

Memorandum 2005-33

Civil Discovery (Draft of Tentative Recommendation)

At the July meeting, the Commission considered whether to (1) clarify and refine the rules governing a deposition taken in California for purposes of a proceeding pending elsewhere, (2) make nonsubstantive, clarifying revisions of the provisions governing service of a response to interrogatories or a response to an inspection demand, and (3) create a calendar preference for writ review of a discovery ruling on an issue common to consolidated cases. Attached is a draft of a tentative recommendation implementing the Commission's decisions on the first two points. The draft does not address the calendar preference issue. The Commission has received several letters regarding that issue, but is expecting substantial further material from the Judicial Council. We will cover that issue in a supplement to this memorandum or in a future memorandum, depending on when we receive the expected material from the Judicial Council. The key issue raised by the present memorandum is whether to approve the attached draft as a tentative recommendation for circulation for comment, as is or with revisions.

At the July meeting, the Commission requested further research regarding several points relating to a deposition taken in California for purposes of a proceeding pending elsewhere. The Commission has since received further comments from process server Tony Klein, which are attached as Exhibit pages 1-3. In general, Mr. Klein agrees with the Commission's proposed approach. He raises a number of new concerns, however, which are discussed below, along with the issues that the Commission asked the staff to research.

(Unless otherwise specified, all statutory references are to the Code of Civil Procedure.)

DEPOSITION IN CALIFORNIA FOR PURPOSES OF A PROCEEDING PENDING
ELSEWHERE (SECTION 2029.010)

The following issues relate to the proposed amendment of Section 2029.010, which governs the procedure for deposing a witness in California for purposes of a proceeding pending in another jurisdiction:

Retention of Local Counsel When Obtaining a Subpoena to Depose a Witness in California for Purposes of an Out-of-State Proceeding

At the July meeting, the Commission asked the staff to do further research on whether to require a litigant in an out-of-state proceeding (other than a pro per litigant) to retain local counsel or have out-of-state counsel admitted pro hac vice before deposing a witness in California. This matter proved relatively easy to research.

Business and Professions Code Section 6125 provides that “[n]o person shall practice law in California unless the person is an active member of the State Bar.” In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), the California Supreme Court interpreted Section 6125 to establish a general rule that “although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California.” The Court determined that an out-of-state law firm violated this rule by having counsel who lacked a California license perform legal services in the state (including settlement negotiations and preparation for an arbitration). *Id.* at 123-24, 140. The Court recognized, however, that Section 6125 is subject to some exceptions and does not define what it means to “practice law” or what is “in California” within the meaning of the statute. *Id.* at 128-31.

Following the *Birbrower* decision, the Legislature passed a bill authored by Senator Morrow (the Commission’s Senate member) calling for creation of a task force to study multijurisdictional legal practice. 2000 Cal. Stat. ch. 47. The California Supreme Court Advisory Task Force on Multijurisdictional Practice was formed in January 2001 and issued a comprehensive report on the subject a year later. Among other things, the report recommended that a rule be drafted under which “out-of-state attorneys would be able to undertake specified tasks in California related to litigation pending in another jurisdiction.” California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002), at 38. In proposing this approach, the task force specifically considered the situation in which an out-of-state attorney “tak[es] depositions in pending or anticipated litigation to occur in a jurisdiction other than California.” *Id.* at 24.

To implement the task force’s recommendation on this point, California Rule of Court 966 was adopted effective November 15, 2004. The stated purpose of the rule is “to permit an attorney who is licensed to practice law in a jurisdiction in

the United States other than California, and who is in California temporarily as part of litigation, to perform litigation tasks in California under specified circumstances.” Cal. R. Ct. 966. The full text of the rule is attached as Exhibit pp. 4-5. “Consumers of legal services are protected because out-of-state attorneys practicing under this rule will be subject to the jurisdiction of the State Bar of California, the jurisdiction of the courts of California, the laws of the State of California relating to the practice of law, and the California Rules of Professional Conduct.” Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004), at 6. In addition, each out-of-state attorney practicing pursuant to the rule is under the supervision of the out-of-state tribunal in which the proceeding is pending. *Id.*

The rule essentially creates a safe harbor such that if a party is represented by an out-of-state attorney in an out-of-state proceeding under the conditions specified in the rule, the party does not have to retain local counsel to be able to depose a witness in California. This is one way in which the rule “allows attorneys to serve the needs of clients with litigation matters spanning multiple U.S. jurisdictions.” *Id.*

Because other law already governs the necessity of local counsel when deposing a witness in California for purposes on an out-of-state proceeding, there is no need to address that point in Section 2029.010. The attached draft would simply **refer to the relevant authorities in the preliminary part and in the Comment to the proposed amendment of that provision.** This would help to alert practitioners, courts, and others to the governing principles.

Does the Commission agree with this approach?

Deposition on Notice or Agreement

Among other circumstances, Section 2029.010 expressly applies “whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California” In comments that the Commission considered at the July meeting, former Discovery Commissioner Richard Best suggested that if a discovery dispute arises when a party to an out-of-state proceeding deposes a witness in California pursuant to properly issued notice or an agreement, the witness and the parties should be able to present the dispute to a California court regardless of whether the deposing party subpoenaed the witness under Section

2029.010. See Memorandum 2005-26 at pp. 21-22 & Exhibit pp. 5-6. He recommended revising the statute to clarify as much.

At the July meeting, however, the Commission questioned whether it is necessary to allow resort to a California court in this situation, because the witness could only be deposed on notice if the witness were a party to the out-of-state proceeding and if that were the case then the witness would be subject to the jurisdiction of the out-of-state tribunal. The staff pointed out that Section 2029.010 is modeled on the Uniform Foreign Depositions Act (“UFDA”), which also refers to a deposition on notice or agreement and has been adopted in many states. But the staff could not explain why the UFDA takes this approach. The Commission directed the staff to look into the issue further.

The staff was unable to find any discussion of the point in the legal literature, so we consulted Commissioner Best on the matter. He pointed out what should have been obvious: When a deposition is taken in California it is sometimes more convenient for the deponent and the parties to resolve a dispute in a California court than to have to travel to the forum state to obtain a resolution. Making a California court available in these circumstances places a burden on the California judiciary. But Section 2029.010 reflects a policy determination that this burden is outweighed by other factors, such as the following:

- (1) As compared to the out-of-state tribunal, a California court may be more protective of policy interests that are considered important in California.
- (2) By providing assistance to litigants and counsel in out-of-state proceedings, Section 2029.010 helps to promote availability of similar assistance for Californians when they take, or have their attorneys take, depositions out-of-state.
- (3) The burden on the California court system due to this type of dispute is not likely to be substantial. In general, a party to an out-of-state proceeding probably will seek relief in that proceeding rather than in a California court, because the out-of-state tribunal is likely to be familiar with the case while the California court is not.

