Study J-505 July 6, 2005

Memorandum 2005-26

Civil Discovery: Miscellaneous Issues

This memorandum addresses the following issues in the Commission's study of civil discovery:

- Service of a response to interrogatories (Code Civ. Proc. § 2030.260).
- Service of a response to an inspection demand (Code Civ. Proc. § 2031.260).
- Deposition in California for purposes of a proceeding pending outside California (Code Civ. Proc. § 2029.010).

The staff selected these issues from among the various discovery topics that have been (1) identified by the Commission for further investigation, (2) suggested by an interested person, or (3) uncovered by the staff in working on civil discovery issues. We are continuing to focus on what appear to be relatively noncontroversial issues of clarification and other technical matters. This approach has been successful thus far and is likely to be more productive than investigating a major reform that may not be politically viable. The approach is also consistent with the tenor of most of the comments submitted in connection with this study.

The following communications are attached for the Commission's consideration:

The staff is keeping track of other communications received in connection with this study. We will present those communications to the Commission as time permits.

(Prof. Weber's background report, introductory staff memoranda on civil discovery, and materials relating to the Commission's recommendation on *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004), are classified under Study J-503 in the

Commission's filing system. Materials relating to the Commission's recommendations on *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003), and *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004), are classified under Study J-504. For administrative convenience, we have created a new classification — Study J-505 — for the Commission's continuing work on substantive discovery reforms.)

SERVICE OF RESPONSE TO INTERROGATORIES (CODE CIV. PROC. § 2030.260)

Code of Civil Procedure Section 2030.260 (formerly, Code of Civil Procedure Section 2030(h)) governs service of a response to interrogatories. It treats an unlawful detainer action differently than any other type of case.

The wording of subdivision (a) is cumbersome and confusing:

> 2030.260. (a) Within 30 days after service of interrogatories, or in unlawful detainer actions within five days after service of interrogatories the party to whom the interrogatories are propounded shall serve the original of the response to them on the propounding party, unless on motion of the propounding party the court has shortened the time for response, or unless on motion of the responding party the court has extended the time for response. In unlawful detainer actions, the party to whom the interrogatories are propounded shall have five days from the date of service to respond unless on motion of the propounding party the court has shortened the time for response.
>
> (b) The party to whom the interrogatories are propounded shall also serve a copy of the response on all other parties who have appeared in the action. On motion, with or without notice, the court may relieve the party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome.

The staff was tempted to change this wording when preparing the Commission's proposed reorganization of the Civil Discovery Act, which was enacted in 2004 and became operative on July 1, 2005. We left it alone, however, to avoid any possible concern that the reorganization would have a substantive effect.

Now that the reorganization has become operative, it is a good time to clean up this provision. We suggest the following amendment:

Code Civ. Proc. § 2030.260 (amended). Service of response to interrogatories

2030.260. (a) Within 30 days after service of interrogatories, ~~or in unlawful detainer actions within five days after service of interrogatories~~ the party to whom the interrogatories are propounded shall serve the original of the response to them on the propounding party, unless on motion of the propounding party the court has shortened the time for response, or unless on motion of the responding party the court has extended the time for response. ~~In unlawful detainer actions,~~

(b) Notwithstanding subdivision (a), in an unlawful detainer action the party to whom the interrogatories are propounded shall have five days from the date of service to respond, unless on motion of the propounding party the court has shortened the time for response.

~~(b)~~ (c) The party to whom the interrogatories are propounded shall also serve a copy of the response on all other parties who have appeared in the action. On motion, with or without notice, the court may relieve the party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome.

Comment. Section 2030.260 is amended to improve clarity. This is not a substantive change.

If the Commission tentatively approves of this amendment (with or without modifications), we would include it in a draft of a tentative recommendation, which would be circulated for comment after being reviewed and approved by the Commission.

SERVICE OF RESPONSE TO INSPECTION DEMAND (CODE CIV. PROC. § 2031.260)

Code of Civil Procedure Section 2031.260 (formerly, Code of Civil Procedure Section 2031(i)) governs service of a response to an inspection demand. Like Section 2030.260, it is awkwardly worded:

> 2031.260. Within 30 days after service of an inspection demand, or in unlawful detainer actions within five days of an inspection demand, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand, the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. In unlawful detainer actions, the

party to whom an inspection demand is directed shall have at least five days from the dates of service of the demand to respond unless on motion of the party making the demand, the court has shortened the time for the response.

The following amendment would help to make the provision more clear:

> **Code Civ. Proc. § 2031.260 (amended). Service of response to inspection demand**
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> 2031.260. (a) Within 30 days after service of an inspection demand, ~~or in unlawful detainer actions within five days of an inspection demand,~~ the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand, the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. ~~In unlawful detainer actions,~~
>
> (b) Notwithstanding subdivision (a), in an unlawful detainer action the party to whom an inspection demand is directed shall have at least five days from the ~~dates~~ date of service of the demand to respond, unless on motion of the party making the demand, the court has shortened the time for the response.
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> **Comment.** Section 2031.260 is amended to improve clarity. This is not a substantive change.

If the Commission agrees, we would include this amendment in the same tentative recommendation as the suggested amendment of Section 2030.260.

DEPOSITION IN CALIFORNIA FOR PURPOSES OF A PROCEEDING PENDING OUTSIDE CALIFORNIA (CODE CIV. PROC. § 2029.010)

Code of Civil Procedure Section 2029.010 (formerly, Code Civ. Proc. § 2029), governs the procedure for deposing a witness in California for purposes of an action pending outside California:

> 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same

> process as may be employed for the purpose of taking testimony in actions pending in California.

As explained in the Reporter's Note to former Section 2029, "[t]his section authorizes the use of the subpoena power of the California Superior Courts to compel witnesses served within its borders to submit to a deposition in California for use in a lawsuit pending in another state or in a foreign nation." State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986 (Jan. 1986) (hereafter, "State Bar-Judicial Council Report"), at 59. Although a court in the forum state "may compel parties to the litigation to submit to discovery procedures through sanctions involving the pending action, non-parties outside the court's territory are generally not subject to its jurisdiction." Mullin, Jr., *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev. 1, 2 (1981) (footnotes omitted). Without a mechanism for enforcing discovery in the state where a non-party witness is located, the non-party witness "may escape the discovery process." *Id*. (footnote omitted). The cooperation that Section 2029 (now Section 2029.010) extends to those administering justice in other jurisdictions "undoubtedly affects their willingness to reciprocate with respect to cases pending in the courts of this state." State Bar-Judicial Council Report, *supra*, at 59.

