Study J-505 April 17, 2006

Memorandum 2006-7

Civil Discovery: Miscellaneous Issues (Comments on Tentative Recommendation)

The Commission has been studying civil discovery and has made a number of recommendations on the subject, all of which have been enacted. Last September, the Commission approved a tentative recommendation that addressed three different areas:

(1) The procedure for writ review of a pretrial ruling in a case that is coordinated or consolidated with other cases.
(2) Nonsubstantive clarification of the provisions governing service of a response to interrogatories and service of a response to an inspection demand.
(3) The procedure for deposing a witness in California for purposes of a proceeding pending elsewhere.

The tentative recommendation was circulated for comment and posted to the Commission's website. Despite extensive efforts to obtain input, the Commission only received the following written comments on the matters raised in the tentative recommendation:

Exhibit p.

- Christopher Cooke, San Francisco (12/22/05) 1
- Jeff Kobrick, Cooke, Kobrick & Wu, LLP (12/22/05) & related material 2
- State Bar Committee on Administration of Justice (2/9/06) 4
- Kristen M. Tsangaris, Dykema Gossett, PLLC (12/28/05) 9

The Commission also received comments on a related matter from Isaac Simon, an associate who works with Commission member Bill Weinberger. See Exhibit p. 10. Also attached is a recent news article about a writ petition affecting 560 cases against the Los Angeles Archdiocese (Exhibit p. 11), as well as some materials pertaining to a study of interstate depositions that is being conducted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") (Exhibit pp. 12-20). The Commission needs to consider the input on each matter in the tentative recommendation and decide what to do next.

WRIT REVIEW OF A PRETRIAL RULING IN A CASE COORDINATED OR CONSOLIDATED WITH OTHER CASES

Last year, Senator Joseph Dunn (Chair of the Senate Judiciary Committee) alerted the Commission to a situation that sometimes arises when several cases that share a common question of law or fact have been coordinated or consolidated. If a trial court rules on a discovery dispute or other pretrial issue in one of several coordinated or consolidated cases, the losing litigant might seek a writ from a court of appeal to overturn the trial court's ruling. If the court of appeal decides to hear the matter on the merits, resolving the issue raised in the writ petition may take considerable time, particularly if the court of appeal decision is challenged in the California Supreme Court. Meanwhile, trial preparation in the case under review either proceeds or is stayed (see Cal. R. Ct. 56). Likewise, trial preparation in the other coordinated or consolidated cases either proceeds or is stayed.

If the cases are stayed, justice in all of them is delayed and evidence may become stale or unavailable, perhaps eventually resulting in a denial of justice in every case. If discovery and other pretrial preparation proceeds, some or all of it might need to be redone depending on the result on appeal. The parties might thus incur unnecessary expense and endure needless stress or other litigation hardships. This can occur any time a party seeks writ review of a pretrial ruling, but the negative effects are compounded when the writ pertains to an issue that is common to coordinated or consolidated cases.

Senator Dunn asked the Commission to explore means of addressing that situation, such as creating a calendar preference for a writ pertaining to an issue that is common to cases being jointly adjudicated. In response, the Commission initially looked into the possibility of creating a calendar preference directing the courts of appeal to prioritize such a matter. The thought was that by reducing the time to issue a decision, the State could minimize the negative effects of delay. The Commission asked the staff to prepare a draft of a tentative recommendation along those lines. See Memorandum 2005-27 (available from the Commission, www.clrc.ca.gov); Minutes (July 2005, pp. 6-7) (available from the Commission, www.clrc.ca.gov).

Before the staff took that step, however, the Commission received input from the Judicial Council and the presiding justices of several courts of appeal. All of that input was negative about the concept of creating a new calendar preference.

The comments said that such a calendar preference is unnecessary because (1) writ petitions already receive priority and (2) any litigant is entitled to request a calendar preference pursuant to Rule 19 of the California Rules of Court. See First Supplement to Memorandum 2005-33 (available from the Commission, www.clrc.ca.gov). The letter from the Judicial Council cautioned that "Chief Justice Ronald M. George individually has stated ... that he opposes this proposal as a matter of policy." *Id.* at Exhibit p. 4.

In light of that input, the Commission decided not to propose a new calendar preference. Instead, the Commission decided simply to "solicit input from attorneys and other interested persons on (1) their experiences in dealing with writ review of a pretrial ruling on an issue common to consolidated cases, (2) any problems they may have encountered in that context and suggestions for reform, and (3) any information they have on approaches used in other jurisdictions that might help to improve California law in this area." Minutes (Sept. 2005), p. 8 (available from the Commission, www.clrc.ca.gov).

After the Commission made that decision, the staff met with Senator Dunn and learned that his concern focuses more on coordinated cases than on consolidated cases. Thus, the Commission's tentative recommendation solicits input on handling writ petitions in both contexts: coordinated cases and consolidated cases.

The staff made extensive efforts to obtain input on this aspect of the tentative recommendation. As usual, the proposal was posted to the Commission's website and distributed to persons and organizations on the mailing list for the discovery study. In addition, the staff sent the proposal and a cover letter to numerous other persons and organizations, including the presiding judges of ten superior courts in highly populated counties and over 60 persons involved in coordinated or consolidated cases (plaintiffs' attorneys, defense attorneys, trial judges, and appellate justices). The staff shared its list of contacts with Senator Dunn's office and the Judicial Council, and sought advice on who else to contact. We followed through on the suggestions we received.

Despite these efforts, the Commission did not get any written comments on this aspect of the tentative recommendation. The staff did receive a number of phonecalls about it:

- Saul Bercovitch of the State Bar informed us that the Appellate Courts Committee considered the request for input but had no comment.

- Judge Daniel Pratt of Los Angeles County Superior Court said that he could not comment because he never had a writ taken from a ruling he made in a coordinated or consolidated case. He had heard that if several writs are sought in a set of coordinated or consolidated cases, they should all be assigned to the same appellate panel, so that the justices become familiar with the matter and can rule more quickly. He thought that was current practice.
- Judge Ronald Prager of San Diego County Superior Court is currently handling coordinated natural gas cases. He said that several writs had been sought, which are taking a very long time to resolve because they involve very difficult issues. His approach is to ignore the writs and continue to march forward with trial preparation. He does not think the situation is problematic; he cannot think of any legislation that would improve the situation.
- Retired Judge Robert James O'Neill, formerly of San Diego County Superior Court and now with ADR Services, Inc., presided over coordinated breast implant cases in which now-Senator Dunn served as plaintiffs' liaison counsel. He recalled that several writs were taken in those cases, which were all assigned to the same appellate panel. In his opinion, that procedure significantly helped reduce the time it took to bring the coordinated cases to trial. Nonetheless, it took years to bring the cases to trial, which benefited the defendants and was a hardship on the plaintiffs. He thought it would be useful to have a Rule of Court allowing a litigant to seek a calendar preference for a writ petition. He was unaware that such a rule now exists (Cal. R. Ct. 19). He said it would be preferable to address the situation by a Rule of Court rather than by legislation.

Based on the input thus far, it is not clear that there is a problem in need of a legislative solution. The paucity of complaints about existing writ procedures might be because people are generally satisfied with the existing procedures.

Alternatively, it is possible that a problem exists but people aware of the problem have not contacted the Commission, either because they do not know about the Commission's study or because they are busy (e.g., managing complex litigation) and have not had time to send comments to the Commission. Certainly, writ petitions do sometimes take a long time to resolve. *See, e.g., Doe 1 v. Superior Court*, 132 Cal. App. 4th 1160, 34 Cal. Rptr. 3d 248 (2005) (writ petition in coordinated case was filed in court of appeal in January but was not finally resolved until September, when court of appeal reconsidered writ as directed by Supreme Court); *Doe 2 v. Superior Court*, 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458 (2005) (court of appeal decided writ petition almost one year after trial court

heard motion to compel). A recent news article describes a writ petition challenging a pretrial ruling affecting 560 abuse cases against the Los Angeles Archdiocese. *L.A. Cardinal's Appeal Could Delay Clergy Abuse Cases*, S.F. Daily J., March 8, 2006, at 1, 5 (reproduced at Exhibit p. 11); see also *Manny v. Roman Catholic Archbishop of Los Angeles*, No. B189633 (2d Dist.). The article reports that the writ petition "angered plaintiffs' lawyers who accused the Los Angeles Archdiocese of trying to stall the 560 civil cases pending against it ...." *L.A. Cardinal's Appeal*, *supra*, at 1.