In light of this analysis, the staff recommends that **Section 2029.010 continue to encompass a deposition on notice or agreement.** We further recommend **clarifying the provision in the manner suggested by Mr. Best.** The provision should make clear that if a party to a proceeding pending in another jurisdiction deposes a witness in this state by properly issued notice or agreement, the deponent or any party may seek relief in a California court regardless of whether

the deposing party obtained a subpoena or subpoena duces tecum under the statute. A contrary rule — requiring a California subpoena — would in most instances call for needless expenditure of judicial and litigant resources.

Type of Deposition

Consistent with the Commission’s decision on this point, the attached draft would amend Section 2029.010 to remove the natural person limitation:

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.

....

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.

....

Mr. Klein comments that the “removal of the natural person limitation is a welcome addition when applying to oral and written depositions.” Exhibit p. 1. He queries, however, whether the statute would include a deposition for production of business records under Code of Civil Procedure Section 2020.010(a)(3) when only copies of records are sought and no oral or written testimony is necessary. *Id.* He points out that “[m]any foreign deposition subpoenas are for records.” *Id.*

Mr. Klein is correct that the statute does not expressly cover a deposition solely for the production of records and things. This has apparently been considered implicit for many years. **It could be made express as shown in boldface below:**

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, **or a deposition for the production of documents and things**, 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.

....

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. **The sentence is also amended to make clear that Section 2029.010 encompasses a deposition for the production of documents and things, regardless of whether the deponent is required to testify.**

....

If the Commission agrees with this approach, the staff will revise the draft to incorporate this change.

What to File

In the staff memorandum for the July meeting, we suggested that the form for applying for a subpoena under Section 2029.010 “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.” Memorandum 2005-26, at p. 17. The attached draft would follow that approach (see pp. 6, 12).

Mr. Klein “especially appreciate[s] the ability to ‘attach a true and correct copy’ rather than an ‘authenticated’ copy.” Exhibit p. 1. He explains:

The current statute does not require “authenticated” copies. Commissions are issued by courts, and an original is given to the applicant. If they are issued, and not part of the foreign court file, they might not be able to be authenticated by the court. Some foreign courts issue orders permitting the out of state deposition. Notice between counsel of the foreign deposition is permissible in some states, but similar to California law, the notice is not filed. If it is not filed, no authenticated copy [of the unfiled] notice could be obtained.

Id.

Does the Commission see any problem with **requiring only a true and correct copy of the mandate or other key document**, as suggested by the staff and endorsed by Mr. Klein?

Statutory Deadline

The attached draft would set a deadline of January 1, 2008, for the Judicial Council to prepare a standard application form for a litigant to use in seeking a subpoena under Section 2029.010. The deadline assumes that the Commission’s

proposal will be introduced and enacted in 2006; the deadline obviously would have to be adjusted if the proposed legislation is introduced later. The concept of including such a deadline was discussed in the staff memorandum for the July meeting (see Memorandum 2005-26, at p. 17).

Mr. Klein makes a number of negative comments about the idea of a deadline. Exhibit pp. 1-2. He apparently misunderstood the nature of the proposed statutory deadline, however, viewing it as a deadline applicable to a litigant seeking a subpoena rather than as a deadline for the Judicial Council to prepare an application form. The staff **continues to believe that it is advisable to include the latter type of deadline in the Commission's proposal.**

New Foreign Deposition Subpoena Form

Consistent with the Commission's views at the July meeting, the attached draft would require the Judicial Council to either prepare new subpoena forms or modify existing subpoena forms to provide clear instructions for use in issuing a subpoena under Section 2029.010. Mr. Klein writes:

I don't see why another subpoena form is necessary. The same, statutory language must be given to any California witness. Why does it need to be different?

Exhibit p. 2.

Mr. Klein is correct that much of the existing subpoena forms is readily applicable to a deposition under Section 2029.010. But portions of those forms are not. For instance, it is unclear what caption and case number to include, and some of the statutory references in some of the forms are plainly inapplicable to a deposition for purposes of an out-of-state proceeding (e.g., the form Deposition Subpoena for Personal Appearance includes a box for indicating that "This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d)."). Although the necessary adjustments may be minimal, **the staff continues to believe that it would be helpful to have the Judicial Council to review the subpoena forms with Section 2029.010 in mind.**

Issuance of a Subpoena Under Section 2029.010 By Counsel

As directed by the Commission, the attached draft would permit local counsel in an out-of-state proceeding to issue a subpoena under Section 2029.010, instead of having to seek such a subpoena from a California court (see pp. 8, 11). Mr. Klein says that this would "constitute a departure from existing law."

Exhibit p. 2. In particular, he believes it would be inconsistent with Code of Civil Procedure Section 1986, which provides:

1986. A subpoena is obtainable as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is obtainable from the clerk of the court in which the action or proceeding is pending, or if there is no clerk then from a judge or justice of such court.

(b) To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined.

(c) To require attendance out of court, in cases not provided for in subdivision (a), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is obtainable from the judge, justice, or other officer before whom the attendance is required.

If the subpoena is to require attendance before a court, or at the trial of an issue therein, it is obtainable from the clerk, as of course, upon the application of the party desiring it. If it is obtained to require attendance before a commissioner or other officer upon the taking of a deposition, it must be obtained, as of course, from the clerk of the superior court of the county wherein the attendance is required upon the application of the party requiring it.

To prevent any possibility that the Commission's proposed approach would be viewed as inconsistent with Section 1986, we have drafted the pertinent new subdivision of Section 2029.010 as follows:

(d) *Notwithstanding Section 1986*, if a party to a proceeding pending in another jurisdiction retains 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.

(Emphasis added.) The inclusion of the "notwithstanding" clause might be an abundance of caution. We note that the Legislature has not taken any similar step with regard to Section 1985(c), which authorizes an attorney of record to "sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein" Nonetheless, the "notwithstanding" clause in subdivision (d) might help to prevent some future

disputes. **Is the proposed draft of subdivision (d) acceptable to the Commission?**

Discovery Dispute

At the July meeting, the Commission decided that Section 2029.010 should make clear that if a dispute arises regarding discovery conducted pursuant to it, a litigant or the deponent may file a petition for appropriate relief in the superior court of the county in which the deposition is to be taken. The Commission further decided that the statute should require the petitioner to pay a first appearance fee, and should also require any person responding to the petition to pay a first appearance fee. The attached draft would implement these decisions (see pp. 8-9, 11, 12).

