Study J-503 January 22, 2004

Memorandum 2004-11

Discovery Improvements from Other Jurisdictions (Draft of Tentative Recommendation)

As a preliminary step in its study of civil discovery, the Commission is in the process of examining a number of minor substantive issues. Attached for the Commission's review is a draft of a tentative recommendation addressing those issues as previously directed by the Commission. The Commission needs to decide whether any revisions are necessary, and whether to approve the draft for circulation for comment.

The draft was prepared by Jeffrey Vize, a student at UC Davis Law School, under the supervision of Commission staff. Mr. Vize has been working for the Commission through the work-study program since early 2003. The staff is grateful for his assistance.

Respectfully submitted,

Barbara Gaal
Staff Counsel

#J-503

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
TENTATIVE RECOMMENDATION

Civil Discovery: Statutory Clarification and Minor Substantive Improvements

February 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **xxx.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The Commission proposes the following improvements to California's civil discovery statutes:

(1) The one-deposition rule for a limited civil case (Code Civ. Proc. § 94) should be amended to make clear that a deposition of an organization is to be treated as a single deposition, even if more than one individual is deposed.

(2) The section concerning an oral deposition taken in California (Code Civ. Proc. § 2025) should be amended to make clear that a party's right to make an audio or video recording of a deposition is not dependent on the method of recording used by the party who noticed the deposition.

(3) Remaining references in the Civil Discovery Act to audiotape and videotape (Code Civ. Proc. §§ 2025, 2032) should be revised to reflect advances in technology, consistent with prior legislation.

(4) The section concerning presuit discovery (Code Civ. Proc. § 2035) should be amended to permit such discovery in anticipation of a suit by a petitioner's successor in interest, subject to statutory safeguards.

(5) The section concerning presuit discovery should also be amended to make clear that if a deposition to perpetuate testimony is taken in another jurisdiction, it must be taken in accordance with the law of that jurisdiction, or in accordance with California or federal law, to be admissible in California.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

CIVIL DISCOVERY: STATUTORY CLARIFICATION AND MINOR SUBSTANTIVE IMPROVEMENTS

The Law Revision Commission is engaged in a study of civil discovery.[1] As a preliminary step, the Commission proposed a nonsubstantive reorganization of the provisions governing civil discovery, to make them more user-friendly and facilitate sound development of the law.[2] The Commission has also begun to consider substantive matters, starting with minor issues relating to:

- The one deposition rule in a limited civil case.
- Audio or video recording of a deposition.
- References to "audiotape" and "videotape" in the Civil Discovery Act.
- Presuit discovery.

As explained below, the Commission tentatively recommends reforms in each of these areas, to eliminate ambiguities, update terminology, and make other minor improvements.

The Commission's work on civil discovery is continuing, and the Commission may propose further reforms in the future. The Commission encourages interested persons to comment on the following proposals and offer suggestions on other areas or ideas to investigate.

Application of the One-Deposition Rule to the Deposition of an Organization

A limited civil case (former municipal court case)[3] is usually subject to special litigation rules known as economic litigation procedures,[4] which were designed to reduce the cost of litigation in a case for a relatively small amount.[5] Among the special procedures applicable to a limited civil case is the one-deposition rule, which permits a party to take only one oral or written deposition as to each adverse party.[6] The one-deposition rule is ambiguous as applied to a deposition of an organization.

A deposition notice directed to a corporation or other organization must "describe with reasonable particularity the matters on which examination is

1. Prof. Gregory Weber of McGeorge School of Law prepared a background study for the Commission. See Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001).

2. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 783 (2003).

3. For the rules governing whether an action or special proceeding is treated as a limited civil case, see Code Civ. Proc. § 85 & Comment. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

4. Section 91.

5. 1982 Cal. Stat. ch. 1581 § 5.

6. Section 94(b).

requested."[7] The organization is obligated to designate and produce at the deposition "those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf."[8] The statute setting forth the one-deposition rule does not specify how the rule applies if a deposition notice in a limited civil case specifies more than one topic on which an organization will be examined, but no one person in the organization has knowledge of every topic specified.

This has led to disputes over whether the organization must produce only one person, even though that person lacks knowledge of all the specified topics, or must produce several people, despite the one-deposition rule. Although such disputes arise at the trial level, there is no published appellate decision resolving the issue, probably because few limited civil cases receive appellate review resulting in a published decision.