But the information the Commission currently has at hand does not show a need for legislative action to address this type of situation. Existing court rules and administrative practices might be sufficient to appropriately balance the competing interests in prompt adjudication of plaintiffs' cases and proper resolution of pretrial issues in those cases. The trial and appellate courts might not need any new statutory guidance on how to handle such matters.

It is possible, however, that further information will demonstrate a need for legislative intervention. The staff therefore recommends that the Commission **continue to monitor the situation, accept comments, and gather available evidence.** The staff will notify the Commission upon receiving any significant new input.

SERVICE OF A RESPONSE TO INTERROGATORIES OR A RESPONSE TO AN INSPECTION DEMAND

The provision governing service of a response to interrogatories (Code Civ. Proc. § 2030.260) establishes different rules for an unlawful detainer case than for other types of cases. As presently written, the rule for an unlawful detainer case is interspersed with the rule for other types of cases:

> 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.

(Emphasis added.)

The same is true of the provision governing service of a response to an inspection demand:

> 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.*

(Emphasis added.)

To improve clarity, the tentative recommendation proposes to revise each of these provisions to clearly separate the rule for an unlawful detainer case from the rule for other types of cases:

> **Code Civ. Proc. § 2030.260 (amended). Service of response to interrogatories**
>
> SEC. ____. Section 2030.260 of the Code of Civil Procedure is amended to read:
>
> 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.

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

SEC. ____. Section 2031.260 of the Code of Civil Procedure is amended to read:

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.

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

The proposed Comments make clear that these revisions are viewed as nonsubstantive.

The State Bar Committee on Administration of Justice ("CAJ") commented on the proposed revisions (Exhibit pp. 5-8). The Commission also received comments on a similar matter from Isaac Simon, a colleague of Commission member Bill Weinberger (Exhibit p. 10). Those comments are discussed below.

CAJ's Comments

CAJ "agrees that the statutory provisions lack clarity ...." Exhibit p. 5. According to CAJ, Sections 2030.260 and 2031.260 "contain an internal ambiguity." *Id.* CAJ explains:

> Under the first sentence of both statutes, parties in civil actions in general *and* in unlawful detainer actions are permitted to file a motion to shorten the time for a discovery response *or* a motion to extend the time for a response. The second sentences of both statutes, which refer to the time to respond in unlawful detainer

> actions only, permit a party to file a motion to *shorten* the time for a discovery response, but say nothing about a motion to *extend* the time to respond.

Id. (emphasis in original). The ambiguity is thus whether a court in an unlawful detainer case may, on motion by a party, extend the time to respond to interrogatories or an inspection demand.

The amendments in the tentative recommendation would make clear that a court may not do so. Based on limited research, the staff considers this the most reasonable interpretation of existing law. If a court in an unlawful detainer case could extend the time to respond to interrogatories, the second sentence of Section 2030.260 would serve no purpose and would in fact be misleading. Likewise, if a court in an unlawful detainer case could extend the time to respond to an inspection demand, the second sentence of Section 2031.260 would serve no purpose and would be misleading. In interpreting a statute, a court is to give meaning to every word if possible, and avoid an interpretation that makes any word surplusage. *See, e.g., Cooley v. Superior Court*, 29 Cal. 4th 228, 249, 57 P.3d 654, 127 Cal. Rptr. 2d 177 (2002). Consistent with this canon of construction, courts probably should interpret Sections 2030.260 and 2031.260 to preclude an extension of time in an unlawful detainer case. Such a construction would accord with the statutory scheme, in which an unlawful detainer case is a summary proceeding designed to be quickly adjudicated.

Although that construction appears to be the most reasonable interpretation of existing law, it might not be good policy. CAJ believes that "the statutes should be clarified to *permit* motions seeking extensions of time" to respond to interrogatories or an inspection demand. Exhibit p. 6 (emphasis in original).

In taking this position, CAJ points out that parties can agree among themselves to extend the time to respond to discovery in an unlawful detainer action. *Id*.; see Code Civ. Proc. §§ 2016.030, 2030.270, 2031.270, 2033.260. CAJ believes that parties "should not be precluded as a matter of law from filing a motion seeking that same relief from the court, which the court could then grant or deny, depending upon the specific facts and circumstances." Exhibit p. 6.

CAJ "recognizes that the statutory scheme is based upon the expedited and summary nature of unlawful detainer proceedings, which may provide a basis for not permitting motions to extend the time to respond to discovery in unlawful detainer actions." *Id*. CAJ says, however, that the

> statutes provide for a response within five days, so a party who is unable to obtain an extension of time by agreement will need to seek and obtain expedited relief from the court in any event. Moreover, although the statutes permit a party to file a motion to *shorten* the time for a discovery response, it is unlikely that a party could, as a practical matter, seek and obtain such an order, given the five day response time set by the statutes. The need for an order extending the time to respond would, in contrast, be much more likely and necessary, given the short time frame.

Id. (emphasis in original).

As a matter of policy, the staff thinks CAJ might be correct in urging that a court be permitted to extend discovery deadlines in an unlawful detainer case. Those five day deadlines are very short. It might not always be realistic to expect a party to be able to respond in the period provided. Often, the parties may be able to deal with such problems by agreement. But if a party refuses a reasonable request for an extension, perhaps a court should have authority to grant the extension despite the party's objection. The proposed amendments in the tentative recommendation would not give a court such authority.

CAJ therefore suggests alternative amendments allowing a court to extend the time to respond to interrogatories or an inspection demand in an unlawful detainer case. See Exhibit pp. 7. The staff would **implement the concept using a lighter touch, along the following lines:**

> **Code Civ. Proc. § 2030.260 (amended). Service of response to interrogatories**
>
> SEC. ____. Section 2030.260 of the Code of Civil Procedure is amended to read:
>
> 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, or unless on motion of the responding party the court has extended 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 by separately stating the special deadline for an unlawful detainer case. The amendment also eliminates an ambiguity by clearly permitting a court to extend, as well as shorten, the time to respond to interrogatories in an unlawful detainer case.

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

SEC. ____. Section 2031.260 of the Code of Civil Procedure is amended to read:

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, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

Comment. Section 2031.260 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case. The amendment also eliminates an ambiguity by clearly permitting a court to extend, as well as shorten, the time to respond to an inspection demand in an unlawful detainer case.

Section 2031.260 is further amended to make stylistic revisions.

CAJ also points out that Code of Civil Procedure Section 2033.250 is a similar provision governing service of a response to requests for admission. Exhibit p. 6. If Sections 2030.260 and 2031.260 are amended as shown above, Section 2033.250 should be amended similarly.

CAJ has provided proposed language for such an amendment. *Id.* Again, the staff suggests using a lighter touch. The Commission could **propose to amend Section 2033.250 along the following lines:**

Code Civ. Proc. § 2033.250 (amended). Service of response to requests for admission

SEC. ____. Section 2033.250 of the Code of Civil Procedure is amended to read:

2033.250. (a) Within 30 days after service of requests for admission, ~~or in unlawful detainer actions within five days after service of requests for admission,~~ the party to whom the requests are directed shall serve the original of the response to them on the requesting party, and a copy of the response on all other parties who have appeared, unless on motion of the requesting 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 request is directed shall have at least five days from the date of service to respond, unless on motion of the requesting 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.

Comment. Section 2033.250 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case. The amendment also eliminates an ambiguity by clearly permitting a court to extend, as well as shorten, the time to respond to requests for admission in an unlawful detainer case.

Section 2031.260 is further amended to make a stylistic revision.

If the Commission decides to proceed in this manner, **it should circulate a new tentative recommendation with the new amendments of Sections 2030.260, 2031.260, and 2033.250.** In addition to those amendments, the tentative recommendation could perhaps include the new statute proposed at pages 2-3 of Memorandum 2006-11 (available from the Commission, www.clrc.ca.gov), which would provide a special five-day notice period for a discovery motion in an unlawful detainer case. The tentative recommendation could be entitled "Discovery Deadlines in an Unlawful Detainer Case." This might help draw the attention of, and promote input from, unlawful detainer specialists. If the Commission so directs, the staff could prepare a draft of such a tentative recommendation for the Commission's next meeting.