Mr. Klein comments that it would be more appropriate to charge a motion fee than a first appearance fee in these circumstances. He points out that a “motion would be the only activity in the case, and would only be necessary in rare occasions.”

Importantly, the Commission is *not* proposing to have a court charge a first appearance fee of hundreds of dollars every time the court issues a subpoena under Section 2029.010. Rather, the fee for issuance of such a subpoena would only be \$20. See pages 7 and 13-15 of the attached draft. If a discovery dispute arises and is presented to a California court, however, *then the parties and deponent would have to pay first appearance fees.*

Mr. Klein is correct that resolving a discovery dispute in these circumstances usually would be like hearing a discovery motion in a California case. But when a court hears a discovery motion in a California case, the parties have already paid first appearance fees. In fact, parties to a California case often pay first appearance fees for filing a complaint and response, the case settles, and the court never has to resolve any motion, must less take further action. The situation in question, in which a California court has to resolve a discovery dispute pertaining to an out-of-state proceeding, is at least as much of a burden on the California court system. To the staff, **it does not seem unduly onerous to charge first appearance fees in this situation.**

What is the Commission’s view?

Respectfully submitted,

Barbara Gaal
Staff Counsel

COMMENTS OF TONY KLEIN

From: psinstitute@comcast.net
Subject: Memorandum 2005-26
Date: July 18, 2005
To: bgaal@clrc.ca.gov

Barbara:

I received the Memorandum 2005-26 and appreciate the attention the Commission is giving this. I agree with the bulk of your recommendations.

I like the specificity in the statute you propose and I have a few more suggestions.

Type of Deponent (pp. 15-16)

The removal of the natural person limitation is a welcome addition when applying to oral and written depositions. Would that include deposition for production of business records under 2020.010(a)(3), when only copies of records are sought and no oral or written testimony is necessary? Many foreign deposition subpoenas are for records.

What to File (pp. 16-17)

Which document to file is the key to this whole process. Because the procedure is so obscure, and not specific, a form will make it more consistent. Making a mandatory form will give guidance to both persons on each side of the counter at the filing window. The form could merely provide check boxes for the statutorily required documents. I especially appreciate the ability to “attach a true and correct copy” rather than an “authenticated” copy. The current statute does not require “authenticated” copies. Commissions are issued by courts, and an original is given to the applicant. If they are issued, and not part of the foreign court file, they might not be able to be authenticated by the court. Some foreign courts issue orders permitting the out of state deposition. Notice between counsel of the foreign deposition is permissible in some states, but similar to California law, the notice is not filed. If it is not filed, no authenticated copy the unfilled notice could be obtained.

The form would also eliminate the need for a Civil Case Cover Sheet. A foreign deposition is not a California case. It never will be. The court is only facilitating discovery by issuing the subpoena. Later, it may resolve issues upon motion such as enforcing compliance, compelling answers, or resolving evidentiary conflicts between California and the foreign state. And after all of that, it still isn't a California case. This relates to the lack of necessity for local counsel.

Statutory Deadline (p. 17)

I don't see a need for a statutory deadline to prepare the form. Subpoenas must be served on a witness within a reasonable time so that the deponent can prepare and attend. (CCP 1987). If the witness is being subpoenaed to produce “consumer records”, that time may be as much as 25 days (CCP 1985.3). On the other hand, a subpoena might just be formality, where an appearance has been agreed upon. Imposing a deadline when the form is to be prepared would unnecessarily restrict litigants. The court has no reason to

restrict issuance based on time.

New Foreign Deposition Subpoena form (p. 17)

I don't see why another subpoena form is necessary. The same, statutory language must be given to any California witness. Why does it need to be different?

Filing Fee (pp. 17-18)

I agree that \$20.00 is a reasonable charge, although still feel that the impact on the court is minimal. Most courts provide pre-issued subpoenas, and must issue them in blank otherwise (CCP 1985). One filing per case should be sufficient, as well as subsequent re-issued subpoenas.

Retention of Local Counsel (pp. 18-19)

This would be a departure from existing law since 1872. Retaining local counsel could raise a number of issues. It may indeed be useful "to have someone familiar with California deposition procedures involved in the deposition." How would they be involved? If local counsel signs the application for issuance of the subpoena, for instance, must he also appear on the heading of all of the documents? If so, does he then become co-counsel? Is there a fee arrangement that must be memorialized by a written contract? Does he attend the deposition, racking up hourly fees? Is he there to determine that a question asked is not relevant under California law, even though it is relevant in the foreign state? Does the opposing attorney need local counsel too? What would be the functions and duties if local counsel was required?

Does a foreign attorney requesting issuance of a subpoena practicing law in California without a license? I don't think so. For this limited purpose, I don't think this constitutes an authorized practice of law. It doesn't in other states. Certainly deposing a witness in this state doesn't constitute an unauthorized practice. I can't see signing the application that is filed in a California court to issue a subpoena as being any less authorized.

Would a pro per or assignee litigant in a foreign state have to retain local counsel to apply for issuance of a California subpoena?

Creation of a Court File (pp. 19-20)

It is probably wise to let the Judicial Council or the individual courts to decide on whether a case file is to be created. There should be some controlling file so that subsequent filings could be directed to it.

Issuance of a Subpoena By Counsel (pp. 20-21)

A foreign deposition subpoena must be issued by the court "of the county where the witness is to be examined" under CCP 1986(b). The text of this section follows at the end of this posting. If the statute allows a California attorney to issue a subpoena there would be little incentive to make any filing with the local court. That would constitute a departure from existing law.

Discovery Dispute (p. 21)

The first appearance fee of \$300.00 seems to be contemplated, but I feel that the motion fee is more appropriate. A motion would be the only activity in the case, and would only be necessary in rare occasions.

Deposition on Notice or Agreement (p. 21)

I agree with clarification of notice vs. the use of a subpoena. Although the statute seems to also require the filing of an application with the notice attached, it seems a somewhat superfluous gesture and would serve no useful purpose since the clerk would not be requested to issue a subpoena.

