom
37 the discovery is being sought.

1 (2) The particular discovery methods described in Section 2036.020 for which
2 authorization is being sought.

3 (3) The reasons for perpetuating testimony or preserving evidence.

4 **Comment.** Section 2036.030 continues former Section 2036(c) without change.
5 Subdivision (b) continues former Section 2036(d) without substantive change.

6 **§ 2036.040. Court order**

7 2036.040. (a) If the court determines that all or part of the discovery requested
8 under this article may prevent a failure or delay of justice in the event of further
9 proceedings in the action in that court, it shall make an order authorizing that
10 discovery.

11 (b) The order shall identify any witness whose deposition may be taken, and any
12 documents, things, or places that may be inspected, and any person whose physical
13 or mental condition may be examined.

14 (c) Any authorized depositions, inspections, and physical and mental
15 examinations shall then be conducted in accordance with the provisions of this
16 chapter relating to these methods of discovery in a pending action.

17 **Comment.** Subdivision (a) of Section 2036.040 continues the first sentence of former Section
18 2036(e) without substantive change.

19 Subdivision (b) continues the second sentence of former Section 2036(e) without change.

20 Subdivision (c) continues the third sentence of former Section 2036(e) without change, except
21 to conform the cross-reference.

22 **§ 2036.050. Use of deposition to perpetuate testimony pending appeal**

23 2036.050. If a deposition to perpetuate testimony has been taken under the
24 provisions of this article, it may be used in any later proceeding in accordance with
25 Section 2025.300.

26 **Comment.** Section 2036.050 continues former Section 2036(f) without substantive change.