Mr. Simon's Comments

Isaac Simon, an associate who works with Commission member Bill Weinberger, has alerted us to a problem with two other discovery provisions that specify a special deadline for an unlawful detainer case. He says that the following provisions need commas as indicated in boldface and brackets:

> 2030.020. ... (b) A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions five days after service of the summons on**[,]** or appearance by, that party, whichever occurs first.
>
> ....
>
> 2031.020. ... (b) A plaintiff may make a demand for inspection without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions within five days after service of the summons on**[,]** or appearance by, the party to whom the demand is directed, whichever occurs first.
>
> ....

Exhibit p. 10.

In making this suggestion, Mr. Simon points out that "[t]he omission of the commas does not appear to be intentional as 2033.020(b) (RFAs) and 2025.210(b) (depositions) contain the commas and therefore make more sense." *Id*. The provisions to which he refers provide as follows:

> 2033.020. ... (b) A plaintiff may make requests for admission by a party without leave of court at any time that is 10 days after the service of the summons on, or, in unlawful detainer actions, five days after the service of the summons on, or appearance by, that party, whichever occurs first.
>
> ....
>
> 2025.210. ... (b) The plaintiff may serve a deposition notice without leave of court on any date that is 20 days after the service of the summons on, or appearance by, any defendant. On motion with or without notice, the court, for good cause shown, may grant to a plaintiff leave to serve a deposition notice on an earlier date.

The placement of the commas (or lack thereof) in all four provisions is exactly as it was in their predecessor statutes (former Sections 2025(b), 2030(b), 2031(b), and 2033(b)), which were repealed in the 2004 nonsubstantive reorganization of the Civil Discovery Act recommended by the Commission. But Mr. Simon is correct that Sections 2030.020 and 2031.020 contain a significant ambiguity: Do both the 5-day and the 10-day deadlines run from service of the summons on, or appearance by, the party subject to discovery, whichever occurs first? Does one deadline run from service of the summons on the party subject to discovery, and the other deadline run from service of the summons on, or appearance by, the party subject to discovery, whichever occurs first? If so, which rule applies to which deadline?

As a matter of policy, it seems logical to apply the same rule to both the 5-day and the 10-day deadline. If a party has been served with a summons, or has appeared in an action, the clock should start ticking for taking discovery from that party. This should be the rule regardless of whether the case is an unlawful detainer case or another type of case.

Inserting a comma in each section as Mr. Simon proposes might be somewhat helpful. It would be more clear, however, to **amend each section to separately state the special deadline applicable in an unlawful detainer case:**

> **Code Civ. Proc. § 2030.020 (amended). Time of propounding interrogatories**
>
> SEC. ____. Section 2030.020 of the Code of Civil Procedure is amended to read:
>
> 2030.020. (a) A defendant may propound interrogatories to a party to the action without leave of court at any time.
>
> (b) A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, ~~or in unlawful detainer actions five days after service of the summons on~~ or appearance by, that party, whichever occurs first.
>
> (c) Notwithstanding subdivision (b), in an unlawful detainer action a plaintiff may propound interrogatories to a party without leave of court at any time that is five days after service of the summons on, or appearance by, that party, whichever occurs first.
>
> (d) Notwithstanding subdivisions (b) and (c), on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to propound interrogatories at an earlier time.
>
> **Comment.** Section 2030.020 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case.

> **Code Civ. Proc. § 2031.020 (amended). Time of making inspection demand**
>
> SEC. ____. Section 2031.020 of the Code of Civil Procedure is amended to read:
>
> 2031.020. (a) A defendant may make a demand for inspection without leave of court at any time.
>
> (b) A plaintiff may make a demand for inspection without leave of court at any time that is 10 days after the service of the summons on, ~~or in unlawful detainer actions within five days after service of the summons on~~ or appearance by, the party to whom the demand is directed, whichever occurs first.
>
> (c) Notwithstanding subdivision (b), in an unlawful detainer action a plaintiff may make a demand for inspection without leave of court at any time that is five days after service of the summons

on, or appearance by, the party to whom the demand is directed, whichever occurs first.

(d) Notwithstanding subdivisions (b) and (c), on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make an inspection demand at an earlier time.

Comment. Section 2031.020 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case.

Although Section 2033.020 has a comma where Mr. Simon thinks there should be one, **it may be helpful to separately state the special unlawful detainer deadline in that provision as well:**

Code Civ. Proc. § 2033.020 (amended). Time of making request for admissions

SEC. ____. Section 2033.020 of the Code of Civil Procedure is amended to read:

2033.020. (a) A defendant may make requests for admission by a party without leave of court at any time.

(b) A plaintiff may make requests for admission by a party without leave of court at any time that is 10 days after the service of the summons on, ~~or, in unlawful detainer actions, five days after the service of the summons on,~~ or appearance by, that party, whichever occurs first.

(c) Notwithstanding subdivision (b), in an unlawful detainer action a plaintiff may make requests for admission by a party without leave of court at any time that is five days after the service of the summons on, or appearance by, that party, whichever occurs first.

(c) Notwithstanding subdivisions (b) and (c), on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make requests for admission at an earlier time.

Comment. Section 2033.020 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case.

The amendments of Sections 2030.020(b), 2031.020(b), and 2033.020(b) shown above could be included in the same tentative recommendation as the other unlawful detainer proposals previously discussed. The staff searched the Civil Discovery Act for any additional provisions presenting similar problems. We found a few other discovery provisions that refer to unlawful detainer cases.

One of these does not present any problems; it simply states that the Judicial Council shall develop and approve official form interrogatories and requests for

admission in any civil action in a state court based on unlawful detainer or certain other types of matters. (Code Civ. Proc. § 2033.710).

Two other provisions potentially raise issues. Code of Civil Procedure Section 2031.030(c)(2), like its predecessor (former Code Civ. Proc. § 2031(c)), is arguably ambiguous as to whether a good cause exception exists for unlawful detainer cases, other types of cases, or both. **The ambiguity could be eliminated by amending the provision along the following lines:**

> **Code Civ. Proc. § 2031.030 (amended). Form of inspection demand**
>
> SEC. ____. Section 2031.030 of the Code of Civil Procedure is amended to read:
>
> 2031.030. (a) A party demanding an inspection shall number each set of demands consecutively.
>
> (b) In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party.
>
> (c) Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:
>
> (1) Designate the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item or by reasonably particularizing each category of item.
>
> (2) Specify a reasonable time for the inspection that is at least 30 days after service of the demand, ~~or in unlawful detainer actions at least five days after service of the demand,~~ unless the court for good cause shown has granted leave to specify an earlier date. In an unlawful detainer action, the demand shall specify a reasonable time for the inspection that is at least five days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date.
>
> (3) Specify a reasonable place for making the inspection, copying, and performing any related activity.
>
> (4) Specify any related activity that is being demanded in addition to an inspection and copying, as well as the manner in which that related activity will be performed, and whether that activity will permanently alter or destroy the item involved.
>
> **Comment.** Subdivision (c) of Section 2031.030 is amended to improve clarity by separately stating the special deadline for an unlawful detainer case.

Code of Civil Procedure Section 2025.270 presents a different issue. It provides:

> 2025.270. (a) An oral deposition shall be scheduled for a date at least 10 days after service of the deposition notice. If, as defined in subdivision (a) of Section 1985.3, the party giving notice of the

> deposition is a subpoenaing party, and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer, the deposition shall be scheduled for a date at least 20 days after issuance of that subpoena.
>
> (b) Notwithstanding subdivision (a), in an unlawful detainer action an oral deposition shall be scheduled for a date at least five days after service of the deposition notice, but not later than five days before trial.
>
> (c) On motion or ex parte application of any party or deponent, for good cause shown, the court may shorten or extend the time for scheduling a deposition, or may stay its taking until the determination of a motion for a protective order under Section 2025.420.

Here, the special deadline for an unlawful detainer case is separately stated. But it is unclear whether the exception applies only to the general 10-day rule of subdivision (a), or also to the special 20-day rule for personal records of a consumer.