Proposed Legislation (pp. 22-24)

I agree with (b), but allowing an attorney to issue in lieu of filing as in new subdivision (d) would create a conflict with CCP 1986(b) and alter the existing procedure.

I agree with (c), although I see no need for a new subpoena form. This process is rare, and changes nothing with respect to service and noticing language on the existing forms. The statute might add a requirement to serve the application with the subpoena, but that might not be necessary either. It gives the witness little relevant information. On the other hand, it specifies that the action is pending elsewhere, gives the name of other counsel, and may reveal a limitation of questions from the content of a court order authorizing the taking of the deposition.

I agree with (d) Alternative A, although an attorney issued foreign subpoena would create a conflict with CCP 1986(b) and alter the existing procedure.

I do not agree with (d) Alternative B. Local counsel has not been required in this statute since its inception is 1872, and this would alter existing law.

I agree with (e), although I feel the first appearance fee is still too high for a motion to the court.

Tony Klein
Process Server Institute
Attorney Service of San Francisco
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CCP 1986(b) To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined.

CALIFORNIA RULE OF COURT 966

Rule 966. Attorneys practicing law temporarily in California as part of litigation

Statement of Purpose. The purpose of this rule is to permit an attorney who is licensed to practice law in a jurisdiction in the United States other than California, and who is in California temporarily as part of litigation, to perform litigation tasks in California under specified circumstances. An attorney practicing in accordance with this rule is not engaged in the unauthorized practice of law in California.

(a) **[Requirements]** For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

(b) **[Permissible activities]** An attorney meeting the requirements of this rule, who complies with all applicable rules, regulations, and statutes, is not engaging in the unauthorized practice of law in California if the attorney's services are part of:

(1) A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

(2) A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;

(3) A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4) A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

(c) **[Restrictions]** To qualify to practice law in California under this rule, an attorney must not:

(1) Hold out to the public or otherwise represent that he or she is admitted to practice law in California;

(2) Establish or maintain a resident office or other systematic or continuous presence in California for the practice of law;

(3) Be a resident of California;

(4) Be regularly employed in California;

(5) Regularly engage in substantial business or professional activities in California; or

(6) Have been disbarred, have resigned with charges pending, or be suspended from practicing law in any other jurisdiction.

(d) **[Conditions]** By practicing law in California pursuant to this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

(e) **[Inherent power of Supreme Court]** Nothing in this rule is to be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

(f) **[Effect of rule on multijurisdictional practice]** Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar of California.

(g) **[Definitions]** The following definitions apply to the terms used in this rule:

(1) “A formal legal proceeding” means litigation, arbitration, mediation, or a legal action before an administrative decision-maker.

(2) “Authorized to appear” means the attorney is permitted to appear in the proceeding by the rules of the jurisdiction in which the formal legal proceeding is taking place or will be taking place.

(3) “Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency” means an attorney who meets all of the following criteria:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency while practicing law under this rule; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
TENTATIVE RECOMMENDATION

Civil Discovery: Miscellaneous Issues

September 2005

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

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

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
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SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission recommends the following improvements in California's civil discovery statutes:

- (1) Nonsubstantive revisions of the provisions governing service of a response to interrogatories (Code Civ. Proc. § 2030.260) and service of a response to an inspection demand (Code Civ. Proc. § 2031.260) to improve clarity.
- (2) Clarification and refinement of the rules governing the procedure for deposing a witness in this state for purposes of a proceeding pending in another jurisdiction (Code Civ. Proc. § 2029.010).

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

CIVIL DISCOVERY: MISCELLANEOUS ISSUES

1 The Law Revision Commission is engaged in a study of civil discovery and has
2 issued several recommendations on that topic.¹ In this tentative recommendation,
3 the Commission proposes to:

- 4 (1) Amend the provisions governing service of a response to interrogatories and
5 service of a response to an inspection demand to improve clarity without
6 making any substantive change.
- 7 (2) Revise the law to provide clear guidance on the procedure that litigants,
8 courts, and witnesses are to follow in seeking, issuing, enforcing, or
9 challenging a subpoena to take a deposition in California for purposes of an
10 out-of-state proceeding.

11 These proposals are explained below.

12 The Commission's work on civil discovery is continuing and the Commission
13 may propose further reforms in the future. The Commission encourages interested
14 persons to identify other matters in need of reform.

15 **Service of a Response to Interrogatories or a Response to an Inspection Demand**

16 The provisions governing service of a response to interrogatories² and service of
17 a response to an inspection demand³ establish different rules for unlawful detainer
18 cases than for other types of cases. As presently written, the rules for unlawful
19 detainer cases are interspersed with the rules for other cases. To improve clarity,
20 the Commission proposes to clearly separate the rules for unlawful detainer cases
21 from the other rules. This would not be a substantive change.

22 **Deposition of a Witness in California for Purposes of a Proceeding Pending in Another 23 Jurisdiction**

24 Code of Civil Procedure Section 2029.010⁴ governs the procedure for deposing
25 a witness in California for purposes of a proceeding pending in another
26 jurisdiction:

27 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
28 commission is issued out of any court of record in any other state, territory, or

1. *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004); *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004); *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

2. Code Civ. Proc. § 2030.260. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

3. Section 2031.260.

4. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Section 2029 without change. Section 2029.010 Comment.

1 district of the United States, or in a foreign nation, or whenever, on notice or
2 agreement, it is required to take the oral or written deposition of a natural person
3 in California, the deponent may be compelled to appear and testify, and to
4 produce documents and things, in the same manner, and by the same process as
5 may be employed for the purpose of taking testimony in actions pending in
6 California.

7 This provision authorizes a California court to use its subpoena power to compel a
8 witness in the state to submit to a deposition for purposes of a proceeding pending
9 elsewhere.⁵ Because an out-of-state tribunal may be unable to compel testimony
10 from a non-party witness located in California, the provision can be critical in
11 ascertaining the truth and achieving justice in an out-of-state proceeding.⁶ The
12 assistance that the provision extends to other jurisdictions may in turn prompt such
13 jurisdictions to reciprocate with respect to cases pending in California.⁷

14 The provision does not specify the details of the procedure for issuing a
15 subpoena to take a deposition in California for purposes of an out-of-state
16 proceeding. It is not clear from the statutory text what type of paper the deposing
17 party must submit to the court, whether that party must pay a filing fee and, if so,
18 what fee applies, whether a hearing before a judge is required, whether an attorney
19 may issue a subpoena instead of the court, what type of court file the court must
20 open (if any), and whether it is necessary to retain local counsel.⁸ Because the
21 provision is limited to a “natural person,” it is also questionable whether an
22 organization located in California can be deposed for purposes of an out-of-state
23 proceeding. Further, the statute does not make clear how to seek relief when a
24 dispute arises in a deposition taken in California for purposes of an out-of-state
25 proceeding. The proper enforcement procedure is particularly uncertain when a

5. State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986, *Reporter’s Note to Section 2029*, at 59 (Jan. 1986) (hereafter, “State Bar-Judicial Council Report”).