Two people have suggested that the Commission clarify the details of the procedure a court is to use in applying Section 2029.010: Richard Best (a former Discovery Commissioner for San Francisco Superior Court) and Tony Klein (a process server). Their comments are quite similar.

Mr. Best writes that Section 2029

> causes some confusion and inconsistency for court clerks, courts and lawyers seeking to comply with what should be a simple procedure. It seldom rises to the level of a legal dispute but is one of those clitches that cause people to spend a lot of time.

Exhibit p. 4. According to Mr. Best, "[o]ften clerks will develop their own systems and procedures which will differ from court to court, clerk to clerk or time to time in the same court." *Id*. He says that this situation "is not a matter [of] any substance or controversy but should be clarified to achieve consistency and clear guidance." *Id*.

Similarly, Mr. Klein says that the procedure for taking a deposition in California for use elsewhere "is inadequately addressed and explained in CCP 2029, so each court handles this procedure differently." Exhibit p. 1. He has

found that the "procedures for receiving a commission, mandate, notice or order from another jurisdiction and issuing a subpoena vary widely from county to county, and blend older requirements with newer, phantom and made up ones." *Id*. In fact, Mr. Klein reports that "[m]ost court clerks, regardless of the county, have a 'doe in the headlights' look about them when I present the documents for filing, and end up calling in a supervisor, who then gives it a unique local spin." *Id*.

Mr. Klein illustrates his points with several examples:

> Some courts charge a full-blown filing fee, requiring a Civil Case Cover Sheet before they issue a California Subpoena; some courts will issue one based upon the presentation of a "mandate, writ, letters rogatory, letter of request, or commission ... issued out of any court of record in any other state" ... Santa Clara County, the most draconian, requires a local California attorney to sign the Civil Case Cover Sheet of any filed document in the court, per subpoena! So if 5 witnesses are being served, they collect $1500 and issue 5 different subpoenas with 5 different case numbers. One Alameda court clerk in Oakland refused to issue the subpoena because the witness worked in Pleasanton, then sent me packing to the Pleasanton branch 35 miles away.

Id. He comments that because the procedure is "obscure, and it is made up on the fly regularly, the result is maddening for me as a process server." *Id.*

Patrick O'Donnell of the Administrative Office of the Courts ("AOC") also encounters confusion regarding the proper procedure for deposing a California witness for purposes of an action pending outside the state. As the attorney who staffs the Discovery Subcommittee of the Judicial Council's Civil and Small Claims Advisory Committee, he receives several calls a year from out-of-state attorneys asking what procedure to use. He also gets some calls from court personnel on the same subject.

Points to clarify include:

- Should Section 2029.010 only apply when a litigant seeks to depose a "natural person" in California for purposes of a legal proceeding pending elsewhere, or should the provision also apply when a litigant seeks to depose an organization under the same circumstances?
- What must a litigant file with a California court to obtain a subpoena compelling a person to submit to a deposition in California for purposes of a legal proceeding pending outside California?

- Should a California court charge a filing fee for issuing such a subpoena? If so, what is the proper fee?
- If a California court issues a subpoena pursuant to Section 2029.010, does it need to open a court file with a California case number, or can it simply use the case number and caption from the out-of-state tribunal?
- Does a litigant need to retain California counsel to obtain a subpoena pursuant to Section 2029.010?
- Can a California or out-of-state attorney issue a subpoena pursuant to Section 2029.010, or must a California court issue such a subpoena?
- What happens if a discovery dispute arises when a litigant seeks to depose a person in California for purposes of a legal proceeding pending elsewhere? If a disputant seeks assistance from a California court (e.g., to enforce a subpoena issued by a California court pursuant to Section 2029.010), what procedural requirements apply?
- How does Section 2029.010 apply to a deposition on notice or by agreement?

We address each of these points in order below, and then present a proposed amendment of Section 2029.010, which reflects our recommendations on the various issues. First, however, we discuss our efforts to find useful guidance in the laws of other jurisdictions.

Laws of Other Jurisdictions

Two Uniform Acts contain a model provision outlining the procedure a state should follow when a litigant wants to depose a witness in the state for purposes of a legal proceeding pending outside the state. Unfortunately, however, neither of these Uniform Acts sets forth a widely-adopted procedure that addresses the points of confusion listed above. Our research also suggests that there is wide variation in how other jurisdictions handle this situation.

(Ariana Gallisa, a student at Stanford Law School, assisted the staff in conducting this research. We are grateful for her help.)

Uniform Foreign Depositions Act

The Uniform Foreign Depositions Act ("UFDA") was approved in 1920 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). The Prefatory Note to the UFDA explains that the "taking of depositions in one State to be used in another is so common and so

often done" that a uniform law on the subject is needed. The key provision in the UFDA states:

> § 1. **Authority to Act.** — Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

This provision makes clear that "in taking the testimony by deposition or otherwise from another State or foreign jurisdiction, the same process as is allowed in the State where the deposition is to be taken for cases pending therein shall apply." UFDA Prefatory Note. Thus, "when a lawyer in one State sends a deposition to take testimony in another State, the officer receiving it knows exactly how to act in order to have the testimony expeditiously and properly taken." *Id*. The UFDA does not provide more precise guidance on the procedure for taking a deposition in one state to be used in another state.

Quite a number of states have adopted the UFDA or a variant of it. *See, e.g.*, Fla. Stat. ch. 92.251; Ga. Code Ann. § 24-10-110 to -112; La. Rev. Stat. Ann. § 13:3821 to 13:3822; Md. Code Ann., Cts. & Jud. Proc. §§ 9-401 to 9-403; Nev. Rev. Stat. 53.050-53.070; N.H. Rev. Stat. Ann. §§ 517:18, 517-A:1; N.Y. C.P.L.R. 3102(e); Ohio Rev. Code Ann. § 2319.09; Ore. R. Civ. Proc. 38(C); S.D. Codified Laws § 19-5-4; Tenn. Code Ann. § 24-9-103; Va. Code Ann. § 8.01-411 to -412.1; Wyo. Stat. Ann. § 1-12-115; *see also* Mo. Stat. Ann. § 492.270; Mo. R. Civ. Proc. 57.08; Neb. Disc. R. 28(e); N.D. Rule Civ. Proc. 45(a)(3); S.C. R. Civ. Proc. 28(d); Tex. Civ. Prac. & Rem. Code § 20.002; Utah R. Civ. Proc. 26(h). Of these statutes and court rules, only the South Carolina provision includes significant detail regarding the procedure to be followed:

> 28. ... (d) **Depositions or Production in Out-of-State Actions.**
> (1) When the deposition of a witness or production of documents or other things, is to be done in this State for use in an out-of-state action or proceeding, *an attorney, licensed to practice law in this State, or the clerk of court, may issue a subpoena,* including a subpoena duces tecum, compelling the attendance of such witness at that deposition, or the production of documents or other things pursuant to this rule and subject to all of the requirements of Rule 45 and Rule 11, *only after payment of the filing fee* set by Administrative Rule, and *after filing with the Clerk of Court:*

(A) A certified copy of any mandate, writ, or commission issued by a court of record in any other state, territory, district, or foreign jurisdiction directing that such deposition be taken or documents or other things produced; or

(B) a certified copy of a notice or written agreement filed in a court of record in any other state, territory, district, or foreign jurisdiction directing that such deposition be taken or documents or other things produced.