Again, this ambiguity predates the 2004 reorganization of the Civil Discovery Act (see former Code Civ. Proc. § 2025(f)). **The staff would like to research the legislative history and other relevant materials before proposing an amendment to eliminate the ambiguity in Section 2025.270(b).** We could address this point in connection with preparing a draft tentative recommendation for the Commission to review.

DEPOSITION OF A WITNESS IN CALIFORNIA FOR PURPOSES OF A PROCEEDING PENDING IN ANOTHER JURISDICTION

The third topic addressed in the tentative recommendation is the procedure for deposing a witness in California for purposes of a proceeding pending in another jurisdiction. The existing provision on this subject (Code Civ. Proc. § 2029.010) provides no guidance on procedural points such as:

- What type of paper a party must submit to a California court to obtain a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.
- What filing fee, if any, a party must pay to have a California court issue a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.
- Whether a hearing before a judge is necessary to have a California court issue a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.

- Whether and under what circumstances an attorney can issue a California subpoena compelling a person in California to attend a deposition in the state for purposes of an out-of-state proceeding.
- What type of court file a California court must open, if any, when a party asks the court to issue a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.
- Whether and how to seek relief in a California court if a dispute arises during a deposition taken in the state for purposes of an out-of-state proceeding.
- What procedural rules apply when a deposition for purposes of an out-of-state proceeding is taken in California on notice or by agreement.

The proposed amendment of Section 2029.010 would address these points, either by stating a specific rule or, in some instances, by directing the Judicial Council to promulgate a rule or prepare a form providing guidance. The proposed amendment would also make clear that Section 2029.010 applies to a deposition of an organization, not just a deposition of a natural person.

The Commission developed this proposal after two people pointed out the need for such statutory guidance: process server Tony Klein and former Discovery Commissioner Richard Best. See Memorandum 2005-26, Exhibit pp. 1-6 (available from the Commission, www.clrc.ca.gov); Memorandum 2005-33, Exhibit pp. 1-3 (available from the Commission, www.clrc.ca.gov). Patrick O'Donnell of the Administrative Office of the Courts ("AOC") had also orally informed the staff that he sometimes receives questions from litigants and court personnel who are confused about the proper procedures to follow in this context.

The Commission received a number of comments on the proposal. Those comments are discussed below, followed by some issues and pertinent developments that have come to the staff's attention. We are also expecting comments from the AOC to arrive in the next few days; we will present that input in a supplement to this memorandum.

Input on the Proposal Generally

The input on the proposed amendment of Section 2029.010 was generally favorable. CAJ "supports the CLRC's efforts to revise Code of Civil Procedure Section 2029.010, and believes this is an area sorely in need of clarification." Exhibit p. 4. "In general, CAJ commends the CLRC's proposal, and believes it is a

positive step in the direction of preventing confusion and making the statute more workable." *Id*.

In December 2005, San Francisco attorney Jeff Kobrick was involved in a matter in which a Texas attorney subpoenaed Mr. Kobrick's client (a San Francisco company and individuals) for a deposition and document production in San Francisco. Exhibit p. 2. Mr. Kobrick requested some materials from the staff, particularly Mr. Klein's comments. *Id*. After the staff directed Mr. Kobrick to those materials, he sent a message stating that "[t]his is really an obscure area." *Id*. at 3. When he got the subpoena from Texas, he "read 2029 and then read other statutes (e.g., governing subpoenas) and realized the statute was about as murky as a statute could be and that the whole area was incoherent." *Id*. He is "glad someone is addressing it." *Id*.

Similarly, Michigan attorney Kristen Tsangaris was recently involved in "a small (but tragic) estate matter filed in a Michigan probate court." Exhibit p. 9. Her firm "served a subpoena duces tecum on a nonparty California corporation registered in Santa Clara County." *Id*. A clerk gave them "a long list of procedural requirements [to] follow, including paying a fee of $299.50 (to increase in January)." *Id*. Ms. Tsangaris "spent the better part of [an] afternoon attempting to understand what [she needed] to do and then how to do it." *Id*. She read one of the staff memoranda leading to the tentative recommendation. *Id.* That prompted her to thank the staff for "providing clarity with both your writing style and your analysis." *Id*. She also asked a question about Section 2029.010, which the staff declined to answer because staff members are not authorized to provide legal advice to individuals. Although Ms. Tsangaris did not comment directly on the tentative recommendation, it seems clear from her comments that she would welcome clarification of the procedural requirements for taking a deposition in California for purposes of an out-of-state proceeding.

The general comments on the tentative recommendation thus reinforce the previous input indicating that this area warrants clarification. The Commission seems to be on the right track in giving attention to this matter.

CAJ's Concern About the Existing Substance of Section 2029.010

CAJ does not comment on any specific aspect of the language the Commission proposes to add to Section 2029.010. CAJ does comment, however, on the existing language in the provision, which states:

> 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.

The tentative recommendation would leave this language largely intact; it just proposes some minor revisions to make clear that the provision applies to a deposition of an organization and encompasses a deposition solely for the production of documents and things.

"CAJ's overarching view is that when a party seeks to take the deposition of a witness in California for purposes of a proceeding pending in another jurisdiction, the witness should receive at least as much procedural protection as a witness in California would receive in a proceeding pending in California." Exhibit p. 4. CAJ members disagree on whether the existing language in Section 2029.010 accomplishes this purpose. "Some members of CAJ believe the ... language already provides 'at least as much procedural protection' for the witness, some believe it does not, and some believe the language is ambiguous and unclear." *Id*. Further, "the line between 'procedural' and 'substantive' protection is at times uncertain, and CAJ recognizes that this may create an additional layer of potential ambiguity and confusion." *Id*.

As an example, CAJ points to the mileage restrictions on where a witness can be deposed (Code Civ. Proc. § 2025.250). Within CAJ, there was "disagreement about whether the language of Section 2029.010 would compel application of the mileage restrictions, leading to CAJ's conclusion that some clarification of the statute was in order." Exhibit p. 5.

CAJ members also discussed "issues relating to the assertion of a privilege by a California witness whose deposition is sought in a non-California proceeding, when the law of the state in which the proceeding is pending differs." *Id*. In that context, "the line between 'procedure' and 'substance' became even more murky, and CAJ wondered whether some of the questions that may arise in connection with privileges or other issues would ultimately need to be answered by using a choice-of-law analysis on a case-by-case basis." *Id*.

A further example given by CAJ is "the situation that would arise when the law of the state in which the proceeding is pending is more restrictive than California law in defining the ability to obtain *any* discovery, or defining the scope of discovery that may be obtained." *Id*. (emphasis in original). It would seem that this issue could "be resolved in the jurisdiction in which the case is pending, in connection with that jurisdiction's issuance in the first instance of the mandate, writ, letters rogatory, letter of request, or commission ...." *Id.* But CAJ was not certain that this would be true in every jurisdiction. *Id*.

The staff is not aware of any easy answers to CAJ's examples. We have not found any cases discussing how to interpret Section 2029.010 or its predecessor, former Code of Civil Procedure Section 2029 (enacted by 1986 Cal. Stat. ch. 1334, § 2; amended by 1989 Cal. Stat. ch. 1416, § 30). The predecessor of former Section 2029 was former Code of Civil Procedure Section 2023, which was enacted by 1959 Cal. Stat. ch. 1590, § 5. Although a few cases mention that provision, again we found no significant discussion of how to interpret it. Earlier California statutes governing an in-state deposition for an out-of-state proceeding differ so substantially from Section 2029.010 that it does not seem worthwhile to search for case law construing them.

Section 2029.010, former Section 2029, and former Section 2023 all closely track the language of the Uniform Foreign Depositions Act ("UFDA"), which was approved by NCCUSL in 1920 but superseded in 1962 by the Uniform Interstate and International Procedure Act ("UIIPA"). In addition to the UFDA language, however, former Section 2029 as originally enacted included the following paragraph:

> (b) The clerk of the superior court in which the deponent resides shall issue a deposition subpoena directed to the deponent if it appears by affidavit or declaration filed that (1) the deponent resides within 75 miles of the place at which the deposition is to be taken, (2) the testimony of the deponent as well as any documents or things described in the deposition subpoena are relevant to the subject matter involved in the action or proceeding, and (3) a deposition taken under these circumstances may be used in the action under the law of the state, territory, district, or foreign nation in which it is pending.