The ambiguity in the one-deposition rule should be eliminated by making clear that the organization must produce as many witnesses as necessary to testify knowledgeably to all of the topics specified in the deposition notice. The organization is the deponent, not the officers, employees, and agents testifying on its behalf. The organization must necessarily speak through natural persons. Because of the large and decentralized nature of some organizations, the deponent's "knowledge" may be fragmented among several individuals.

If the one-deposition rule limited the deposition of an organization to one individual, increased gamesmanship could occur. For example, an organization could designate as a witness the employee most qualified to testify on one of five topics identified in a deposition notice, even if another person is most qualified to testify on the remaining four topics. The deponent would have unilateral power to exclude relevant information from being discovered.

The purpose of the discovery rules is to "enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise."[9] Revising the one-deposition rule as proposed would promote those goals.[10]

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7. Section 2025(d).

8. *Id.*

9. Williams v. Volkswagenwerk Aktiengesellschaft, 180 Cal. App. 3d 1244, 1254, 226 Cal. Rptr. 306 (1986).

10. The proposed reform would also be consistent with the language and existing interpretations of the provision requiring the organization to designate who will testify. Section 2025(d) requires an organization to designate and produce at the deposition "those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf." The use of the plural is contrary to modern statutory drafting conventions. The implication is that the Legislature intended for the organization to designate as many witnesses as necessary to testify.

This has been the practice, at least with regard to an unlimited civil case. See Maldonado v. Superior Court, 94 Cal. App. 4th 1390, 115 Cal. Rptr. 2d 137 (2002) (plaintiffs entitled to have corporate defendant's three designated witnesses bring requested documents to depositions and prove they had undertaken some effort to familiarize themselves with areas of their supposed "knowledge.").

Equal Right to Record a Deposition By Audio or Video Technology

With limited exceptions, Section 2025(*l*) requires deposition testimony to be stenographically recorded. In addition to recording the testimony stenographically, the party who notices the deposition (the "deposing party") may also record the testimony by audio or video technology, if that party states an intention to do so in the deposition notice, or the other parties agree to such recording. The statute further states that "[a]ny other party, at that party's expense, may make a *simultaneous* audio or video record of the deposition."[11]

That language is ambiguous. It is unclear whether the party who did not notice the deposition (the "non-deposing party") is entitled to make an audio or video record simultaneously with preparation of the stenographic record, or only simultaneously with preparation of an audio or video record by the deposing party. If the latter is true, the deposing party has full control over whether a deposition is recorded by audio or video technology. The Commission has been unable to find any published cases resolving which interpretation of the sentence is correct.

To prevent unnecessary disputes over this issue, the Commission recommends that the word "simultaneous" be deleted from the sentence. That would make clear that the non-deposing party is entitled to make an audio or video record regardless of whether the deposing party does so.

There is solid justification for such an approach, and it appears consistent with the legislative history of the statute.[12] Recording a deposition by audio or video technology entails extra costs, but also confers evidentiary benefits that vary depending on the factual context and the perspective of a particular litigant. Each party should be able to make its own assessment of whether an audio or video record is necessary under the circumstances of a particular case, in addition to the stenographic record. Protections are in place to ensure that any audio or video record of a deposition is reliable and accurate.[13] There is no need to give the

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In contrast to a limited civil case, there is no limit on the number of depositions that may be taken in an unlimited civil case. But commentary supports the view that in a limited civil case an organization must produce as many witnesses as necessary to testify knowledgeably, just as in an unlimited civil case:

> It is not clear how the "one deposition per adverse party" rule applies where the adverse party is a corporation or other entity. When the deposition notice is addressed to the entity, it must designate the person or persons "most qualified" to testify on its behalf. … Presumably, the party seeking discovery would be entitled to more than one deposition where the entity designates more than one person.

R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, Discovery ¶ 8:1909.1 (2002).

11. Section 2025(*l*) (emphasis added).

12. The Commission is aware of nothing in the legislative history of the Civil Discovery Act suggesting that the Legislature intended to prohibit a non-deposing party from audio or video recording a deposition when the deposing party only records the testimony stenographically.