6. Mullin, Jr., *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev. 1, 2 (1981).

7. State Bar-Judicial Council Report, *supra* note 5, at 59. Section 2029.010 is similar to the Uniform Foreign Depositions Act (“UFDA”), which was approved in 1920 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). 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).

Other states have not adopted the UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 8.

8. Like Section 2029.010, the UFDA does not specify the details of the procedure for issuing a subpoena to take a deposition in a state for purposes of a proceeding pending in another state.

1 deposition is taken on notice or agreement without issuance of a California
2 subpoena.

3 Because the statute fails to provide guidance on these points, California courts
4 vary widely in how they handle such matters.⁹ This inconsistent and unpredictable
5 treatment is unfair. To ensure even-handedness and prevent confusion, the Law
6 Revision Commission proposes to amend the provision to give additional guidance
7 as detailed below. The recommended reforms to clarify the process will not only
8 benefit litigants in out-of-state proceedings, but will also assist California court
9 personnel, process servers, witnesses, and others affected by application of the
10 provision.

11 ***Procedure for Seeking and Issuing a Subpoena to Depose a Witness in California for Purposes***
12 ***of an Out-of-State Proceeding***

13 By its terms, Section 2029.010 does not apply unless (1) a court of another
14 jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or
15 commission, or (2) the deposition of a natural person in California is required by
16 notice or agreement. Presumably, a litigant cannot obtain a subpoena under the
17 statute without presenting evidence that one of these requirements is satisfied.
18 Aside from this restriction, it is not clear what a litigant must do to obtain a
19 subpoena.

20 The requirements reportedly differ from court to court and sometimes even from
21 clerk to clerk.¹⁰ In some instances, a clerk will issue a subpoena on presentation of

Section 3.02 of the Uniform Interstate and International Procedure Act (“UIIPA”) is more specific in some respects. It was approved by NCCUSL in 1962 and intended to supersede the UFDA, but it has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821 to 13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). It is thus of limited value as a model for nationwide uniformity.

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* note 6, at 52 (noting “the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities”). There does not seem to be any uniformity in how other states handle the matters that require clarification here in California.

9. Email from Tony Klein to Barbara Gaal (July 6, 2005), attached to Law Revision Commission Staff Memorandum 2005-26 as Exhibit pp. 1-3 (available from the Commission, www.clrc.ca.gov); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004), attached to Law Revision Commission Staff Memorandum 2005-26 as Exhibit pp. 4-6 (available from the Commission, www.clrc.ca.gov).

10. See sources cited in note 9 *supra*.

1 the original or a copy of one of the documents listed in the statute. Other times, a
2 court may require greater formality, such as the filing of a formal petition or civil
3 case cover sheet, or attendance at a hearing before a judge or other judicial
4 officer.¹¹

5 The Commission recommends that the procedure be clear, simple, and uniform
6 from county to county. It does not seem necessary to subject litigants to the
7 expense of a court hearing, or to consume the attention of a judicial officer, just
8 for issuance of a subpoena. If a discovery dispute arises, then a judge or other
9 judicial officer may need to be involved. To obtain a subpoena under the
10 Commission's proposed amendment of Section 2029.010, however, it would be
11 sufficient to file a properly completed application with the court clerk and the
12 clerk would issue the subpoena. The proper court for filing the application would
13 be the superior court of the county in which the deposition is to be taken.

14 The Commission further recommends that the Legislature direct the Judicial
15 Council to prepare an application form for use in this situation. A litigant would be
16 required to use the Judicial Council form once that form becomes available. This
17 would streamline the process for litigants, court clerks, process servers, attorneys,
18 and other affected parties. The proposed law would specify that the application
19 form require the applicant to attach a true and correct copy of the mandate, writ,
20 letters rogatory, letter of request, commission, or other document authorizing the
21 deposition in the out-of-state proceeding.¹² Aside from this restriction, the content
22 of the form would be left to the Judicial Council to develop, perhaps drawing on
23 requirements stated in some of the more detailed statutes from other states.¹³

24 To further streamline the process, the proposed law would also direct the
25 Judicial Council to prepare subpoena forms that include clear instructions for use
26 in issuance of a subpoena under Section 2029.010. The Judicial Council would
27 have the option of either creating new forms or modifying existing forms to meet
28 this requirement. Again, use of these forms would be mandatory once they become
29 available.

11. Like Section 2029.010, many of the comparable statutes of other states are silent regarding the proper procedural approach. The statutes that do address such details vary in the degree of formality they require. In some states, a judge must issue the subpoena, not the court clerk. See, e.g., Mich. R. Civ. Proc. 2.305(E); Ala. R. Civ. Proc. 28(c); Ky. R. Civ. Proc. 28.03; N.C. R. Civ. Proc. 28(d); Wash. Superior Ct. Civ. R. 45(d)(4). Other states use a less complicated approach. See, e.g., Ariz. R. Civ. Proc. 30(h); Mont. R. Civ. Proc. 28(d); Miss. R. Civ. Proc. 45(a)(2); N.D. R. Civ. Proc. 45(a)(3); Utah R. Civ. Proc. 26(h).

12. A true and correct copy of the required document should be sufficient. It would not be appropriate for the application form to require the original or a certified copy, because the original might not be accessible to the litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

13. See, e.g., Ariz. R. Civ. Proc. 30(h); Me. R. Civ. Proc. 30(h).

1 ***Filing Fee for Issuing a Subpoena to Depose a Witness in California for Purposes of an Out-***
2 ***of-State Proceeding***

3 There is great disparity in the fees California courts charge for issuance of a
4 subpoena to take a deposition in the state for purposes of an out-of-state
5 proceeding. Some courts charge a first appearance fee and at least one court
6 charges multiple first appearance fees if a litigant seeks more than one subpoena.
7 Other courts require more modest fees.¹⁴

8 The Uniform Civil Fees and Standard Fee Schedule Act of 2005¹⁵ does not
9 expressly address what fee to charge in this situation. The Commission proposes
10 to amend the law to specify a relatively modest fee of \$20 per subpoena,¹⁶
11 comparable to the fee for issuing a commission to take an out-of-state deposition.¹⁷

12 ***Retention of Local Counsel When Obtaining a Subpoena to Depose a Witness in California for***
13 ***Purposes of an Out-of-State Proceeding***

14 Section 2029.010 does not say whether it is necessary for a party to retain local
15 counsel to be able to depose a witness in California for purposes of a proceeding
16 pending in another jurisdiction. But there is other guidance on that point.