A similar paragraph appeared in former Section 2023. This language was deleted from former Section 2029 in 1989. See 1989 Cal. Stat. ch. 1416, § 30.

One could argue from the deletion of the language that thereafter a deposition pursuant to former Section 2029 was not subject to a mileage restriction and thus the same is true of the current provision, Section 2029.010. It seems at least as likely, however, that the language was deleted because

(1) it imposed inappropriate burdens on the clerk of court (assessing whether the mileage restriction was satisfied, whether the discovery sought was relevant to the out-of-state case, and whether the requested discovery could be used in the out-of-state case), or

(2) the mileage restriction in former Section 2029(b) was slightly inconsistent with the mileage restriction in the statute governing depositions generally (former Section 2025) and the two provisions could be conformed by deleting Section 2029(b) and relying on Section 2029(a) to make the requirements of Section 2025 applicable to an in-state deposition for an out-of-state case.

The staff has not attempted to research the legislative history at State Archives or through the Judicial Council, which might have been involved in the 1989 legislation.

In theory, cases from other jurisdictions that have adopted the UFDA might perhaps shed some light on the mileage restriction or other issues raised by CAJ. Approximately 20 states have adopted the UFDA or a variant of it. See Memorandum 2005-26, p. 8. The staff has not specifically searched for case law on CAJ's points. But earlier, multi-jurisdictional research in this study turned up little case law on interstate depositions; there does not appear to be much guidance on how to interpret and apply provisions like Section 2029.010.

CAJ does not propose any specific statutory revisions to address the points it raises. The group recognizes that "it may be easier to enunciate" than to codify the principle of providing at least the same amount of protection when a California witness is deposed for purposes of an out-of-state proceeding as when a California witness is deposed for purposes of an in-state proceeding. Exhibit p. 4.

The Commission thus needs to consider whether to attempt to revise Section 2029.010 to provide better guidance on points such as the ones raised by CAJ. Is it preferable to stick with the current proposal, which would simply augment Section 2029.010 by clarifying the procedural steps involved in obtaining a subpoena and enforcing discovery obligations under the statute? Or

should the Commission venture further and reevaluate the existing substance of the statute?

In answering this question, the Commission should be aware that NCCUSL recently commenced a study of interstate depositions. That study and its implications for the instant study are discussed below.

NCCUSL Study of Interstate Depositions

NCCUSL has made repeated efforts to draft a uniform law facilitating the taking of a deposition in one state for purposes of a proceeding pending in another jurisdiction. Its first effort was the UFDA, which was superseded by the UIIPA, an act that addressed jurisdictional and service of process issues as well as interstate depositions. Unlike the UFDA, the UIIPA was not widely adopted and was withdrawn by NCCUSL in 1977. Just last year, NCCUSL formed a new drafting committee on interstate depositions. According to NCCUSL's website (www.nccusl.org) , the purpose of the committee is to draft "an act which would provide a procedure to enable a party to effectuate depositions and discovery documents in other states." The committee had its first meeting last December. A memorandum regarding that meeting and a discussion draft prepared by the committee's Reporter are attached as Exhibit pages 12-20.

It is perhaps premature to devote much effort to analyzing the discussion draft, as it is a preliminary document and far from being NCCUSL's endproduct. According to the Chair of the NCCUSL committee, the soonest NCCUSL will approve a final act on this subject is the summer of 2007.

Nonetheless, some review of the discussion draft and related materials is appropriate, for two reasons. First, the Commission should assess whether it makes sense to continue with its proposal while NCCUSL's work is ongoing. Second, the work of the NCCUSL committee may provide insight into how to improve the tentative recommendation.

Like the Commission, the goal of the NCCUSL committee is to "set forth a clear, simple, and efficient procedure, that minimizes judicial involvement [and] is inexpensive to the litigants …." Exhibit p. 12. The proposal in the discussion draft, if adopted in California, would essentially provide that when a "court of record in any foreign jurisdiction" issues a subpoena commanding a person to appear or produce items for inspection in California, and a party presents that subpoena to a California court, the clerk of the court shall issue a subpoena "with identical terms." Exhibit pp. 15-17.

The new subpoena is to be served in accordance with California law and the "time, place and manner" of the discovery is to be in accordance with California law. *Id*. at 16, 17. The proper California court to issue the subpoena would either be the court where the witness resides or is located, or the court where the discovery is to be conducted. The NCCUSL committee is still debating this point. *See id*. at 14, 16, 17.

A motion to enforce, quash, or modify the subpoena, or a motion directed to service of the subpoena, is to be made in the same court, in accordance with California law. *Id*. at 16, 17. The same is true of a motion made during the taking of the deposition or a motion regarding inspection of documents or other items. *Id*.

Like the Commission's proposal, the proposal in the discussion draft would apply to a subpoena duces tecum, as well as a subpoena solely seeking testimony. *Id*. at 13. Similarly, both proposals would extend to discovery from an artificial entity, as well as discovery from a natural person. *Id*. The NCCUSL committee is still debating whether to require that a copy of the deposition notice be served along with the subpoena. *Id*. at 13-14. It is also considering whether to include a provision stating that "[t]he person … that has been served with a subpoena under this act, and any party to the litigation, shall have the same rights as if the litigation were pending in this state." *Id*. at 17.

The discussion draft proposal does not address some of the nitty gritty procedural points that would be clarified by the legislation in the tentative recommendation or by Judicial Council rules and forms promulgated pursuant to that legislation. For example, the discussion draft proposal does not address:

- What filing fee, if any, a party must pay to have a California court issue a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.
- Whether and under what circumstances a California or out-of-state attorney can issue a California subpoena compelling a person in California to attend a deposition in the state for purposes of an out-of-state proceeding.
- What caption should be used on the California subpoena.
- What type of court file a California court must open, if any, when a party asks the court to issue a subpoena to take a deposition in the state for purposes of an out-of-state proceeding.
- What filing fee applies, and whether it is necessary to initiate a California proceeding, when a person asks a California court to

resolve a dispute that arose during a deposition taken in the state for purposes of an out-of-state proceeding.

- What procedural rules apply when a deposition for purposes of an out-of-state proceeding is taken in California on notice or by agreement.

The staff also has questions about aspects of the discussion draft proposal. Specifically,

- Would the proposal apply when a foreign jurisdiction issues a document other than a subpoena, such as a commission or mandate to take a deposition of a witness in California? A state or other foreign jurisdiction might not have a procedure for issuing a document called a "subpoena" compelling attendance beyond its borders. In California, for instance, the current procedure is to obtain a commission to take a deposition in another state (Code Civ. Proc. § 2026.010). Perhaps the NCCUSL committee plans to define "subpoena" broadly to encompass a commission, mandate, and the various other types of documents currently listed in Section 2029.010.
- Would the proposal require the person seeking a subpoena to submit the original of a subpoena from another jurisdiction? A true and correct or a certified copy? Would any assurance of authenticity be required?
- If the California subpoena is to be obtained in the court where the witness resides or is located (one of the alternatives under discussion), would the court clerk be required to assess whether that requirement is satisfied? If so, how would the clerk do that? Would it be more workable to require that the subpoena be obtained in the county where the discovery is to be conducted, as in the Commission's proposal?
- The discussion draft proposal would require that a motion relating to the deposition or other discovery event be brought in the court that issued the subpoena. Would it also be permissible to bring such a motion in the out-of-state tribunal familiar with the case, as under the Commission's proposal?

An attractive aspect of the discussion draft proposal is the language stating that the new subpoena is to be served in accordance with California law and the "time, place and manner" of the discovery is to be in accordance with California law. In contrast, Section 2029.010 currently states that the discovery is to be taken "in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California." It is unclear whether the phrase "by the same process" refers to procedural steps such as the time and place of the discovery, or only to refers to service of process on the

witness. Using the "time, place, and manner" language in the discussion draft might help address CAJ's overarching concern that "when a party seeks to take the deposition of a witness in California for purposes of a proceeding pending in another jurisdiction, the witness should receive at least as much procedural protection as a witness in California would receive in a proceeding pending in California." Exhibit p. 4.

CAJ's concern might also be addressed to some extent by another provision that the NCCUSL committee is considering, the one stating: "The person … that has been served with a subpoena under this act, and any party to the litigation, shall have the same rights as if the litigation were pending in this state." *Id*. at 17. The staff is less sure about the potential impact of this language; it might be overly sweeping.