(2) Such witness may be compelled to attend a deposition only in the county where he resides, where he is employed, or where he transacts business in person.

(3) Such witness or a party may obtain a protective order pursuant to Rule 26(c) upon application to the court in the county from which the subpoena is issued.

(4) If such witness fails to obey the subpoena or refuses to answer any question propounded upon oral examination, the provisions of Rule 37(a) and (b) shall apply, and the party requesting the deposition shall make application for such order to the court of the county from which the subpoena was issued.

(5) Such witness is entitled to the same compensation as provided to a witness pursuant to Rule or statute.

(6) The clerk of court, shall, upon receipt of the above described filing fee, file all papers received by him pursuant to this Rule.

S.C. R. Civ. Proc. 28(d) (emphasis added). According to Westlaw, the filing fee for obtaining a subpoena pursuant to this provision is $50.

Code of Civil Procedure Section 2029.010 is also similar to the UFDA. Differences between the California provision and the UFDA include:

- The UFDA applies if a "mandate, writ or commission" is issued by an out-of-state court. The California provision applies in these circumstances, but also applies if an out-of-state court issues letters rogatory or a letter of request.

  (A "mandate" is a judicial command directing an officer to enforce a judgment, sentence, or decree. A "writ" is a written court order directed to a sheriff or other officer, who must return it to the court with a brief statement of what the officer has done pursuant to the writ. A "commission" is an authorization or order to do some act, such as to take a deposition. "Letters rogatory" is a formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court be formally taken there under its direction and transmitted to the first court for use in the pending action. A "letter of request" is a request by a court in one country to a

competent authority in another country (usually a court) to obtain evidence or perform some other judicial act.)

- The UFDA applies to "testimony of a witness" in California. Section 2029.010 expressly covers both an oral and a written deposition in California, but the deposition must be of a "natural person."
- The UFDA does not expressly cover compelling a witness to produce documents or other tangible items. The California provision does.

Uniform Interstate and International Procedure Act

In 1962, NCCUSL approved the Uniform Interstate and International Procedure Act ("UIIPA"), which was meant to supersede the UFDA and two other uniform acts. Section 3.02 of the UIIPA governs the taking of testimony within a state for use in an action pending elsewhere. It provides:

> **3.02. Assistance to Tribunals and Litigants Outside this State**
>
> (a) [A court] [The ____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.
>
> (b) A person within this state may voluntarily give his testimony or statement or produce documents or other things for use in a proceeding before a tribunal outside this state in any manner acceptable to him.
>
> (The Comment to this provision explains that the bracketed language at the beginning of subdivision (a) "is designed to give the enacting state a choice between authorizing all of its courts to render assistance or restricting these functions to one or more designated courts.")

Important differences between this provision and the UFDA are:

- The UFDA requires the witness' testimony to be taken "in the same manner and by the same process and proceeding" as testimony is taken for a proceeding pending in the state where the witness testifies. The UIIPA provision allows a court to use this approach, but also allows the court to use the procedure of the jurisdiction in which the action in pending, or some other procedure. If court does not specify a procedure, the parties are to use the procedure of the state in which the witness testifies.
- The UFDA does not clearly address whether testimony can be compelled for purposes of an administrative proceeding pending in another jurisdiction, or only for purposes of a court proceeding. By using the term "tribunal," the UIIPA provision "is intended to encompass any body performing a judicial function." UIIPA § 3.02 Comment.
- Under the UFDA, a witness may be compelled to testify "[w]henever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state." Under the UIIPA provision, an order compelling testimony "may be made upon the application of any interested person or in response to a letter rogatory."
- The UFDA does not expressly cover compelling a witness to produce documents or other tangible items. The UIIPA provision does.

Although the UIIPA has been around since 1962, only a few states have adopted or essentially adopted Section 3.02 of that Act. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326. Louisiana has adopted UIIPA Section 3.02, but has also kept its version of the UFDA. See La. Rev. Stat. Ann. §§ 13:3821 to 13:3822, 13:3824.

Other Laws

Many states have provisions that do not track either the UFDA or UIIPA Section 3.02. There is great variety among these. See Ala. R. Civ. Proc. 28(c): Alaska R. Civ. Proc. 27(c); Ariz. R. Civ. Proc. 30(h); Ark. R. Civ. Proc. 28(c); Conn. Gen. Stat. § 52-155; Conn. R. Superior Ct. Civ. Proc. § 13-28; Del. Code ann. tit. 10, § 4311; Haw. Rev. Stat. § 624-27; Idaho R. Civ. Proc. 28(e); Ill. Supreme Ct. R. 204(b); Iowa Code § 622.84; Kan. Stat. Ann. § 60-228(d); Ky. Rev. Stat. Ann. § 28.03; Me. R. Civ. Proc. 30(h); Minn. R. Civ. Proc. 45.04; Miss. R. Civ. Proc. 45(a)(2); Mont. R. Civ. Proc. 28(d); N.J. R. Civ. Prac. 4:11-4; N.M. Stat. Ann. § 38-8-1; N.C. R. Civ. Proc. 28(d); R.I. Gen. Laws § 9-18-11; Vt. Stat. Ann. tit. 12, § 1248;

Wash. Superior Ct. Civ. R. 45(d)(4); W. Va. R. Civ. Proc. 28(d); Wisc. Stat. § 887.24; see also Fitlow, *How to Take an Out-of-State Deposition*, Utah Bar J. (Feb./March 2001) (explaining that "each state has its own peculiar requirements"); Mullin, Jr., *supra*, at 52 (noting "the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities").

Some of these provisions establish a simple procedure for taking a witness' deposition for purposes of an action pending elsewhere. For example, Montana's rule says that "[w]henever the deposition of any person is to be taken in this state pursuant to the laws of another state of the United States or of another country for use in proceedings there, the district court of the county where the witness is to be served, upon proof that notice has been duly served, may issue the necessary subpoenas." Mont. R. Civ. Proc. 28(d). Mississippi's provision leaves no doubt that the clerk of court can issue a subpoena; a judge need not be involved. Miss. R. Civ. Proc. 45(a)(2); see also Ariz. R. Civ. Proc. 30(h).

