

Memorandum 2004-48

**Civil Discovery: Correction of Obsolete Cross-References
(Government Code Section 12963.3)**

At the September meeting, the Commission approved a final recommendation on *Civil Discovery: Correction of Obsolete Cross-References*. The recommendation includes an amendment of Government Code Section 12963.3 to correct an obsolete cross-reference to former Code of Civil Procedure Section 2018. Meanwhile, the Legislature amended Government Code Section 12963.3 to replace that cross-reference with a cross-reference to Code of Civil Procedure Section 2025, effective January 1, 2005. See AB 2870 (Mullin), 2004 Cal. Stat. ch. 647, § 6. The Commission needs to decide how to revise its recommendation to account for that development.

AMENDMENT PROPOSED BY THE COMMISSION

Government Code Section 12963.3 prescribes the procedures for taking a deposition in an action by the Department of Fair Employment and Housing (“DFEH”). Subdivision (b) specifies who may serve as deposition officer for such a deposition.

When the Commission approved its final recommendation, subdivision (b) said that a deposition in a DFEH action “may be taken before any officer of the department who has been authorized by the director to administer oaths and take testimony, or before any other person before whom a deposition may be taken in a civil action pursuant to *subdivision (a) of Section 2018 of the Code of Civil Procedure.*” (Emphasis added.) The italicized cross-reference was in the statute when the statute was first enacted in 1980. See 1980 Cal. Stat. ch. 1023, § 5. At that time, Code of Civil Procedure Section 2018(a) prescribed guidelines as to who was permitted to serve as deposition officer for a deposition outside the state. See 1961 Cal. Stat. ch. 192, § 1. The apparent intent of Section 12963.3 was to allow a deposition to be taken before (1) any officer of DFEH who was authorized by the director to administer oaths and take testimony, or (2) before any person permitted to take a valid deposition outside of California.

Former Code of Civil Procedure Section 2018(a) was repealed by the Civil Discovery Act of 1986, and a new Section 2018 was added, which pertained to the work product privilege instead of deposition procedure. 1986 Cal. Stat. ch. 1334, §§ 1, 2. Government Code Section 12963.3 was never revised to reflect this change and refer to Code of Civil Procedure Section 2026(c), the post-1986 Act provision most similar to former Section 2018(a).

The Commission thus proposed to correct the obsolete cross-reference to former Section 2018(a). The tentative recommendation would have replaced that cross-reference with a reference to Section 2026(c). While the tentative recommendation was circulating for comment, however, the Commission's nonsubstantive reorganization of the civil discovery provisions was enacted. 2004 Cal. Stat. ch. 182. When that reorganization becomes operative on July 1, 2005, Section 2026(c) will be repealed and the corresponding new provision will be Code of Civil Procedure Section 2026.010(d), specifying who is permitted to serve as deposition officer for a deposition outside California. Thus, the final recommendation approved at the September meeting proposes to refer to Section 2026.010(d):

Gov. Code § 12963.3 (amended). Depositions

SEC. __. Section 12963.3 of the Government Code is amended to read:

12963.3. (a) Depositions taken by the department shall be noticed by issuance and service of a subpoena pursuant to Section 12963.1. If, in the course of the investigation of a complaint, a subpoena is issued and served on an individual or organization not alleged in the complaint to have committed an unlawful practice, written notice of the deposition shall also be mailed by the department to each individual or organization alleged in the complaint to have committed an unlawful practice.

(b) A deposition may be taken before any officer of the department who has been authorized by the director to administer oaths and take testimony, or before any other person before whom a deposition may be taken in a civil action pursuant to subdivision (a) of Section 2018 subdivision (d) of Section 2026.010 of the Code of Civil Procedure. The person before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the person's direction and in the person's presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination shall be noted on the deposition by the person before whom the

deposition is taken, and evidence objected to shall be taken subject to the objections.

Comment. Subdivision (b) of Section 12963.3 is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2018(a)), which set forth guidelines for who was permitted to take a valid deposition outside the state. See 1961 Cal. Stat. ch. 192, § 1 (former Code Civ. Proc. § 2018); see also 1980 Cal. Stat. ch. 1023, § 5 (earlier version of Section 12963.3). Former Code of Civil Procedure Section 2018(a) was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2026(c). 1986 Cal. Stat. ch. 1334, §§ 1, 2. Section 12963.3.1(b) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2018(a) and the relocation. It is now amended to reflect that change, as well as a subsequent nonsubstantive reorganization of the provisions governing civil discovery. See 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

AMENDMENT ENACTED IN LATE SEPTEMBER AND OPERATIVE JANUARY 1, 2005

In 2004 legislation sponsored by the Fair Employment and Housing Commission ("FEHC"), the cross-reference to former Section 2018(a) was revised in a manner different from the Commission's recommendation. As of January 1, 2005, Government Code Section 12963.3(b) will refer to Code of Civil Procedure Section 2025, the lengthy provision governing the procedure for taking an oral deposition inside (not outside) California. See 2004 Cal. Stat. ch. 647, § 6. Subdivision (k) of that provision specifies who is permitted to serve as deposition officer for a deposition in California.