13. Section 2025(*l*)(2) sets forth in detail the procedures that must be followed if the deposition is recorded by audio or video technology by, or at the direction of a party. Special requirements apply where an expert witness' testimony is video recorded for use at trial in lieu of live testimony. Section 2025(*l*)(2)(B). If the testimony is recorded both stenographically and by audio or video technology, the

deposing party full control over whether such a record is made. Section 2025(*l*) should be amended to eliminate uncertainty regarding the authority of a non-deposing party to record a deposition by audio or video technology.

References to "Videotape" and "Audiotape"

In 2002, the Legislature enacted legislation that replaced references to "videotape" and "audiotape" in civil discovery provisions with terms that reflect advances in technology.[14] References to "videotape" were changed to "video technology," "video recording," or "video record." References to "audiotape" were similarly corrected.

A few references to "videotape" and "audiotape" remain in the Civil Discovery Act.[15] Those omissions appear to have been oversights. The Law Revision Commission therefore recommends conforming the remaining references to "videotape" and "audiotape" in the Civil Discovery Act to the terminology changes made in 2002.

Presuit Discovery

Under specified circumstances, a person who expects to be a party to a lawsuit in a California state court may successfully petition to conduct discovery before the lawsuit is filed. The statute governing such presuit discovery (Section 2035) is ambiguous with respect to (1) whether a petitioner may take presuit discovery when the contemplated lawsuit would be filed by the petitioner's successor in interest instead of by the petitioner, and (2) whether a deposition to perpetuate testimony is admissible in California if it was taken under the laws of a jurisdiction other than California, the United States, or the jurisdiction in which it was held. The Commission recommends that these ambiguities be eliminated.

Suit to be Filed by Petitioner's Successor in Interest. Section 2035(a) authorizes presuit discovery, under specified conditions, by someone who expects to be a *party* to an action. It does not expressly permit a person to engage in presuit discovery in anticipation of a suit by or against the person's successor in interest.

The statute does allow a successor in interest who expects to be a party to engage in presuit discovery if the statutory conditions are met. But this provision only functions to the extent that the successor in interest is identifiable at the time presuit discovery is sought. An unborn child or future assignee, for example, might eventually qualify as a successor in interest as well. As the statute is written, it does not seem to permit anyone to conduct presuit discovery on behalf of such a person. It is not inconceivable, however, that a court would find such authority implicit in the statute, even though it is not explicit.

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stenographic transcript is the official record of the testimony, not the audio or video record. Section 2025(p).

14. 2002 Cal. Stat. ch. 1068 (AB 2842 (Harman)).

15. See Code Civ. Proc. §§ 2025(*l*)(2)(H)-(I); 2032(g)(1)-(2).

The statute should be amended to eliminate this ambiguity and expressly authorize a petitioner to conduct presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest.[16] Such discovery should be subject to all of the same safeguards as other presuit discovery.

The Legislature developed those safeguards to prevent presuit discovery from being exploited as a means of conducting broad-ranging "fishing expeditions" for information before a lawsuit is filed.[17] The key safeguard is Section 2035(a), which expressly prohibits use of the statute for purposes 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 a future action. The petitioner must also show a present inability to bring the action or cause it to be brought.[18] Notice and a contested hearing are required.[19] And, the court must find that the perpetuation of testimony "may prevent a failure or delay of justice."[20]

This last requirement is crucial, because it ensures that presuit discovery is not conducted unless a court is convinced that such discovery is in the interests of justice. If a petitioner makes such a showing with respect to presuit discovery on behalf of a successor in interest, it would be inappropriate to deny the requested discovery.

That would be particularly true if the petitioner also complied with two new safeguards:

(1) The petition must include a copy of any written instrument, the validity or construction of which may be called in question or is connected with the subject matter of the proposed discovery.[21]

(2) The petition must show that the successor in interest is presently unable to bring an action or cause it to be brought.[22]

The Commission recommends that these safeguards be added to Section 2035, and that the statute be expanded to cover an anticipated suit by a successor in interest.

Amending the statute in this manner would not be a significant extension of the statute, might be helpful to some petitioners and their successors in interest, and would provide guidance on the point. The existing safeguards, in conjunction with the proposed requirements that the petitioner demonstrate the successor's present

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16. For examples of provisions that authorize presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest, see Ohio R. Civ. Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; 1959 Unif. Perpetuation of Testimony Act, § 1(a) & Comment.