Other provisions require a more onerous procedure. For example, Illinois requires the filing of a petition for an order compelling a witness to testify, which is to be heard by the court. Ill. Supreme Ct. R. 204(b). Similarly, Maine has a detailed statute requiring retention of local counsel and commencement of an action in Maine:

> 30. ... (h) **Depositions for Use in Foreign Jurisdictions.**
>
> (1) The deposition of any person may be taken in this state upon oral examination pursuant to the laws of another state or of the United States or of another country for use in proceedings there.
>
> (2) If a party seeking to take a deposition or depositions under this subdivision files with the clerk in the county where any deponent resides or is employed or transacts business in person an application as provided in paragraph (3) of this subdivision,
>
> (i) *the clerk shall docket the application as though it were a pending action* under these rules and may issue a subpoena or subpoenas as provided in Rule 45, in aid of the taking of the deposition of any person named or described in the application;
>
> (ii) whether or not a subpoena has issued, any deponent or party may apply for and be granted any appropriate relief as provided in subdivision (d) of this rule and in Rules 37(a) and 37(b)(1).
>
> (3) The application required by paragraph (2) of this subdivision shall bear the same title as the action or proceeding in the court where it is pending and shall set forth
>
> (i) The name and location of the court in which the action or proceeding is pending.

(ii) The title and docket or other identifying number of the action or proceeding in the court where pending.

(iii) A brief statement of the nature of the action or proceeding and the provisions of the laws of the jurisdiction where the action or proceeding is pending which authorize the deposition.

(iv) The time and place for taking each deposition.

(v) The name and address of each person to be examined, if known, and if the name is not known a general description sufficient to identify the person or the particular class or group to which the person belongs.

(vi) If a subpoena duces tecum is to be served, a designation of the materials to be produced.

(vii) A statement that timely and adequate notice of the taking has been given to all opposing parties either in the manner required by the laws of the jurisdiction where the action or proceeding is pending or in the manner provided in paragraph (1) of subdivision (b) of this rule.

The application shall be signed by a member of the bar of this state, and the member's signature constitutes a certification by the member that to the best of the member's knowledge, information, and belief all statements and supporting facts contained therein are true. The sanctions provided by Rule 11 are applicable to the certification.

Me. R. Civ. Proc. 30(h) (emphasis added); see also Alaska R. Civ. Proc. 27(c) (subpoena issued by court on motion); Del. Code Ann. tit. 10, § 4311 (subpoena duces tecum only issued on order of court).

Arizona's provision is also noteworthy for the level of detail it includes:

30(h). When an action is pending in a jurisdiction foreign to the State of Arizona and a party or a party's attorney wishes to take a deposition in this state, it may be done and a subpoena or subpoena duces tecum may issue therefor from the Superior Court of this state. The party or the attorney shall file, as a civil action, an application, under oath, captioned as is the foreign action, which contains the following information:

(a) The caption of the case and the court in which it is pending including the names of all parties and the names of the attorneys for the parties;

(b) References to the law of the jurisdiction in which the action is pending which authorized the taking of the deposition in this state and such facts as, under that law, must appear to entitle the party to take the deposition and have a subpoena issued for the attendance of the witness;

(c) A certified copy of the notice of taking deposition, order of the court authorizing the deposition, commission or letters rogatory

> or such other pleadings as, under the law of the foreign jurisdiction, are necessary in order to take the deposition;
>
> (d) A description of the notice given to other parties and a description of the service of the application to be made upon other parties to the action.
>
> Upon the filing of the application, the clerk of the Superior Court of the county in which the deposition is to be taken shall forthwith issue the subpoena or subpoena duces tecum as requested by the application. An affidavit of service of the application upon all other parties to the civil action shall be filed with the clerk of the court.
>
> No further proceedings in the Superior Court of the State of Arizona are required but any party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure.

Ariz. R. Civ. Proc. 30(h).

New Jersey's provision is short, but likewise provides guidance on key procedural matters:

> Whenever the deposition of a person is to be taken in this State pursuant to the laws of another state, the United States, or another country for use in connection with proceedings there, the Superior Court may, on ex parte petition, order the issuance of a subpoena to such person in accordance with R. 4:14-7. The petition shall be captioned in the Superior Court, Law Division, shall be designated "petition pursuant to R. 4:11-4" and shall be filed in accordance with R. 1:5-6(b). It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to N.J.S.A. 22A:2-7.

N.J. R. Civ. Prac. 4:11-4.

The Rhode Island provision stands out because it is deferential to the deposition procedures of the state or county in which the action is pending. R.I. Gen. Laws § 9-18-11. Wisconsin's statute is unusual because it applies only if there is reciprocity: The state in which the action is pending must have a law "requiring persons within its borders to give their testimony by deposition in actions pending in Wisconsin." Wisc. Stat. § 887.24. The remaining provisions take a hodgepodge of different approaches.

Lessons From the Laws of Other Jurisdictions

What is to be gleaned from the laws of other jurisdictions on this subject? There does not seem to be any uniformity in how other states handle the matters that require clarification here in California. Although the UFDA has been enacted

in many states, it does not address those points. The Commission will have to proceed without the benefit of a widely-adopted statute that could serve as a model and a basis for uniformity. Instead, the Commission should focus solely on developing a proposal that is the best policy for California. In doing so, however, the Commission may be able to gain insight from some of the provisions used in other jurisdictions.

Type of Deponent

The first issue Mr. Best raises concerns the type of deponent to which Section 2029.010 applies. By its terms, the statute is limited to "the oral or written deposition of a *natural person* in California ...." (Emphasis added.) Mr. Best finds this illogical and contrary to his perception of what is actually done: "[I]t seems to make no sense to limit the procedure to natural persons and it is probably not done in practice; 'natural' should be amended to 'any.'" Exhibit p. 5.

The Reporter's Note to former Section 2029 explains this limitation as follows:

> Subdivision (a) restates and slightly amplifies the provisions of the opening paragraph of present CCP § 2023. This paragraph embodies the Uniform Foreign Deposition Act. The present statute speaks of deposing "witnesses." In actions pending in California courts, depositions may now be taken from both natural persons and from organizations, who must designate persons to respond on their behalf. *It is unclear whether the present statute would permit a deposition of an organization to be taken for use in an action pending elsewhere. Rather than burdening California courts with inquiries into this facet of foreign law, the Commission decided to confine proposed Section 2029 to depositions of natural persons*.

