Study J-503 May 23, 2003

First Supplement to Memorandum 2003-17

Discovery Improvements from Other Jurisdictions (Discussion of Issues)

This supplemental memorandum addresses comments we have received from Richard Haeussler regarding several issues discussed in Memorandum 2003-17, relating to potential discovery improvements. Mr. Haeussler's comments are attached as an Exhibit. This memorandum also includes a few additional comments from staff regarding presuit discovery and automatic supplementation.

COMMENTS OF RICHARD HAEUSSLER

Although he has had no experience with presuit discovery in 30 years of practice, Mr. Haeussler believes that "such a procedure would be useful" in limited circumstances. Exhibit p. 1.

Mr. Haeussler also supports a "limited" automatic duty to supplement discovery responses. *Id*. He remarks that supplemental interrogatories and inspection demands, as authorized currently under the Discovery Act, "are easier to deal with than the mandatory duty to supplement proposed." *Id*. The Commission has not yet considered a proposal on this topic and the staff is recommending that further work on automatic supplementation be deferred until other topics, such as pretrial disclosures, have been examined. Memorandum 2003-17, p. 14.

Mr. Haeussler advances several proposals for improving the disclosure and early meeting procedures currently in use in the federal courts. *Id*. While the Commission has decided to explore these topics in its study of civil discovery, they are not currently under consideration. The staff will retain Mr. Haeussler's comments for future consideration.

Memorandum 2003-17 (p. 16) proposes language that would clarify application of the "one-deposition rule" to a deposition of an organization in a limited civil case. Mr. Haeussler does not comment on this proposal. Rather, he objects to the restrictive nature of the rule generally and suggests expanding the

number of depositions that may be taken in a limited civil case. Exhibit pp. 1-2. This is not an issue that the Commission has decided to include in this study. We are inclined to consider Mr. Haeussler's suggestions in the study on jurisdictional limits of small claims cases and limited civil cases (Study J-1321).

Mr. Haeussler favors clarification of the right by all parties to videotape or audiotape a deposition as proposed in Memorandum 2003-17 (p. 21). Exhibit p. 2.

STAFF COMMENTS

Presuit Discovery

The staff has proposed adding a provision to Code of Civil Procedure Section 2035(d)(3) requiring that a copy of any written instrument at issue be attached to the petition for presuit discovery:

> (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. A copy of any written instrument the validity or construction of which may be called in question, or which is connected with the subject matter of the deposition shall be attached to the petition.
>
> ....

Memorandum 2003-17, pp. 8-9.

The proposed language is taken from the former Uniform Perpetuation of Testimony Act (1959). *Id.* at 8. That Act applied solely to the taking of depositions to perpetuate testimony. In contrast, Section 2035(b) authorizes several discovery methods (depositions, inspections, physical and mental examinations) that may be used for the purpose of perpetuating testimony or preserving evidence. Therefore, the staff recommends that the proposed language be revised as follows (changes in italics):

> (3) The subject matter of the expected action and the petitioner's involvement. A copy of any written instrument the validity or

construction of which may be called in question, or which is connected with the subject matter of the *proposed discovery* shall be attached to the petition.

Duty to Automatically Supplement Discovery Response

There is an error on page 13 (first indented paragraph) of Memorandum 2003-17. The sentence in question currently reads: "Before then, Rule 26(e) still imposed a duty to disclose — albeit a much narrower one." It should read: "Before then, Rule 26(e) still imposed a duty to *supplement* — albeit a much narrower one."

Respectfully submitted,

Lynne Urman
Staff Counsel

Exhibit

COMMENTS OF RICHARD HAEUSSLER

From: "Richard L. Haeussler" <haeu@ix.netcom.com>
To: "Barbara Gaal Calif Law Revision Comm." <bgaal@clrc.ca.gov>
Subject: Comments of Discovery Improvements
Date: Thu, 8 May 2003 07:10:12 -0700

PRESUIT DISCOVERY:

In thirty years, I have never had occasion to file such a suit and have never had any experience in making this decision for a client. I can understand how in limited circumstances that such a procedure would be useful.

DUTY TO AUTOMATICALLY SUPPLEMENT DISCOVERY RESPONSES:

In the case of an automatic supplement of discovery responses, I am in favor of this provision on a limited basis.

The present system requires that the proponent of the discovery ask by a supplemental discovery request if there has been an additional information. [CCP §2030(c)(8) and/or CCP§2031(e)]. I think that these requests are easier to deal with than the mandatory duty to supplement proposed.

In the Federal Court system, it is my belief that the initial duty to disclose under FRCP § 26 and the early meeting of counsel immediately after the filing of a response, has been a worthless exercise. I would propose that such a meeting after all the defendants have responded, and a limited set of discovery would be more productive. I would also suggest that such a meeting be held at which all counsel meet and exchange documents, and set a discovery schedule after a reasonable time to obtain initial limited discovery. Very limited with the scope being restricted to information about information upon which the Answer is based [Affirmative Defenses, etc.], and information which the responding party may have about other responsible parties.

ONE DEPOSITION RULE IN A LIMITED CIVIL CASE:

I believe that this provision is to restrictive ! ! !

I would suggest that:

a. That a deposition may be taken of each party,

b. That no more than two depositions by each side may be taken of non-parties, unless prior court approval on good cause shown,

c. That video recorded depositions of treating doctors/and allied medical providers may be taken for use at trial, and

d. Expert depositions under CCP § 2034, if not already taken.

Reasons:

Deposition of each party. One deposition is really not reasonable if there is more than one party plaintiff or defendant. This would allow each party to be deposed. This could be limited, as to the length that a deposition may take [no more than two hours].

Depositions of non party witnesses. I believe that this speaks for itself. If there is a non party witness, this provision would allow a reasonable chance to get their information.

Video Recording of Medical Providers. This is really a cost factor consideration. At the present time, without regard to either limited or unlimited jurisdiction, I take the video recorded deposition of a treating doctor, and physical therapist, for two reasons: Cost and availability.

A. Costs: At the present time, most treating doctors are demanding between $2,500.00 and $8,000.00 for one-half day testimony in court, payable in advance FOR EACH TIME THEY ARE PLACED ON STANDBY FOR TRIAL. This makes it almost impossible to get a doctor to come to trial.

B. Availability: Even when they agree to come to trial, I have had the experience that the doctor refuses to come, or placed on notice goes out of town, etc. They evade a subpoena for trial.

By Video recording the deposition of a treating doctor, I am able to take advantage of CCP § 2025(u)(4). I believe that this provision should be made clearer and all the provisions relating to video taping a deposition made into its own section.

Equal Right to Video Record A Deposition: I have never run into this problem. However, I am usually the one who is video recording the

Deposition and giving the notice of both the deposition and video recording. It would seem that the provision suggested is to clarify the provision which I am in favor of.