Should the Commission revise its proposal to incorporate the "time, place, and manner" language or other aspects of the NCCUSL committee's discussion draft? Should the Commission put its study on hold until the NCCUSL study is complete, and then examine NCCUSL's endproduct? Should the Commission go forward with its own study, perhaps finalizing a recommendation this year for introduction in the Legislature in 2007?

Awaiting NCCUSL's endproduct would entail significant delay. If NCCUSL finalizes a uniform act in the summer of 2007 (the earliest date anticipated), it is unlikely that the Commission could fully consider the uniform act and finalize a recommendation for introduction in the Legislature in 2008. More probably, it would be 2009 before the Commission would have legislation ready to introduce, two years later than if it did not wait for NCCUSL's endproduct.

In addition, it is not clear that NCCUSL will address all of the nitty gritty procedural points covered in the tentative recommendation. Legislation dealing with some of those points (e.g., filing fees) might need to be tailored to each state's codes and court system.

But NCCUSL may come up with an act that would potentially offer benefits of uniformity and improvements that we have not considered (e.g., ones dealing with the existing substance of Section 2029.010, addressing points such as the ones raised by CAJ). Certainly, NCCUSL's endproduct will be worth examining once it is available. **To avoid needless duplication of effort, the staff recommends tabling the interstate deposition portion of this study and revisiting this topic after NCCUSL completes its work.**

If the Commission agrees with this approach, it does not need to resolve the remaining issues in this memorandum, at least not until it reactivates its work on interstate depositions. But if the Commission decides to go forward with that project despite NCCUSL's ongoing work, then it should consider the additional issues below.

Mr. Cooke's Concern About Representation By Out-of-State Counsel

San Francisco attorney Christopher Cooke raises a concern about the extent to which an out-of-state attorney can represent a client in connection with a deposition that is conducted in California. He points out that there is a significant distinction between (1) permitting an out-of-state lawyer to "take the deposition of someone in California without running afoul of [the] statute requiring only licensed members of the bar to practice law in California," and (2) permitting an out-of-state lawyer to "appear in a California cour[t] without leave of court, to obtain and enforce a subpoena against a California resident ...." Exhibit p. 1. He says that in the latter situation the courts "have uniformly required someone making any appearance in a California court either to be a member of the Bar, or to be admitted pro hac vice." *Id*. He warns that the Commission's proposal might be interpreted to change that rule. *Id.*

Mr. Cooke is correct that the two situations he describes raise different considerations. **The Commission's proposal should point this out**, but the tentative recommendation does not clearly do so. If the Commission goes forward with its proposal on interstate depositions, **the staff will attempt to draft revisions clarifying this matter and present them to the Commission for consideration at a later meeting.**

The Commission's Questions About What Constitutes a Deposition "on notice or by agreement"

Section 2029.010 currently applies not only whenever a court of record issues a document compelling a witness to attend a deposition, but also "whenever, *on notice or agreement,* it is required to take the oral or written deposition of a natural person in California." (Emphasis added.) The tentative recommendation proposes to add language clarifying that if a discovery dispute arises relating to a deposition taken in California for purposes of an out-of-state proceeding, the deponent or any party may seek relief in a California court regardless of whether the deposing party obtained a subpoena under Section 2029.010.

At its meeting last September, the Commission discussed what it means to take a deposition "on notice or agreement." Does the language apply only when a witness is legally compelled to attend, such as by a law compelling a party to attend a deposition without being subpoenaed (e.g., Code Civ. Proc. § 2025.280), or a by a binding contractual agreement (e.g., a multiple-party contract requiring each signatory to provide testimony or other information if needed to resolve a future dispute relating to the agreement). Or does the language also apply when a witness voluntarily agrees to attend a deposition?

The Commission considered but rejected the possibility of flagging this point in the tentative recommendation and specifically soliciting comments on it. Unfortunately, none of the input received thus far addresses it.

As a matter of policy, it might be advisable to broadly define a deposition "on notice or agreement." Otherwise, there would be no guidance on what rules apply, or how to handle a dispute that arises, when a California witness voluntarily appears at a deposition for purposes of an out-of-state proceeding.

If the Commission goes forward with its proposal on interstate depositions, it could **add such a definition to its proposed amendment of Section 2029.010, along the following lines:**

> (h) For purposes of this section, a deposition "on notice or agreement" means a deposition in which the deponent is compelled to attend by issuance of notice or by a contractual agreement, as well as a deposition in which the deponent attends voluntarily.
>
> **Comment.** ... Subdivision (h) is added to make clear that the references to a deposition "on notice or agreement" are to be interpreted broadly. For an example of a provision requiring a deponent to attend by issuance of notice, see Section 2025.280.

Use of the Terms "Deponent" and "Letters Rogatory"

In preparing the Commission's proposal for circulation as a tentative recommendation, the staff noticed two other terminological issues.

First, Section 2029.010 refers to "the oral or written *deposition*" of a person and states that "the *deponent* may be compelled to appear and testify, and to produce documents and things, in the same manner ...." (Emphasis added.) The tentative recommendation would add other references to "the deposition" and "the deponent."

This language might be somewhat confusing as applied to a situation in which a nonparty witness is compelled to produce a document or other item for

inspection, without having to testify. Under California law, however, such a situation is currently referred as a "deposition," in which there is a "deponent" and a "deposition officer." See Code Civ. Proc. §§ 2020.010, 2020.410-2020.440; Evid. Code §§ 1560-1566.

It might be more clear to use different terminology to refer to that situation. At a future meeting, the staff plans to raise the possibility of clarifying the treatment of a records-only subpoena under the Civil Discovery Act generally, because that issue was raised in a comment unrelated to Section 2029.010. Rather than proposing any changes now in the specific context of Section 2029.010, it may be better to **continue to use the terms "deposition" and "deponent" in that provision for now and possibly do further revisions later as part of a more comprehensive cleanup.**

The other terminological issue relates to use of the term "letters rogatory" instead of "letter rogatory." Section 2029.010 currently uses the term "letters rogatory" in the singular sense: "Whenever any ... letters rogatory .. is issued ...." The tentative recommendation would add a second, similar reference: "The application form shall require the applicant to attach a true and correct copy of the ... letters rogatory ...."

Both the terms "letter rogatory" and "letters rogatory" are used in the singular sense in other sources. For example, compare 28 U.S.C. § 1781 ("a letter rogatory") with Black's Law Dictionary (3d ed.) (defining "letters rogatory" as "[a] formal communication in writing, sent by a court in which ...."). Besides Section 2029.010, there are only a few other references in the California codes, but the usage is nonetheless inconsistent. See Code Civ. Proc. §§ 413.10, 2027.010; Gov't Code § 11188.

The staff's inclination is to **continue to use the term "letters rogatory" in Section 2029.010 for purposes of this study.** If consistency in usage of "letters rogatory" as opposed to "letter rogatory" throughout the codes is desired, that could be achieved by other legislation.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

COMMENTS OF CHRISTOPHER COOKE

Feedback form submitted on <www.clrc.ca.gov>:

From: Christopher Cooke <ccooke@ckwlaw.com>
Date: Dec. 22, 2005

Message: I have only one suggestion and comment to make. You indicate that, under your proposed changes, you would not create a requirement that an out-of-state attorney needs to retain local counsel to enforce a subpoena issued to a California resident to compel discovery for use in a lawsuit pending in another state. You state, as support, the fact that the California State Bar has already concluded that out of state attorneys who practice temporarily in California do not need to be members of the State Bar. I would disagree slightly with your premise. The State Bar was addressing whether it was illegal for the out of state lawyer to take the deposition of someone in California without running afoul of this statute requiring only licensed members of the bar to practice law in California, if they are only doing work on something that temporarily requires them to come to California. It is a very different matter to permit an out of state attorney, who is not familiar with California codes, rules and customs, to appear in a California courts without leave of court, to obtain and enforce a subpoena against a California resident, and the state bar was not addressing that situation. The Courts have uniformly required someone making any appearance in a California court either to be a member of the Bar, or to be admitted pro hac vice. Your proposed legislation (or at least your comments about it) appear to change this requirement. So, I would suggest amending your comments to note that distinction, or amending your legislation to make clear that only a member of the Bar of California, or an attorney admitted by a court pro hac vice, may seek leave of court to enforce a subpoena. Under what I am suggesting, the attorney can take the deposition, but not move the court to compel further responses, unless he or she is admitted pro hac vice, or is a member (such as local counsel) of the State Bar. Thanks for the chance to comment.