State Bar-Judicial Council Report, *supra*, at 58-59 (emphasis added). The drafters' concerns seem to have been that (1) there might be one or more jurisdictions that do not permit a deposition of an organization, (2) a litigant might attempt to avoid that restriction by deposing an organization in California instead of in the forum state, and (3) a California court should not have to research the law of another jurisdiction to prevent such subterfuge.

Although we have not researched this matter, the staff suspects that these concerns are less valid than in the past. There probably are few if any jurisdictions that do not permit a litigant to depose an organization. We will attempt to confirm this when time permits.

Based on what we know so far, we tentatively agree with Mr. Best that limiting Section 2029.010 to a natural person probably is not good policy. No

other state appears to follow this approach. In conducting out-of-state litigation, it may be just as important to depose an organization in California as it is to depose an individual here. It may thus make sense to **revise Section 2029.010 to apply to the oral or written deposition of any person in California.**

What to File With the California Court to Obtain a Subpoena

Mr. Best asks, "What if anything must be filed with what California court to have the court issue a subpoena?" Exhibit p. 5. In his experience, the answer varies from court to court. "Clerks may require a formal petition to the court with or without a hearing, may require only the opening of a court file in that court to obtain a subpoena, may or may not require the filing of the original commission issued by the foreign jurisdiction, or may issue a subpoena using the foreign jurisdiction's case number and not require the opening of a file unless court action is required to compel compliance." *Id.* Mr. Best points out that use of these "different procedures that may not be published ... can cause unnecessary confusion, delay and expenses to be incurred." *Id*. at 4-5. He thinks the procedure "should be clear and uniform" instead. *Id.* at 5. He suggests a simple procedure: "The Clerk shall issue the subpoena upon request of a party and presentation of the original or certified copy of the document from a foreign jurisdiction requesting or authorizing the discovery in a pending matter." *Id*. at 6.

Mr. Klein also believes that the procedure for obtaining a subpoena pursuant to Section 2029.010 should be simple:

> The procedure could require [simply a] face page describing any one of the required documents from the foreign court, specified in the statute. The face page should comport with the requirements of California Rule of Court 201. (Perhaps a Judicial Council form?) ... CCP 2029 states that "Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court", THAT gives rise to the court's ability and authority to issue a California subpoena.... The out of state document triggers the authority in the spirit of comity and reciprocal inter-state cooperation to facilitate discovery.

Exhibit p. 2 (emphasis in original).

Based on what we know so far, the staff tends to agree with Messrs. Best and Klein that the procedure for obtaining a subpoena pursuant to Section 2029.010 should be simple. It is true that some states require a hearing before a judge. *See* pp. 12-13, *supra*; Mich. R. Civ. Proc. 2.305(E); *see also* Ala. R. Civ. Proc. 28(c) (subpoena issued by judge); Ky. R. Civ. Proc. 28.03 (same); N.C. R. Civ. Proc.

28(d) (same); Wash. Superior Ct. Civ. R. 45(d)(4) (same). But other states use a less complicated approach. *See* p. 12, *supra*; *see also* N.D. R. Civ. Proc. 45(a)(3) (subpoena issued by clerk); Utah R. Civ. Proc. 26(h) (same). It does not seem necessary to subject litigants to the expense of a court hearing, or to consume the attention of a judicial officer, just for issuance of a subpoena. If a discovery dispute arises, then a judge or other judicial officer may need to be involved. **To obtain a subpoena pursuant to Section 2029.010, however, we think it should be sufficient to file a properly completed application with a court clerk.**

As suggested by Mr. Klein, we further recommend that **the application be on a form prepared by the Judicial Council.** This would streamline the process for litigants, court clerks, and process servers like Mr. Klein. The application form should require the applicant to **attach a true and correct copy of the mandate, writ, letters rogatory, letter of request, commission, or other document authorizing the deposition in the out-of-state action.** Aside from this restriction, the content of the form should be left to the Judicial Council to develop, perhaps drawing on the requirements stated in some of the more detailed statutes from other states. It would be advisable, however, to **set a statutory deadline for preparation of the form.**

It also seems advisable to **have the Judicial Council prepare a form subpoena for use in this situation.** Again, the details of the subpoena should be left to the Judicial Council to develop, taking into consideration suggestions such as those of Mr. Best (see Exhibit p. 6).

Filing Fee

A related issue is how much to charge for obtaining a subpoena under Section 2029.010. Mr. Klein believes that the fee should be modest, far less than the fee for first appearance, which some courts charge in this situation:

> A modest filing fee should be stated or referenced in the Government Code. The impact on the court does not justify the tendering of a new first appearance fee of $300.00. The fee should be between $5.00 and $20.00. (Florida manages with a $5.00 fee.) The fee as specified in GC § 26850.1 would make the fee $6.00, a commensurate fee for reciprocal judicial assistance.

Exhibit pp. 2-3; *see also id.* at 2.

The Government Code provision referenced by Mr. Klein (Section 26850.1) specifies a $6 filing fee for "filing and indexing all papers for which a charge is not elsewhere provided, other than papers filed in actions or special proceedings,

official bonds, or certificates of appointment ....” This provision would be repealed by the Judicial Council’s proposal on Uniform Civil Filing Fees, which is pending in the Legislature as Assembly Bill 1742 (Committee on Judiciary). The corresponding new provision would be proposed Government Code Section 70626(b)(10).

The proposal on Uniform Civil Filing Fees does not include a provision specifically stating the fee for issuance of a subpoena under Section 2029.010. It does, however, set a $20 fee for obtaining a commission to take a deposition outside California (proposed Government Code Section 70626(b)(5)). It seems reasonable to **charge the same $20 fee for issuing a subpoena to take a deposition in California for purposes of a proceeding pending elsewhere.** This fee should be expressly stated by statute.

Mr. Klein says that

> an application fee should be assessed only once. The court should issue a regular or miscellaneous case number. Multiple and subsequent subpoenas should be issued using the same file number and should not require additional fees.

Exhibit p. 3. The staff is not convinced that the fee for issuing multiple subpoenas should be the same as for issuing a single subpoena. It is more work for a clerk to issue several subpoenas than it is to issue only one subpoena. We would **charge the $20 fee for every subpoena issued.** The statute specifying the filing fee should make this clear.

Retention of Local Counsel

According to Mr. Klein, some California courts require a party to hire local counsel to obtain a subpoena under Section 2029.010, while others do not. Exhibit p. 1. He is convinced that requiring local counsel is unnecessary and sometimes harmful:

> I explain the procedure to out-of-state counsel, letting them know that the filing fee is $300 for issuing a subpoena in some counties but not others, and an [additional] $100-$200 for a local lawyer to sign off on it when they are not co-counsel, associate counsel, or will be attending the proposed deposition; but are to become California counsel of record!
>
> What normally happens is the deponent is served, he or she shows up for a deposition, both sides fly in and take the deposition before a local court reporter, and at the end, everybody goes home.