17. Block v. Superior Court, 219 Cal. App. 2d 469, 477 n.5, 33 Cal. Rptr. 205 (1963) (interpreting former Section 2017, the predecessor of Section 2035); see also Hunt-Wesson Foods, Inc. v. County of Stanislaus, 273 Cal. App. 2d 92, 94, 77 Cal. Rptr. 832 (1969).

18. Section 2035(d)(2).

19. Section 2035(e).

20. Section 2035(f).

21. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act.

22. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act.

inability to bring or defend an action and attach any relevant writing, should inhibit any attempt to use the statute for purely investigative purposes.

Law Applicable to a Deposition to Perpetuate Testimony. Section 2035(g) states that a deposition to perpetuate testimony may be used in a subsequent action in California state court if the deposition was taken pursuant to Section 2035, "or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation." The provision does not make clear whether an out-of-state deposition must have been taken under the laws of the state in which it was taken, or just "another state."[23] This omission leaves open the possibility that a deposition taken in a second state under a third state's laws regarding presuit discovery could be admissible in California. The provision is similarly ambiguous with regard to the admissibility of a deposition to perpetuate testimony that was taken in another country.

The Commission recommends that the statutory language be clarified to prevent disputes regarding the admissibility of a deposition taken in another jurisdiction. Specifically, Section 2035(g) should be amended to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under California law, federal law, or a comparable provision of the jurisdiction in which it was taken.

23. Weber, *supra* note 1, at 1071.

PROPOSED LEGISLATION

Code Civ. Proc. § 94 (amended). Discovery

SECTION 1. Section 94 of the Code of Civil Procedure is amended to read:

94. Discovery is permitted only to the extent provided by this section and Section 95. This discovery shall comply with the notice and format requirements of the particular method of discovery, as provided in Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4. As to each adverse party, a party may use the following forms of discovery:

(a) Any combination of 35 of the following:

(1) Interrogatories (with no subparts) under Section 2030.

(2) Demands to produce documents or things under Section 2031.

(3) Requests for admission (with no subparts) under Section 2033.

(b) One oral or written deposition under Sections 2025 to 2028, inclusive. For purposes of this subdivision, a deposition of an organization shall be treated as a single deposition even though more than one person may be designated or required to testify pursuant to subdivision (d) of Section 2025.

(c) Any party may serve on any person a deposition subpoena duces tecum requiring the person served to mail copies of documents, books or records to the party's counsel at a specified address, along with an affidavit complying with Section 1561 of the Evidence Code.

The party who issued the deposition subpoena shall mail a copy of the response to any other party who tenders the reasonable cost of copying it.

(d) Physical and mental examinations under Section 2032.

(e) The identity of expert witnesses under Section 2034.

Comment. Subdivision (b) of Section 94 is amended to make clear the proper treatment of a deposition of an organization.

Code Civ. Proc. § 2025 (amended). Oral deposition inside California

SEC. 2. Section 2025 of the Code of Civil Procedure is amended to read:

2025....

(h)(1) The service of a deposition notice under subdivision (c) is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify, as well as to produce any document or tangible thing for inspection and copying.

(2) The attendance and testimony of any other deponent, as well as the production by the deponent of any document or tangible thing for inspection and copying, requires the service on the deponent of a deposition subpoena under Section 2020.

(3) A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means. The court may expressly provide that a nonparty deponent may appear at his or her deposition by

telephone if it finds there is good cause and no prejudice to any party. A party deponent shall appear at his or her deposition in person and be in the presence of the deposition officer. The procedures to implement this section shall be established by court order in the specific action or proceeding or by the California Rules of Court.

….

(*l*)(1) The deposition officer shall put the deponent under oath. Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically. The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods. Any other party, at that party's expense, may make ~~a simultaneous~~ an audio or video record of the deposition, provided that other party promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, serves a written notice of this intention to make an audio or video record of the deposition testimony on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served under subdivision (c), and on any deponent whose attendance is being compelled by a deposition subpoena under Section 2020. If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011. Examination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code.