COMMENTS OF JEFF KOBRICK

From: Jeff Kobrick <jkobrick@ckwlaw.com>
Subject: Commission Recommendation of 9/2005
Date: Dec. 22, 2005
To: Barbara Gaal

Dear Ms. Gaal,

I am an attorney and I have a matter now where a Texas attorney has subpoenaed my client, a San Francisco company and individuals, for a deposition and documents in San Francisco.

I have read the Commission recommendation of Sept. ***2005*** [correction from previous email) on revisions of CCP section 2029, and was wondering how I could obtain access to the materials cited in Footnote 13 (the July 13, 2005 email from Tony Klein to you and other material cited in that footnote) which would be most helpful to me in my case.

Thank you very much for your help.

Jeff Kobrick

Jeffrey W. Kobrick
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REPLY OF BARBARA GAAL

From: Barbara Gaal <bgaal@clrc.ca.gov>
Subject: Re: Commission Recommendation of 9/2005
Date: Dec. 22, 2005
To: Jeff Kobrick

Dear Mr. Kobrick:

Thank you for your inquiry. All materials relating to the Law Revision Commission's ongoing study of civil discovery are available on the Commission's website at

<http://www.clrc.ca.gov/J503.html>. See in particular Memorandum 2005-26, Exhibit pp. 1-6 (the materials cited in n. 13 of the Commission's tentative recommendation). See also Memorandum 2005-33, Exhibit pp. 1-3 (additional comments of Mr. Klein).

Please let me know if you have any difficulty accessing these materials or need any other assistance.

I hope you enjoy the holidays.

Sincerely,

Barbara Gaal

Barbara Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303
Voice: 650-494-1335
Fax: 650-494-1827
Website: www.clrc.ca.gov

RESPONSE OF JEFF KOBRICK

From: Jeff Kobrick <jkobrick@ckwlaw.com>
Subject: Re: Commission Recommendation of 9/2005
Date: Dec. 22, 2005
To: Barbara Gaal

Thanks, Barbara.

This is really an obscure area. When I got the subpoena from Texas, I read 2029 and then read other statutes (e.g., governing subpoenas) and realized the statute was about as murky as a statute could be and that the whole area was incoherent. I am glad someone is addressing it.

I think I should be able to find what you cite. Many thanks.

Jeff Kobrick

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ADMINISTRATION OF JUSTICE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
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TO: The California Law Revision Commission

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

DATE: February 9, 2006

SUBJECT: Civil Discovery: Miscellaneous Issues – Tentative Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the September 2005 Tentative Recommendation of the California Law Revision Commission ("CLRC"), *Civil Discovery: Miscellaneous Issues*, and appreciates the opportunity to submit these comments.

I. Deposition of a witness in California for purposes of a proceeding pending in another jurisdiction

CAJ supports the CLRC's efforts to revise Code of Civil Procedure Section 2029.010, and believes this is an area sorely in need of clarification. In general, CAJ commends the CLRC's proposal, and believes it is a positive step in the direction of preventing confusion and making the statute more workable. CAJ's specific comments are set out below.

CAJ's overarching view is that when a party seeks to take the deposition of a witness in California for purposes of a proceeding pending in another jurisdiction, the witness should receive at least as much procedural protection as a witness in California would receive in a proceeding pending in California. CAJ also believes, however, that it may be easier to enunciate this principle than put the principle into precise statutory language.

Within CAJ, different views were expressed about the meaning of current statutory language that the CLRC does not propose amending. Specifically, Section 2029.010 provides that a 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 that purposes in actions pending in California. Some members of CAJ believe the quoted language already provides "at least as much procedural protection" for the witness, some believe it does not, and some believe the language is ambiguous and unclear. Moreover, the line between "procedural" and "substantive" protection is at times uncertain, and CAJ recognizes that this may create an additional layer of potential ambiguity and confusion.

CAJ's discussion can be illustrated by a few examples. Under Code of Civil Procedure Section 2025.250, the deposition of a natural person must be taken either within 75 miles of the deponent's residence, or within the county where the action is pending and within 150 miles of the deponent's residence, unless otherwise ordered. Related provisions apply to the deposition of an organization. CAJ uniformly believes that these same provisions should apply to the California witness in a non-California proceeding. There was also a general consensus that the mileage restrictions were in the nature of a "procedural" protection. There was, however, disagreement about whether the language of Section 2029.010 would compel application of the mileage restrictions, leading to CAJ's conclusion that some clarification of the statute was in order. CAJ is not suggesting that Code of Civil Procedure Section 2025.250 – or any other specific statute – be incorporated by reference into Section 2029.010, as that would raise problematic issues concerning incorporation by reference of all statutes that provide "procedural protection" to a witness.

CAJ also discussed issues relating to the assertion of a privilege by a California witness whose deposition is sought in a non-California proceeding, when the law of the state in which the proceeding is pending differs. Here, the line between "procedure" and "substance" became even more murky, and CAJ wondered whether some of the questions that may arise in connection with privileges or other issues would ultimately need to be answered by using a choice-of-law analysis on a case-by-case basis.

Finally, CAJ discussed the situation that would arise when the law of the state in which the proceeding is pending is more restrictive than California law in defining the ability to obtain *any* discovery, or defining the scope of discovery that may be obtained. The general view was that this issue may be resolved in the jurisdiction in which the case is pending, in connection with that jurisdiction's issuance in the first instance of the mandate, writ, letters rogatory, letter of request, or commission, but that was not certain and could depend upon the process in a particular jurisdiction. Moreover, providing "at least as much procedural protection" to the California witness should not preclude an argument in California based on *greater* protection offered by the other jurisdiction. In any event, it is possible that this type of issue could arise in connection with Section 2029.010.

II. Discovery in unlawful detainer actions

The CLRC proposes amending the provisions of the Code of Civil Procedure governing service in unlawful detainer actions of responses to interrogatories and inspection demands. According to the Tentative Recommendation, the proposed amendments are intended to improve clarity, and are not intended to be substantive changes.

CAJ agrees that the statutory provisions lack clarity, but CAJ's proposed revisions differ from those that the CLRC proposes. CAJ notes, in particular, that existing Code of Civil Procedure Section 2030.260 and 2031.260 contain an internal ambiguity. Under the first sentence of both statutes, parties in civil actions in general *and* in unlawful detainer actions are permitted to file a motion to shorten the time for a discovery response *or* a motion to extend the time for a response. The second sentences of both statutes, which refer to the time to respond in unlawful detainer actions only, permit a party to file a motion to *shorten* the time for a discovery

response, but say nothing about a motion to *extend* the time to respond. This same analysis applies to Code of Civil Procedure Section 2033.250, governing requests for admission, and CAJ believes that statute should be considered along with the other two.

CAJ believes the statutes should be clarified to *permit* motions seeking extensions of time to respond to interrogatories, inspection demands, and requests for admission in unlawful detainer actions.[*] Under Code of Civil Procedure Sections 2030.270 (interrogatories), 2031.270 (inspection demands), and 2033.260 (requests for admissions) the parties may agree to extend the time for service of a response. There is no limitation in those statutes relating to extensions of time in unlawful detainer actions. These statutes are consistent with Code of Civil Procedure Section 2016.030, which provides: "Unless the court orders otherwise, the parties may by written stipulation modify the procedures provided by this title for any method of discovery permitted under Section 2019.010." Under all of these provisions, the parties are permitted to agree – without any court intervention – to extend the time for a response to discovery. They may, of course, be restricted by a *court order* that provides otherwise, but there is no restriction in these statutes that exists as a matter of law.