17 By statute, a person may not practice law in California unless the person is an
18 active member of the State Bar.¹⁸ A recently adopted rule of court makes clear,
19 however, that under specified conditions it is permissible for an attorney duly
20 licensed to practice in another state to perform litigation tasks in California on a
21 temporary basis for purposes of a proceeding pending in another jurisdiction.¹⁹
22 The drafters of this rule specifically considered the situation in which an out-of-
23 state attorney depose a witness in California for purposes of an out-of-state
24 proceeding.²⁰ Thus, if a party is represented by an out-of-state attorney in an out-
25 of-state proceeding under the conditions specified in the rule, the party does not
26 have to retain local counsel to be able to depose a witness in California. Further, if

14. Email from Tony Klein to Barbara Gaal (July 6, 2005), attached to Law Revision Commission Staff Memorandum 2005-26 as Exhibit pp. 1-3 (available from the Commission, www.clrc.ca.gov).

15. 2005 Cal. Stat. ch. 75.

16. See proposed Gov't Code § 70626(b)(6) *infra*.

17. Gov't Code § 70626(b)(5).

18. Bus. & Prof. Code § 6125.

19. Cal. R. Ct. 966. An attorney who temporarily practices law in California pursuant to this rule thereby submits to the jurisdiction of the State Bar and the state courts. The attorney is also subject to the laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar, and the California Rules of Court. *Id.*

For a case holding that Business and Professions Code Section 6125 does not apply to legal services provided in California by out-of-state counsel to a non-California resident, see *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998).

20. California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations, at 24 (Jan. 7, 2002).

1 a party is self-represented in an out-of-state proceeding, the party does not have to
2 retain local counsel to be able to depose a witness in California.²¹

3 Because these matters are already governed by other law, there is no need to
4 address them in Section 2029.010. To assist persons in using the statute, however,
5 the Commission’s proposed Comment would refer to the relevant authorities.²²

6 ***Issuance of a Subpoena Under Section 2029.010 By Counsel***

7 For purposes of an action pending in California, a member of the State Bar in
8 good standing who represents one of the parties may issue a subpoena instead of
9 having to obtain a subpoena from the court.²³ Section 2029.010 does not specify,
10 however, whether a California or an out-of-state attorney may issue a subpoena to
11 depose a witness in California for purposes of a proceeding pending in another
12 jurisdiction.

13 The Commission proposes to amend the statute to make clear that an active
14 member of the California Bar retained to represent a party in an out-of-state
15 proceeding may issue a deposition subpoena or subpoena duces tecum pursuant to
16 the statute for purposes of that proceeding. The proposed law would not extend
17 that privilege to an out-of-state attorney. It seems reasonable to require the
18 involvement of either a California court or a California attorney to issue process
19 under the authority of the State of California.²⁴

20 ***Discovery Dispute***

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

25 The proposed law would eliminate that ambiguity. It would require the person
26 desiring relief to file a petition in the superior court of the county in which the
27 deposition is being taken. The petitioner would have to pay a first appearance fee,
28 as would each person who responds to the petition.²⁵ The amount of these first

21. See *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[A]lthough persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California.”).

22. See proposed Section 2029.010 Comment *infra*.

23. Section 1985(c).

24. Contrary to the proposed approach, 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 that appears to be an unusual position.

25. If another dispute later arises relating to a deposition being taken in the same county for purposes of the same out-of-state proceeding, a party or deponent who has already paid a first appearance fee would not have to pay another first appearance fee under Section 2029.010.

1 appearance fees would be the same as the amount specified in the Government
2 Code for a proceeding pending in California that is comparable to the out-of-state
3 proceeding in which the deposition is being taken.²⁶

4 ***Deposition on Notice or Agreement***

5 Section 2029.010 expressly applies “whenever, on notice or agreement, it is
6 required to take the oral or written deposition of a natural person in California”
7 If a deposition is required on notice or agreement, the deposing party may see no
8 need to subpoena the witness under the statute because the witness is already
9 obligated to attend the deposition. The statute does not make clear, however,
10 whether issuance of a California subpoena is a prerequisite to invoking the
11 enforcement power of a California court in the event of a discovery dispute.

12 In general, if a dispute arises regarding a deposition taken in California pursuant
13 to notice or agreement for purposes of an out-of-state proceeding, the disputants
14 could seek relief in the out-of-state forum. That would make sense, because the
15 out-of-state tribunal is likely to be familiar with the proceeding, and a witness who
16 can be deposed on notice probably is a party deponent subject to the jurisdiction of
17 that tribunal.

18 In some instances, however, it may be preferable for a deponent or party to the
19 out-of-state proceeding to seek relief in a California court when a dispute arises
20 over a deposition taken in California. In particular, the proximity of a California
21 court to the place of deposition may be a significant factor.²⁷

22 When this occurs, it should be possible for the deponent or party to resort to the
23 California court regardless of whether the deposition is being taken pursuant to a
24 California subpoena. The opposite approach — requiring a California subpoena to

26. For example, if the out-of-state proceeding is a probate matter concerning the internal affairs of a trust, the first appearance fees for the petitioner and each responding party would be \$320 apiece, which is the “uniform filing fee for each petition concerning the internal affairs of a trust under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9 of the Probate Code.” Gov’t Code § 70652(a), (b).

27. The importance of providing a convenient forum for resolution of any discovery dispute helps to explain why Section 2029.010 encompasses a deposition on notice or agreement. The UFDA and many statutes modeled on the UFDA also encompass a deposition on notice or agreement. See sources cited in note 7 *supra*.

It is a burden on the California court system to have to resolve a dispute relating to a deposition in California for purposes of an out-of-state proceeding. But Section 2029.010 reflects a policy decision that this burden is outweighed by other factors. In particular:

(1) As compared to the out-of-state tribunal, a California court may be more protective of policy interests that are considered important in California.

(2) By providing assistance to litigants and counsel in out-of-state proceedings, Section 2029.010 helps to promote availability of similar assistance for Californians when they take, or have their attorneys take, depositions out-of-state.

