

Memorandum 2004-30

**Civil Discovery: Statutory Clarification and
Minor Substantive Improvements
(Comments on Tentative Recommendation)**

The comment period has ended for the tentative recommendation on *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, which proposes five minor reforms relating to civil discovery. The comments of the State Bar Committee on Administration of Justice (“CAJ”) are attached as Exhibit pp. 1-2. The Commission did not receive any other comments. Each of the five reforms is discussed below. The main issue for the Commission is whether to approve the proposal as a final recommendation (as is, or with revisions), for printing and submission to the Legislature.

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

The tentative recommendation proposes to revise the one-deposition rule for a limited civil case (Code Civ. Proc. § 94) 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. This reform was suggested by attorney Christine Wilson. Memorandum 2002-21, Exhibit p. 20 (available at www.clrc.ca.gov).

CAJ supports this proposal and reports that its members “had, for the most part, interpreted the statute in this manner in any event.” Exhibit p. 1. In light of CAJ’s support, Ms. Wilson’s initial suggestion, and the lack of any opposition, **the Commission should proceed with this reform.**

Equal Right to Record a Deposition By Audio or Video Technology

The statute governing an oral deposition taken in California (Code Civ. Proc. § 2025) is ambiguous as to whether a non-deposing party (i.e., a party other than the one who notices a deposition) is entitled to audio or video record a deposition if the party who noticed the deposition elects not to do so. The tentative recommendation proposes to amend this provision to make clear that a party’s right to audio or video record a deposition is not dependent on the method of recording used by the party who noticed the deposition. This reform

was suggested by former San Francisco discovery commissioner Richard Best. Memorandum 2003-17, Exhibit pp. 4-5 (available at www.clrc.ca.gov).

CAJ supports this proposal. Exhibit p. 1. In light of CAJ's support, Mr. Best's initial suggestion, and the lack of any opposition, **the Commission should proceed with this reform.**

References to "Videotape" and "Audiotape"

In 2002, the Legislature enacted a bill that replaced references to "videotape" and "audiotape" in civil discovery provisions with terms that reflect advances in technology. 2002 Cal. Stat. ch. 1068. A few references to "videotape" and "audiotape" appear to have been overlooked and remain in the Civil Discovery Act. The tentative recommendation proposes to conform these remaining references to the new terminology introduced in 2002. This reform was suggested by the staff.

CAJ supports this proposal and views it as "noncontroversial." Exhibit p. 1. CAJ "agrees the statute should be revised to reflect advances in technology, consistent with prior legislation." **In light of CAJ's support and the need for conformity with the 2002 legislation, the Commission should proceed with this reform.**

Presuit Discovery

The two remaining reforms pertain to the provision governing presuit discovery, Code of Civil Procedure Section 2035.

Suit to be Filed by Petitioner's Successor in Interest

The tentative recommendation proposes to amend Section 2035 to permit presuit discovery in anticipation of a suit by a petitioner's successor in interest, subject to statutory safeguards. Without taking a position, Prof. Weber brought this approach to the Commission's attention in his background study, which points out that "Ohio and Oklahoma specify that a petition can be made even if it is not the petitioner but rather his or her heirs or representatives who will be the parties to the action that cannot yet be brought." Weber, *Potential Innovations in Civil Discovery*, 32 McGeorge L. Rev. 1051, 1072 (2001).

CAJ opposed the first draft of this proposal. See Memorandum 2002-33, pp. 5-8 (available at www.clrc.ca.gov); Memorandum 2003-17, Exhibit pp. 1, 3. In response, the Commission added some statutory safeguards to the proposed

amendment before circulating its tentative recommendation. See Memorandum 2003-17, pp. 4-10.

CAJ now reports that it “has no further comments at this time.” Exhibit p. 1. The staff recommends **going forward with the proposed reform, for the reasons expressed in the tentative recommendation.**

Law Applicable to a Deposition to Perpetuate Testimony

The tentative recommendation proposes to amend Section 2035 to make clear that if a deposition to perpetuate testimony is taken in another jurisdiction, it must be taken under the law of that jurisdiction, or under California or federal law, to be admissible in California. Prof. Weber brought this ambiguity to the Commission’s attention in his background study. See Weber, *supra*, at 1071.

CAJ did not take a position on the first draft of this proposal. See Memorandum 2003-17, Exhibit p. 1. CAJ did not take a position on this aspect of the tentative recommendation either. Exhibit p. 2. CAJ “does, however, view the proposed amendment as noncontroversial in any event.” *Id.*

Given the lack of opposition, the staff recommends **going forward with the proposed reform, for the reasons expressed in the tentative recommendation.**

NEXT STEP

The Commission needs to decide whether to approve the draft as a final recommendation, for printing and introduction in the Legislature. Because the proposed reforms appear noncontroversial and we are not aware of any analytical flaws, **we recommend that the Commission finalize the recommendation.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

TO: The California Law Revision Commission

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

DATE: May 17, 2004

SUBJECT: Civil Discovery: Statutory Clarification and Minor Substantive Improvements – Tentative Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the February 2004 Tentative Recommendation of the California Law Revision Commission ("CLRC"), *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*. CAJ appreciates the opportunity to submit these comments

1. The one-deposition rule for a limited civil case (Code Civ. Proc. § 94)

CAJ supports the recommendation. CAJ agrees the statute 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. CAJ members had, for the most part, interpreted the statute in this manner in any event.

2. Oral deposition taken in California (Code Civ. Proc. § 2025)

CAJ supports the recommendation. CAJ agrees the statute 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)

CAJ supports the recommendation. CAJ agrees the statute should be revised to reflect advances in technology, consistent with prior legislation. CAJ views the recommendation as noncontroversial.

4. Presuit discovery – suit by petitioner's successor in interest (Code Civ. Proc. § 2035)

CAJ expressed opposition to this proposal when it was originally made. CAJ's comments are discussed in CLRC's Memorandum 2003-17, dated April 30, 2003 <http://www.clrc.ca.gov/pub/2003/MM03-17.pdf>. The CLRC made some changes to the original proposal in response to those comments, and CAJ has no further comments at this time.

5. Presuit discovery – law applicable to a deposition to perpetuate testimony (Code Civ. Proc. § 2035)

CAJ did not take a position on whether the statute should be amended to make clear that if a deposition to perpetuate testimony is taken in another jurisdiction, it must be taken under the law of that jurisdiction, or under California or federal law, to be admissible in California. CAJ does, however, view the proposed amendment as noncontroversial in any event.

DISCLAIMER

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