> Sometimes all the outside counsel needs are copies of records, authenticated under California law for use in the out of state case.
>
> The procedure has never required local counsel to be involved. Yet when a local court requires it, they arbitrarily add $100-$300 unnecessarily to the bill.
>
> This has a chilling effect on discovery; not so much in a Phen-Phen or securities case, but the smaller PI, contract or any regular case.

Exhibit pp. 1-2.

The policy concerns Mr. Klein raises are valid. It is important to minimize litigation expenses, particularly in a small case. Unnecessarily increasing the cost of taking a deposition, as by needlessly requiring a party to hire local counsel, may cause a party to forego the deposition and perhaps ultimately lead to an unjust result.

But there are competing policy considerations. In particular, because parties are to conduct a deposition under Section 2029.010 in the same manner as a deposition in an action pending in California, it may be useful to have someone familiar with California deposition procedures involved in the deposition. Failure to do so might even amount to unauthorized practice of law. The staff has not yet researched this point but we are aware that there is an extensive body of case law and literature on this subject. **We need to look into this further.** Regardless of what the Commission ultimately decides on this point, **Section 2029.010 should expressly say whether local counsel is required.**

Creation of a Court File

A further issue is whether a court must open a California court file with a California case number whenever it issues a subpoena pursuant to Section 2029.010. Mr. Best believes this is unnecessary. He suggests that the "case number from the foreign jurisdiction and the identity of the foreign jurisdiction ... be used on the subpoena in lieu of a California case number." Exhibit p. 6.

The staff is inclined to **leave this matter to the Judicial Council or individual courts to decide,** rather than addressing it by statute. It should be enough to require a person to file an application with a court before the court issues a subpoena under Section 2029.010. The Judicial Council and the individual courts are best-situated to determine what type of file the court should create to contain the application. It is appropriate to give them flexibility to account for the

different filing systems and administrative procedures used in courts throughout the state.

Issuance of a Subpoena By Counsel

Mr. Best points out that under Code of Civil Procedure Section 1985(c), an attorney can issue a subpoena. He questions how that rule applies to a deposition that is conducted in California for purposes of a proceeding pending elsewhere:

> Often a California lawyer is contacted by out of state counsel to set up the deposition in California. Can the California lawyer issue the subpoena? Must he formally become counsel of record? Can the out of state lawyer issue the subpoena? Does a lawyer become counsel of record by placing its name on the subpoena or making a motion to enforce it? It would be helpful to clarify what formalities and what connection to the case a lawyer must have in order to issue the subpoena. It may be that the procedure is clear and that a lawyer cannot issue a subpoena in this circumstance but must obtain one from the clerk. If so, it may be desirable to change that procedure and allow any active member of the bar to "appear", issue a subpoena and seek to enforce it. There may be no need to involve the court in many cases with the attendant but unnecessary expense to government and the parties. If enforcement is sought, a file can be opened and fee collected at that point.

Exhibit p. 5. Mr. Best suggests amending Section 2029.010 to authorize a California attorney acting as local counsel to issue a subpoena or subpoena duces tecum under that section: "The Clerk of the Superior Court in any county *or an attorney licensed to practice law in California who is an active member of the California state bar and who has been retained to represent a party for this purpose,* may issue a subpoena or subpoena duces tecum in accord with this section." *Id.* at 6 (emphasis added).

The staff is inclined to agree that **a California attorney retained to represent a party in an out-of-state proceeding should be able to issue a subpoena or subpoena duces tecum directed to a California witness for purposes of that proceeding.** The statute should not go so far, however, as to permit an out-of-state attorney to issue a California subpoena or subpoena duces tecum. A few states do permit an out-of-state attorney to issue a subpoena under the state's authority that is directed to a witness within the state. *See* Iowa Code Ann. § 622.84(1); Mo. Stat. Ann. § 492.270; *Wiseman v. American Motor Sales Corp.*, 479 N.Y.S.2d 528, 533 (1984) (interpreting Missouri law). But it seems reasonable to

require the involvement of either a California court or a California attorney to issue process under the authority of the State of California.

Discovery Dispute

If a dispute arises regarding discovery conducted in California for purposes of a proceeding pending elsewhere, it may be necessary for the deponent or a party to the proceeding to seek relief in a California court. Section 2029.010 does not provide guidance on the proper procedure to follow in such circumstances.

Mr. Best suggests that a subpoena issued under Section 2029.010 be enforceable by filing a petition in the superior court of the county in which the deposition is to be taken. Exhibit p. 6. Mr. Klein makes clear that if a California court has to resolve a discovery dispute, it would be appropriate to charge a first appearance fee :

> There is no statute authorizing the $300 filing fee [for issuance of a subpoena under Section 2029.010].... If the court is necessary to resolve issues over relevance, a protective order, or to compel insufficient production, then the court would be entitled to a filing fee. Parties would then appear pro hac vice or retain local counsel. This happens 1 in 200-300 times.

Exhibit p. 2.

The staff **agrees with these suggestions.** The Commission should also make clear that if another dispute later arises relating to discovery conducted in the same county for purposes of the same proceeding, **it is not necessary to pay another first appearance fee.**

Deposition on Notice or Agreement

Mr. Best raises a concern regarding how Section 2029.010 applies when a party to an out-of-state proceeding seeks to depose a California witness by properly issued notice or by agreement:

> In California and presumably in most foreign jurisdictions, a party may notice the deposition of another party to occur in another jurisdiction. Although the C.C.P. § 2029 provides for depositions in out of state cases to be taken in California on notice, it does not appear that recourse could be had to California courts to compel discovery in the absence of a subpoena. This renders the notice provision somewhat meaningless as far as California law and procedure is concerned. If a deposition is properly noticed to occur in California, it would seem appropriate to provide an alternative forum for resolving disputes here just as Federal Courts

> require disputes to be resolved in the local court. Thus, in the case of foreign state litigation where one party notices a deposition under that state's law to take place in California and most likely involving a California resident as a deponent, it may be reasonable to allow both the deponent and the parties to litigate disputes arising out of that deposition in California courts.

Exhibit pp. 5-6.

The staff does not interpret Section 2029.010 the same way as Mr. Best. The statute says that "whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, *and by the same process* as may be employed for the purpose of taking testimony in actions pending in California." (Emphasis added.) Under Code of Civil Procedure Section 2025.280, a deposition notice is sufficient to compel a party to a lawsuit to attend a deposition; a subpoena is not needed. Thus, we believe that the "same process" — i.e., a deposition notice — would suffice for a California court to compel a party to testify under Section 2029.010.