(3) The burden on the California court system due to this type of dispute is not likely to be substantial. In general, a party to an out-of-state proceeding probably will seek relief in that proceeding rather than in a California court, because the out-of-state tribunal is likely to be familiar with the case while the California court is not.

1 enforce discovery rights and obligations relating to a deposition taken on notice or
2 agreement in the state for purposes of an out-of-state proceeding — would entail
3 needless paperwork, expense, and expenditure of judicial and litigant resources in
4 the many instances in which no discovery dispute occurs. The Commission
5 proposes to amend Section 2029.010 to make clear that if a party to a proceeding
6 pending in another jurisdiction deposes a witness in this state by properly issued
7 notice or by agreement, the deponent or any party may seek relief in a California
8 court regardless of whether the deposing party obtained a subpoena or subpoena
9 duces tecum under the statute.

10 *Creation of a Court File*

11 Another issue is what type of file a California court should use for materials
12 filed or issued pursuant to Section 2029.010 — applications, subpoenas, petitions,
13 responses to petitions, and the like. Again, the statute is silent on this point. In
14 particular, it is unclear what caption the court should use (the out-of-state caption
15 or a new California caption) and whether the court should create a separate file for
16 each subpoena sought or each out-of-state case, as opposed to filing all such
17 materials together.

18 The Commission recommends that the Legislature direct the Judicial Council to
19 promulgate a court rule governing these matters, which would impose the same
20 requirements in each county. This would promote uniformity but afford greater
21 flexibility than regulating these matters by statute.

22 *Type of Deponent*

23 By its terms, Section 2029.010 is limited to “the oral or written deposition of a
24 natural person in California” This limitation was deliberately imposed in the
25 Civil Discovery Act of 1986.²⁸ The drafters’ apparent concern was that some
26 jurisdictions might not permit a deposition of an organization (as opposed to a
27 natural person) and litigants might try to subvert such a restriction by seeking to
28 depose an organization in California instead of the forum state.

29 California appears to be unique, however, in its approach to this point. The
30 Commission is not aware of any statute comparable to Section 2029.010 that
31 applies only to a deposition of a natural person.

32 As a matter of policy, deposing an organization located in California may be just
33 as important to the pursuit of truth as deposing an individual who resides in the
34 state. Consistent with the spirit of comity inherent in Section 2029.010, the
35 Commission recommends revising the statute to apply to the oral or written
36 deposition of any person in California. This revision, together with the other
37 clarifications of Section 2029.010 proposed by the Commission, would help to
38 achieve justice, prevent confusion, and make the statute more workable for all
39 concerned.

28. State Bar-Judicial Council Report, *supra* note 5, at 59.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 2029.010 (amended). Deposition in California for purposes of proceeding**
2 **pending outside California**

3 SECTION 1. Section 2029.010 of the Code of Civil Procedure is amended to
4 read:

5 2029.010. (a) Whenever any mandate, writ, letters rogatory, letter of request, or
6 commission is issued out of any court of record in any other state, territory, or
7 district of the United States, or in a foreign nation, or whenever, on notice or
8 agreement, it is required to take the oral or written deposition of a ~~natural~~ person
9 in California, the deponent may be compelled to appear and testify, and to produce
10 documents and things, in the same manner, and by the same process as may be
11 employed for the purpose of taking testimony in actions pending in California.

12 (b) Except as provided in subdivision (d), to obtain a subpoena or subpoena
13 duces tecum under this section, the party seeking a deposition shall file an
14 application with the superior court of the county in which the deposition is to be
15 taken.

16 (c) On receiving a properly completed application under this section, and
17 payment of the filing fee specified in Section 70626 of the Government Code, the
18 clerk of court shall issue the requested subpoena or subpoena duces tecum.

19 (d) Notwithstanding Section 1986, if a party to a proceeding pending in another
20 jurisdiction retains an attorney licensed to practice in this state, who is an active
21 member of the State Bar, and the requirements of subdivision (a) are satisfied, that
22 attorney may issue a subpoena or subpoena duces tecum under this section.

23 (e) If a dispute arises relating to a deposition that a party is taking in this state
24 for purposes of a proceeding pending in another jurisdiction, the deponent or a
25 party to the proceeding may file a petition for a protective order or to compel
26 discovery or obtain other appropriate relief in the superior court of the county in
27 which the deposition is being taken. On filing the petition, the petitioner shall pay
28 a first appearance fee. On responding to the petition, each person who responds
29 shall pay a first appearance fee. The amount of these first appearance fees shall be
30 as specified in Chapter 5.8 (commencing with Section 70600) of Title 8 of the
31 Government Code for a proceeding in this state that would be comparable in
32 nature to the out-of-state proceeding in which the deposition is being taken. If
33 another dispute later arises relating to a deposition being taken in the same county
34 for purposes of the same out-of-state proceeding, a party or deponent who has
35 already paid a first appearance fee does not have to pay another first appearance
36 fee under this section.

37 (f) If a party to a proceeding pending in another jurisdiction seeks to depose a
38 witness in this state by properly issued notice or by agreement, it is not necessary
39 for that party to obtain a subpoena or subpoena duces tecum under this section to

1 be able to seek relief under subdivision (e). The deponent or any other party may
2 also seek relief under subdivision (e) in those circumstances regardless of whether
3 the deponent was subpoenaed under this section.

4 (g) On or before January 1, 2008, the Judicial Council shall do all of the
5 following:

6 (1) Prepare an application form to be used for purposes of subdivision (b). The
7 application form shall require the applicant to attach a true and correct copy of the
8 mandate, writ, letters rogatory, letter of request, commission, or other document
9 authorizing the deposition. As soon as the application form becomes available,
10 every applicant shall use the form.

11 (2) Prepare one or more new subpoena forms that include clear instructions for
12 use in issuance of a subpoena under subdivision (c) or (d). Alternatively, the
13 Judicial Council may modify one or more existing subpoena forms to include clear
14 instructions for use in issuance of a subpoena under subdivision (c) or (d). As soon
15 as one or more new or modified Judicial Council forms become available, use of
16 those forms is mandatory.

17 (3) Adopt a rule specifying the type of court file and case caption a court is to
18 use for purposes of (i) issuing a subpoena under this section or (ii) enforcing
19 discovery rights and obligations under this section.