As of July 1, 2005, however, Section 2025 will be repealed as part of the Commission's nonsubstantive reorganization of the civil discovery provisions. The new provision corresponding to Section 2025(k) will be Code of Civil Procedure Section 2025.320.

It is thus clear that a further amendment of Government Code Section 12963.3 will be necessary to reflect the nonsubstantive reorganization. Due to the 2004 amendment, however, it is less obvious whether the statute should refer to the new provision governing who is permitted to serve as deposition officer for a deposition outside California (Section 2026.010(d)) or the new provision governing who is permitted to serve as deposition officer for a deposition in

California (Section 2025.320) or both. Upon realizing that this would be a question, the staff sought input from DFEH and FEHC.

NEW AMENDMENT REQUESTED BY DFEH AND FEHC

DFEH responded by explaining that “the efficiency of its investigative authority will be enhanced by allowing depositions to be taken before statutorily recognized officers both in and out of the State of California.” Email from P. Ramsey to B. Gaal (Nov. 2, 2004) (attached as an Exhibit). DFEH therefore requests that Government Code Section 12963.3 be revised to refer to both Code of Civil Procedure Section 2025.320(d) and Code of Civil Procedure Section 2026.010(d). *Id.* FEHC has said that it will defer to DFEH’s decision on this matter. Email from J. Frankfurt to B. Gaal (Nov. 1, 2004).

As best the staff can tell, the requested approach is unlikely to be controversial. We recommend that the Commission **revise its recommendation to incorporate the following amendment of Government Code Section 12963.3:**

Gov. Code § 12963.3 (amended). Depositions

SEC. __. Section 12963.3 of the Government Code is amended to read:

12963.3. (a) Depositions taken by the department shall be noticed by issuance and service of a subpoena pursuant to Section 12963.1. If, in the course of the investigation of a complaint, a subpoena is issued and served on an individual or organization not alleged in the complaint to have committed an unlawful practice, written notice of the deposition shall also be mailed by the department to each individual or organization alleged in the complaint to have committed an unlawful practice.

(b) A deposition may be taken before any officer of the department who has been authorized by the director to administer oaths and take testimony, or before any other person before whom a deposition may be taken in a civil action pursuant to ~~Section 2025~~ Sections 2025.320 and 2026.010(d) of the Code of Civil Procedure. The person before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the person’s direction and in the person’s presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination shall be noted on the deposition by the person before whom the deposition is taken, and evidence objected to shall be taken subject to the objections.

Comment. Subdivision (b) of Section 12963.3 is amended to reflect revision and relocation of the civil discovery provision

referenced in it (Code Civ. Proc. § 2025, pertaining to a deposition in California) and the civil discovery provision previously referenced in it (former Code Civ. Proc. § 2018(a), pertaining to a deposition outside the state). See 1961 Cal. Stat. ch. 192, § 1 (former Code Civ. Proc. § 2018); see also 1980 Cal. Stat. ch. 1023, § 5 (earlier version of Section 12963.3). Former Code of Civil Procedure Section 2018(a) was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2026(c). 1986 Cal. Stat. ch. 1334, §§ 1, 2. Section 12963.3(b) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2018(a) and the relocation. In 2004, however, it was revised to refer to the provision governing who is permitted to serve as a deposition officer for an oral deposition taken in California (Code Civ. Proc. § 2025). 2004 Cal. Stat. ch. ch. 647, § 6. It is now amended to restore the reference to the provision specifying who is permitted to serve as a deposition officer for an oral deposition taken outside California, and to reflect the nonsubstantive reorganization of the civil discovery provisions operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Conforming revisions should also be made in the preliminary part (narrative portion) of the Commission's recommendation.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

EMAIL FROM PAUL RAMSEY

Subject: AB 2870; AB 3081; Government Code section 12963.3
Date: Nov 2, 2004
From: Paul Ramsey <paul.ramsey@dfeh.ca.gov>
To: Barbara Gaal <bgaal@clrc.ca.gov>

Dear Ms. Gaal:

As I indicated in our earlier telephone conversation, the Department of Fair Employment and Housing believes the efficiency of its investigative authority will be enhanced by allowing depositions to be taken before statutorily recognized officers both in and out of the State of California. Therefore, it is the request of the Department that Government Code section 12963.3, which has been amended by AB 2870, be revised to refer to both Code of Civil Procedure section 2025.010, subdivision (d) and Code of Civil Procedure section 2026.320.

If you have any further questions, please do not hesitate to contact me.

Thank you for your attention to this matter.

Paul R. Ramsey, Chief Counsel
Department of Fair Employment and Housing
Tel. 916-227-2883