Nonetheless, the fact that Mr. Best raised this issue and interpreted the statute differently indicates that **clarification of this point would be useful.** Section 2029.010 should be amended to make clear that if a party to a proceeding pending in another jurisdiction seeks to depose a witness in California by properly issued notice or by agreement, it is not necessary for that party to have obtained a California subpoena to be able to compel the witness' testimony in a California court.

Perhaps, however, it should be necessary to retain California counsel before deposing a witness in California by properly issued notice or agreement in a proceeding pending elsewhere. **We will look into this point and raise it again later.**

Proposed Legislation

The staff's recommendations in this memorandum could be implemented by **amending Section 2029.010 along the following lines:**

> **Code Civ. Proc. § 2029.010 (amended). Deposition in California for purposes of proceeding pending outside California**
>
> 2029.010. (a) Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required

to take the oral or written deposition of a ~~natural~~ person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

(b) Except as provided in subdivision (d), to obtain a subpoena or subpoena duces tecum under this section, the party seeking a deposition shall file an application with the superior court of the county in which the deposition is to be taken. On or before [insert date], the Judicial Council shall prepare an application form to be used for this purpose. The application form shall require that the mandate, writ, letters rogatory, letter of request, commission, or other document authorizing the deposition be attached to the application. As soon as the application form becomes available, every applicant shall use the form.

(c) On receiving a properly completed application under this section, and payment of the filing fee specified in Section [insert number] of the Government Code, the clerk of court shall issue the requested subpoena or subpoena duces tecum. On or before [insert date], the Judicial Council shall prepare a subpoena form to be used for this purpose. As soon as the subpoena form becomes available, it shall be used for every subpoena or subpoena duces tecum issued under this section.

[*Subdivision (d): Alternative A*]

(d) To obtain a subpoena or subpoena duces tecum under this section, it is not necessary to retain an attorney licensed to practice in this state. If a party to a proceeding pending in another jurisdiction chooses to retain an attorney licensed to practice in this state, who is an active member of the State Bar, and the requirements of subdivision (a) are satisfied, that attorney may issue a subpoena or subpoena duces tecum under this section.

[*Subdivision (d): Alternative B*]

(d) To obtain a subpoena or subpoena duces tecum under this section, it is necessary to retain an attorney licensed to practice in this state who is an active member of the State Bar. If the requirements of subdivision (a) are satisfied, that attorney may issue a subpoena or subpoena duces tecum under this section.

(e) If a dispute arises relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding may file a petition for a protective order or to compel discovery or obtain other appropriate relief in the superior court of the county in which the discovery is being conducted. On filing the petition, the petitioner shall pay a first appearance fee as specified in the Government Code. On responding to the petition, the responding party shall pay a first appearance fee as specified in the Government Code. If another

dispute later arises relating to discovery conducted in the same county for purposes of the same proceeding, it is not necessary to pay another first appearance fee.

(f) If a party to a proceeding pending in another jurisdiction seeks to depose a witness in this state by properly issued notice or by agreement, it is not necessary for that party to obtain a subpoena or subpoena duces tecum under this section to be able to seek relief under subdivision (e).

Comment. The first sentence of Section 2029.010 (new subdivision (a)) is amended to apply to an organization located in California, not just an individual found in the state.

Subdivisions (b)-(d) are added to clarify the procedure for obtaining a California subpoena or subpoena duces tecum to depose a witness in this state for purposes of a proceeding pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivision (e) is added to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

Subdivision (f) is added to clarify how this section applies when a party to a proceeding pending in another jurisdiction seeks to depose a witness in this state by properly issued notice or by agreement.

This draft includes two versions of subdivision (d), relating to retention of local counsel. As previously discussed, we need to do further research on this point.

In addition to amending Section 2029.010, it would also be necessary to revise the Government Code to specify the filing fee for obtaining a subpoena under this statute. We have not attempted to draft that revision, or to be precise about the location of the first appearance fees referenced in proposed Section 2029.010(e), because the Judicial Council's proposal on Uniform Civil Filing Fees (Assembly Bill 1742 (Committee on Judiciary)) is still pending in the Legislature.

If the Commission approves the reforms recommended in this memorandum (as is, or with modifications), the staff will prepare a draft of a tentative recommendation, to be reviewed and approved by the Commission before being circulated for comment.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

COMMENTS OF TONY KLEIN

To: bgaal@clrc.ca.gov
Date: Wednesday, September 8, 2004
Subject: Discovery Statutes — Foreign Deposition Subpoenas
From: Tony Klein <psinstitute@juno.com>

Barbara:

I have spent a moderate amount of time plowing through the Law Revision Commission postings and don't see if you have discussed incoming foreign deposition subpoenas for cases pending in another state.

The procedure is inadequately addressed and explained in CCP 2029, so each court handles this procedure differently. (CCP 2029 follows at the end of this post>)

I have researched the legislative history of this statute back to 1872. The procedures for receiving a commission, mandate, notice or order from another jurisdiction and issuing a subpoena vary widely from county to county, and blend older requirements with newer, phantom and made up ones.

Some courts charge a full-blown filing fee, requiring a Civil Case Cover Sheet before they issue a California Subpoena; some court will issue one based upon the presentation of a “mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state” .... Santa Clara County, the most draconian, requires a local California attorney to sign the Civil Case Cover Sheet of any filed document in the court, per subpoena! So if 5 witnesses are being served, they collect $1500 and issue 5 different subpoanes with 5 different case numbers. One Alameda court clerk in Oakland refused to issue the subpoena because the witness worked in Pleasanton, then sent me packing to the Pleasanton branch 35 miles away.

Most court clerks, regardless of the county, have a “doe in the headlights” look about them when I present the documents for filing, and end up calling in a supervisor, who then gives it a unique local spin.

It's, admittedly, an obscure procedure.

But because its obscure, and it is made up on the fly regularly, the result is maddening for me as a process server. I explain the procedure to out-of-state counsel, letting them know that the filing fee is $300 for issuing a subpoena in some counties but not others, and an

addtionally $100-$200 for a local lawyer to sign off on it when they are not co-counsel, associate counsel, or will be attending the proposed deposition; but are to become California counsel of record!

What normally happens is the deponent is served, he or she shows up for a deposition, both sides fly in and take the deposition before a local court reporter, and at the end, everybody goes home. Sometimes all the outside counsel needs are copies of records, authenticated under California law for use in the out of state case.

The procedure has never required local counsel to be involved. Yet when a local court requires it, they arbitrarily add $100-$300 unnecessarily to the bill.