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

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

26 Subdivision (d) does not specify whether a party to an out-of-state proceeding must retain local
27 counsel to obtain a subpoena or subpoena duces tecum under this section. For guidance on that
28 point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also Report of the California
29 Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and
30 Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on
31 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a
32 party to an out-of-state proceeding may take a deposition in California without retaining local
33 counsel if the party is self-represented or represented by an attorney duly admitted to practice in
34 another jurisdiction of the United States. Cal. R. Ct. 966; Final Report and Recommendations,
35 *supra*, at 24.

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

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

42 Under subdivision (g), the Judicial Council is to prepare forms to facilitate compliance with
43 this section. To promote court uniformity and prevent confusion, the provision also requires the
44 Judicial Council to adopt a rule governing the creation and labeling of court files that are used for
45 purposes of this section.

46 **Staff Note.** Subdivision (g) would set a deadline of January 1, 2008, for the Judicial Council
47 to prepare the required forms and adopt the required rule. This deadline is premised on enactment
48 of the proposed amendment in 2006, with an effective date of January 1, 2007. That would give

1 the Judicial Council one year to prepare the forms and adopt the rule. The Commission will need
2 to adjust the deadline if the proposed amendment is not introduced in the Legislature until 2007
3 or later.

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

5 SEC. _____. Section 2030.260 of the Code of Civil Procedure is amended to
6 read:

7 2030.260. (a) Within 30 days after service of interrogatories, ~~or in unlawful~~
8 ~~detainer actions within five days after service of interrogatories~~ the party to whom
9 the interrogatories are propounded shall serve the original of the response to them
10 on the propounding party, unless on motion of the propounding party the court has
11 shortened the time for response, or unless on motion of the responding party the
12 court has extended the time for response. ~~In unlawful detainer actions,~~

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

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

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

23 **Code Civ. Proc. § 2031.260 (amended). Service of response to inspection demand**

24 SEC. _____. Section 2031.260 of the Code of Civil Procedure is amended to
25 read:

26 2031.260. (a) Within 30 days after service of an inspection demand, ~~or in~~
27 ~~unlawful detainer actions within five days of an inspection demand,~~ the party to
28 whom the demand is directed shall serve the original of the response to it on the
29 party making the demand, and a copy of the response on all other parties who have
30 appeared in the action, unless on motion of the party making the demand, the court
31 has shortened the time for response, or unless on motion of the party to whom the
32 demand has been directed, the court has extended the time for response. ~~In~~
33 ~~unlawful detainer actions,~~

34 (b) Notwithstanding subdivision (a), in an unlawful detainer action the party to
35 whom an inspection demand is directed shall have at least five days from the ~~dates~~
36 date of service of the demand to respond, unless on motion of the party making the
37 demand, the court has shortened the time for the response.

38 **Comment.** Section 2031.260 is amended to improve clarity. This is not a substantive change.

39 **Gov't Code § 70626 (amended). Miscellaneous filing fees**

40 SEC. _____. Section 70626 of the Government Code is amended to read:

1 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
2 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
3 68085.1.

4 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
5 sale, a writ of possession, a writ of prohibition, or any other writ for the
6 enforcement of any order or judgment.

7 (2) Issuing an abstract of judgment.

8 (3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the
9 Code of Civil Procedure.

10 (4) Certifying a copy of any paper, record, or proceeding on file in the office of
11 the clerk of any court.

12 (5) Taking an affidavit, except in criminal cases or adoption proceedings.

13 (6) Acknowledgment of any deed or other instrument, including the certificate.

14 (7) Recording or registering any license or certificate, or issuing any certificate
15 in connection with a license, required by law, for which a charge is not otherwise
16 prescribed.

17 (8) Issuing any certificate for which the fee is not otherwise fixed.

18 (b) The fee for each of the following services is twenty dollars (\$20). Amounts
19 collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

20 (1) Issuing an order of sale.

21 (2) Receiving and filing an abstract of judgment rendered by a judge of another
22 court and subsequent services based on it, unless the abstract of judgment is filed
23 under Section 704.750 or 708.160 of the Code of Civil Procedure.

24 (3) Filing a confession of judgment under Section 1134 of the Code of Civil
25 Procedure.

26 (4) Filing an application for renewal of judgment under Section 683.150 of the
27 Code of Civil Procedure.

28 (5) Issuing a commission to take a deposition in another state or place under
29 Section 2026.010 of the Code of Civil Procedure.

30 (6) Issuing a subpoena under Section 2029.010 of the Code of Civil Procedure to
31 take a deposition in this state for purposes of a proceeding pending in another
32 jurisdiction.

33 ~~(6)~~ (7) Filing and entering an award under the Workers' Compensation Law
34 (Division 4 (commencing with Section 3200) of the Labor Code).

35 ~~(7)~~ (8) Filing an affidavit of publication of notice of dissolution of partnership.

36 ~~(8)~~ (9) Filing an appeal of a determination whether a dog is potentially
37 dangerous or vicious under Section 31622 of the Food and Agricultural Code.

38 ~~(9)~~ (10) Filing an affidavit under Section 13200 of the Probate Code, together
39 with the issuance of one certified copy of the affidavit under Section 13202 of the
40 Probate Code.

41 ~~(10)~~ (11) Filing and indexing all papers for which a charge is not elsewhere
42 provided, other than papers filed in actions or special proceedings, official bonds,
43 or certificates of appointment.

1 **Comment.** Subdivision (b) of Section 70626 is amended to specify the fee for obtaining a
2 subpoena from a California court to take a deposition in this state for purposes of a proceeding
3 pending in another jurisdiction. If a person seeks multiple subpoenas, a separate fee is payable
4 under this subdivision for each subpoena sought.

5 ☞ **Staff Note.** Government Code Section 70626 was enacted as part of the Uniform Civil Fees
6 and Standard Fee Schedule Act of 2005 (2005 Cal. Stat. ch. 75). As enacted in that bill,
7 Government Code Section 70626(b)(5) refers to Code of Civil Procedure Section 2026, which
8 was repealed as part of the 2004 nonsubstantive reorganization of the Civil Discovery Act. The
9 corresponding new provision is Code of Civil Procedure Section 2026.010. A bill pending before
10 the Governor would correct the cross-reference by replacing Code of Civil Procedure Section
11 2026 with Code of Civil Procedure Section 2026.010. See AB 1742 (Committee on Judiciary).
12 For purposes of this draft, we have assumed that the Governor will sign AB 1742 and
13 Government Code Section 70626(b)(5) will correctly refer to Code of Civil Procedure Section
14 2026.010.