(2) If the deposition is being recorded by means of audio or video technology by, or at the direction of, any party, the following procedure shall be observed:

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

(B) The operator of the recording equipment shall be competent to set up, operate, and monitor the equipment in the manner prescribed in this subdivision. The operator may be an employee of the attorney taking the deposition unless the operator is also the deposition officer. However, if a video recording of deposition testimony is to be used under paragraph (4) of subdivision (u), the operator of the recording equipment shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions. Services and products offered or provided by the deposition officer or the entity providing the services of the deposition officer to any party or to any party's attorney or third party who is financing all or part of the action shall be offered or provided to all parties or their attorneys attending the deposition. No service or product may be offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party or any party's attorney or third party who is financing all or part of the action unless the service or product is offered or

provided to all parties or their attorneys attending the deposition. All services and products offered or provided shall be made available at the same time to all parties or their attorneys. The deposition officer or the entity providing the services of the deposition officer shall not provide to any party or any other person or entity any service or product consisting of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition. The deposition officer or the entity providing the services of the deposition officer shall not collect any personal identifying information about the witness as a service or product to be provided to any party or third party who is financing all or part of the action. Upon the request of any party or any party's attorney attending a deposition, any party or any party's attorney attending the deposition shall enter in the record of the deposition all services and products made available to that party or party's attorney or third party who is financing all or part of the action by the deposition officer or by the entity providing the services of the deposition officer. A party in the action who is not represented by an attorney shall be informed by the noticing party that the unrepresented party may request this statement.

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

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

(E) Counsel for the parties shall identify themselves on camera or on the audio recording.

(F) The oath shall be administered to the deponent on camera or on the audio recording.

(G) If the length of a deposition requires the use of more than one unit of tape or electronic storage, the end of each unit and the beginning of each succeeding unit shall be announced on camera or on the audio recording.

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

(I) A party intending to offer an audio or video recording of a deposition in evidence under subdivision (u) shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any

party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing. The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering ~~a videotape or an audiotape~~ an audio or video recording of that testimony under subdivision (u) shall accompany that offer with a stenographic transcript prepared from that recording.

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

Comment. Subdivision (h)(3) of Section 2025 is amended to make a technical correction.

Subdivision (*l*)(1) is amended to make clear that the right of a non-deposing party to make an audio or video record of deposition testimony is not dependent on the method of recording used by the party noticing the deposition, except as otherwise provided by court order or party stipulation.

Subdivision (*l*)(2) is amended for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

☞ **Staff Note.** To conserve resources and focus attention on the proposed reforms, only subdivisions (h) and (*l*) of Section 2025 are reproduced here. Subdivisions (a)-(g), (i)-(k), and (m)-(v) have been omitted.

Code Civ. Proc. § 2032 (amended). Physical and mental examinations

SEC. 3. Section 2032 of the Code of Civil Procedure is amended to read:

2032 ….

(g)(1) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by ~~audiotape~~ audio technology any words spoken to or by the examinee during any phase of the examination. This observer may monitor the examination, but shall not participate in or disrupt it. If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative.

If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order. If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, 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.

If the examinee submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician except with consent of the examinee or on order of the court for good cause shown.

(2) The examiner and examinee shall have the right to record a mental examination ~~on audio tape~~ by audio technology. However, nothing in this article shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.

Comment. Subdivision (g) of Section 2032 is amended for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

☞ **Staff Note.** To conserve resources and focus attention on the proposed reforms, only subdivision (g) of Section 2032 is reproduced here. Subdivisions (a)-(f) and (h)-(k) have been omitted.

Code Civ. Proc. § 2035 (amended). Presuit discovery

SEC. 4. Section 2035 of the Code of Civil Procedure is amended to read:

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 and the petitioner's successor in interest 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 proposed discovery, shall be attached to the petition.

(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~~ 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. 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. For similar provisions, see Ohio R. Civ. Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; 1959 Unif. Perpetuation of Testimony Act, § 1(a) & Comment.

Two new safeguards are included to ensure that presuit discovery is conducted only when it is warranted. Under subdivision (d)(2), presuit discovery is permissible only if both the petitioner and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act. Under subdivision (d)(3), a petition for presuit discovery must include a copy of any written instrument connected with the subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act.

Subdivision (g) 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.