This has a chilling effect on discovery; not so much in a Phen-Phen or securities case, but the smaller PI, contract or any regular case.

The filing fee is unnecessary and unsupported by any statute. There is no statute authorizing the $300 filing fee. The impact on the court is minimal at best. If the court is neccesary to resolve issues over relevance, a protecitve order, or to compel insufficient production, then the court would be entitled to a filing fee. Parties would then appear pro hac vice or retain local counsel. This happens 1 in 200-300 times.

Therefore, I was hoping that in the quest for analogous state and federal discovery statutes, someone might have borrowed upon those procedures for inter-district discovery more liberally, such as self executing discovery, as in federal actions, or a $5.00 filing fee in Florida for reciprocal discovery procedures for cases pending in another state.

These are some proposed amendments to CCP 2029, with commentary.

I would propose an amendment to CCP § 2029 setting forth a uniform procedure for issuance of subpoenas.

• The procedure could require a simply face page describing any one of the required documents from the foreign court, specified in the statute The face page should comport with the requirements of California Rule of Court 201. (Perhaps a Judicial Council form?)The current statute. (CCP 2029 states that “Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court”, THAT gives rise to the court’s ability and authority to issue a California subpoena; no local counsel, no declaration, no civil case cover sheet, no filing fee. The out of state document triggers the authority in the spirit of comity and reciprocal inter-state cooperation to facilitate discovery.)

• The procedure should allude to the ability of an out of state lawyer to sign the declaration. This request for reciprocal judicial assistance does not require local counsel. This has been a constant in California since 1872!

• A modest filing fee should be stated or referenced in the Government Code. The impact on the court does not justify the tendering of a new first appearance fee of $300.00. The

fee should be between $5.00 and $20.00. (Florida manages with a $5.00 fee.) The fee as specified in GC § 26850.1 would make the fee $6.00, a commensurate fee for reciprocal judicial assistance.

• An application fee should be assessed only once. The court should issue a regular or miscellaneous case number. Multiple and subsequent subpoenas should be issued using the same file number and should not require additional fees.

Tony Klein
Process Server Institute
Attorney Service of San Francisco
415/495-4221

CCP 2029. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

Richard E. Best, 2004
Best@Justice.com
http://CaliforniaDiscovery.findlaw.com

C.C.P. §2029 Revisions
California Subpoena for Foreign State Action

When a case is pending in another state and a deposition is sought in California a subpoena may be required to obtain the appearance, production or testimony of a witness. A commission, notice or letters rogatory is issued by the foreign state court to obtain a subpoena in California. C.C.P.§2029 provides:

> 2029. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

This section causes some confusion and inconsistency for court clerks, courts and lawyers seeking to comply with what should be a simple procedure. It seldom rises to the level of a legal dispute but is one of those clitches that cause people spend a lot of time. Often clerks will develop there own systems and procedures which will differ from court to court, clerk to clerk or time to time in the same court. This is not a matter or any substance or controversy but should be clarified to achieve consistency and clear guidance.

A preliminary issue arises from the current wording of CCP 2029. The section refers to taking the deposition of a "natural" person, but it seems to make no sense to limit the procedure to natural persons and it is probably not done in practice: "natural" should be amended to "any". There is no reason to limit the "notice" procedure to natural persons.

The clerk can "issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it." Anecdotal information suggests courts adopt different procedures that may not be published and can cause unnecessary confusion,

delay and expenses to be incurred. What if anything must be filed with what California court to have the court issue a subpoena? Clerks may require a formal petition to the court with or without a hearing, may require only the opening of a court file in that court to obtain a subpoena, may or may not require the filing of the original commission issued by the foreign jurisdiction, or may issue a subpoena using the foreign jurisdiction's case number and not require the opening of a file unless court action is required to compel compliance. The procedure should be clear and uniform.

In California a subpoena can be issued by a court clerk or lawyer. CCP 1985(c). "An attorney at law who is the attorney of record in an action or proceeding may sign and issue a subpoena." Often a California lawyer is contacted by out of state counsel to set up the deposition in California. Can the California lawyer issue the subpoena ? Must he formally become counsel of record? Can the out of state lawyer issue the subpoena? Does a lawyer become counsel of record by placing its name on the subpoena or making a motion to enforce it? It would be helpful to clarify what formalities and what connection to the case a lawyer must have in order to issue the subpoena. It may be that the procedure is clear and that a lawyer cannot issue a subpoena in this circumstance but must obtain one from the clerk. If so, it may be desirable to change that procedure and allow any active member of the bar to "appear", issue a subpoena and seek to enforce it. There may be no need to involve the court in many cases with the attendant but unnecessary expense to government and the parties. If enforcement is sought, a file can be opened and fee collected at that point.

In California and presumably in most foreign jurisdictions, a party may notice the deposition of another party to occur in another jurisdiction. Although the C.C.P. §2029 provides for depositions in out of state cases to be taken in California on notice, it does not appear that recourse could be had to California courts to compel discovery in the absence of a subpoena. This renders the notice provision somewhat meaningless as far as California law and procedure is concerned. If a deposition is properly noticed to occur in

California, it would seem appropriate to provide an alternative forum for resolving disputes here just as Federal Courts require disputes to be resolved in the local court. Thus, in the case of foreign state litigation where one party notices a deposition under that state's law to take place in California and most likely involving a California resident as a deponent, it may be reasonable to allow both the deponent and the parties to litigate disputes arising out of that deposition in California courts.

PROPOSED ADDITIONS TO 2029

The Clerk of of the Superior Court in any county or an attorney licensed to practice law in California who is an active member of the California state bar and who has been retained to represent a party for this purpose, may issue a subpoena or subpoena duces tecum in accord with this section. The subpoena shall include the name, address, telephone and bar number of the attorney. The Clerk shall issue the subpoena upon request of a party and presentation of the original or certified copy of the document from a foreign jurisdiction requesting or authorizing the discovery in a pending matter. The case number from the foreign jurisdiction and the identity of the foreign jurisdiction shall be used on the subpoena in lieu of a California case number. A copy of any document issued by or in the foreign jurisdiction authorizing the taking of the deposition in an action pending in that jurisdiction or a declaration of counsel attesting to such facts shall be attached to the subpoena and any copy served on any person. The Superior Court in the county where the deposition is to be taken may be designated on the subpoena. The subpoena may be enforced in that Superior Court by the filing of a Petition.

In any action pending in another jurisdiction in which a deposition has been properly noticed to occur in California, any issues regarding the conduct of the deposition including the propriety of any questions or objections may be resolved by a California Superior Court in the county in which the proceeding is pending, or in the absence of such a court, in the county in which the deposition is pending.