CAJ believes that if parties can agree among themselves to extend the time to respond to discovery in unlawful detainer actions, they should not be precluded as a matter of law from filing a motion seeking that same relief from the court, which the court could then grant or deny, depending upon the specific facts and circumstances. CAJ recognizes that the statutory scheme is based upon the expedited and summary nature of unlawful detainer proceedings, which may provide a basis for not permitting motions to extend the time to respond to discovery in unlawful detainer actions. However, the statutes provide for a response within five days, so a party who is unable to obtain an extension of time by agreement will need to seek and obtain expedited relief from the court in any event. Moreover, although the statutes permit a party to file a motion to *shorten* the time for a discovery response, it is unlikely that a party could, as a practical matter, seek and obtain such an order, given the five day response time set by the statutes. The need for an order extending the time to respond would, in contrast, be much more likely and necessary, given the short time frame.

For all of these reasons, CAJ believes that if any changes are to be made, the Code of Civil Procedure Sections in question should be amended to read as set forth below. CAJ also suggests an unrelated change in Section 2030.260 concerning the time to serve a copy of a response on other parties in the action, which is unique to Section 2030.260 because of the current statutory structure.

[*] This is one possible interpretation of the existing statutory language, but CAJ recognizes the ambiguity. CAJ has not researched the statutory language to determine whether there is anything in the legislative history or elsewhere that sheds light on the intent of the statutes, and has not been able to determine how the various courts interpret the statutes, in particular whether courts believe that parties lack the authority to move to extend the time to respond to discovery in unlawful detainer actions. Based on the experience of CAJ members who practice in the unlawful detainer area, extensions of time to respond to discovery are often granted by agreement between the parties, without court intervention.

Section 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 unlawful detainer actions the party to whom the interrogatories are propounded shall ~~have five days from the date of service to respond~~ serve the original of the response to them on the propounding party within five days after service of the interrogatories, 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.

~~(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 within the time specified in subdivision (a) or (b), as applicable. 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.

Section 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 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~~ 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, within five days after service of the demand, unless on motion of the party making the demand, the court has shortened the time for the response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

Section 2033.250

(a) Within 30 days after service of requests for admission, ~~or in unlawful detainer actions within five days after service of requests for admission~~, the party to whom the requests are directed shall serve the original of the response to them on the requesting party, and a copy of the response on all other parties who have appeared, unless on motion of the requesting 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 unlawful detainer actions the party to whom the request~~s~~ ~~is~~ are directed shall ~~have at least five days from the date of service to respond~~ serve the original of the response to them on the requesting party, and a copy of the response on all other parties who have appeared in the action, within five days after service of the requests, unless on motion of the requesting 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.

DISCLAIMER

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

COMMENTS OF KRISTEN M. TSANGARIS

From: KTsangaris@dykema.com
Subject: CCP 2029
Date: Dec. 28, 2005
To: bgaal@clrc.ca.gov

Dear Ms. Gaal,

I read with interest your Memorandum 2005-33 regarding Civil Discovery. Thank you for providing clarity with both your writing style and your analysis.

My firm is involved in a small (but tragic) estate matter filed in a Michigan probate court. We served a subpoena duces tecum on a nonparty California corporation registered in Santa Clara County. The County Clerk has given us a long list of procedural requirements we must follow, including paying a fee of $299.50 (to increase in January). I spent the better part of my afternoon attempting to understand what I need to do and then how to do it.

I was intrigued by the addition of the provision which would permit local counsel to issue the subpoena. After reviewing the current Code and your memorandum, I concluded that under current law a local attorney may issue the necessary subpoena without resort to the court. I understand that the proposed changes clarify this point, but am I correct in my conclusion that a local attorney already has this power?

Thank you for any insight that you can offer.

Kristen Tsangaris

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COMMENTS OF ISAAC SIMON

From: Isaac Simon <ISimon@pmcos.com>
Date: February 28, 2006
To: William Weinberger <WWeinberger@pmcos.com>
Subject: Law Revision Committee (CCP 2030.020)

I wanted to pass the following discrepancy on to you as a member of the law revision committee.

In writing up the research on the early discovery issue, I noticed that CCP 2030.020(b) (interrogatories) and 2031.020(b) (inspection demands) need commas, as follows:

"A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions five days after service of the summons on[,] or appearance by, that party, whichever occurs first." (CCP 2030.020(b).) (2031.020(b) reads similarly.)

The omission of the commas does not appear to be intentional as 2033.020(b) (RFAs) and 2025.210(b) (depositions) contain the commas and therefore make more sense.

L.A. Cardinal's Appeal Could Delay Clergy Abuse Cases

San Francisco Daily Journal,

March 8, 2006

By Sandra Hernandez
Daily Journal Staff Writer

LOS ANGELES — Lawyers for Roman Catholic Cardinal Roger Mahony filed an appeal Tuesday in Los Angeles County Superior Court that sought to temporarily delay nearly all litigation involving alleged sexual abuse by priests in San Diego and Los Angeles counties.

Mahony is seeking to unseal confidential documents known as certificates of merit involving older cases. These certificates are statements from mental health professionals declaring that the abuse claim is credible. The documents were intended to prevent frivolous claims and were intended to remain under seal.

The appeal angered plaintiffs' lawyers who accused the Los Angeles Archdiocese of trying to stall the 560 civil cases pending against it in the two counties.

"I've never seen anything like this," said Irwin M. Zalkin, a San Diego lawyer representing 50 claims against the church. "This is ludicrous, and they should be sanctioned.

"I don't know how tangled up this will get. But this is a blip. Their day of reckoning is coming," said Zalkin of Zalkin and Zimmer.

Venus Soltan, a Costa Mesa lawyer who also represents 50 claims against the church, said, "Frankly, we didn't expect this [appeal] on this issue. The certificates of merit are something the statute is clear about. The church doesn't get to see them. To stop the entire proceedings on this one measure shows how far they are willing to go."

Church attorney J. Michael Hennigan, of Hennigan, Bennett & Dorman in Los Angeles, denied the archdiocese is trying to delay proceedings.

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Cardinal's Appeal Could Delay Clergy Cases

Continued from Page 1

"It's our intention to move ahead with discovery," he said, "but the stay does halt all things related to the appeal.

Lee W. Potts, another attorney for the archdiocese, said the appeal was aimed at learning "what is in the certificates, how the court reviewed them and give us a chance to test the validity of the certificates of merit."

But Ryan DiMaria, a plaintiffs' lawyer, and an alleged victim of priest abuse himself, said, "This is just a legal tactic by the Catholic Church to stall.

"But the truth will eventually come out, and all this stalling will hurt them," said DiMaria, who has settled his claims against the church in Orange County and now works at Manly McGuire & Stewart in Newport Beach.

"This action clearly shows that Cardinal Mahony has no intention of settling these cases or helping to protect kids, contrary to his public comments," said Mary Grant, southwest regional director of Survivors Network for Those Abused by Priests.

Tuesday's appeal could have far reaching implications for at least 44 cases set to go to trial later this year.

Attorneys for the church and alleged victims had been expected to lay out the ground rules for pre-trial discovery next month. The church's appeal could stay all discovery in cases not yet set for trial, including depositions of elderly or ill priests, plaintiffs' lawyers said.

Attorneys agree it could make settlement of some uninsured cases more difficult.

Those cases involve alleged abuse that took place before 1953 or after 1985, when the archdioces had no insurance carrier. Those cases include some of the most troubling cases, including that of Michael Wempe, who was recently convicted of one charge of abusing a minor.

Settlement talks have been ongoing.

"This muddies the mediation to the extent the archdiocese is involved., said Soltan, a participant in those talks. "We are in mediation with the orders, but the archdiocese's involvement with those order mandates they be involved," said Soltan, who is involved in those talks.

D R A F T

FOR DISCUSSION ONLY

INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For Drafting Committee Meeting, March 17-19, 2006

Without Prefatory Note and Comments

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE ON INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

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Copies of this Act may be obtained from:
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INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

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INTERSTATE DEPOSITIONS AND DISCOVERY OF DOCUMENTS ACT

Alternative A

[SECTION 1. Whenever any subpoena [or subpoena duces tecum] is issued from any court of record in any foreign jurisdiction, commanding the person [or entity] to whom it is directed to attend and give testimony at a deposition, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person [or entity], or to permit inspection of premises, at a time and place therein specified, and that person [or entity] is a resident or is located within this state, upon presentment of such subpoena [and notice of deposition with proof of service] the clerk of the court, in the county or district in which that person [or entity] to whom the subpoena is directed resides or is located [or: where discovery is to be conducted], shall forthwith issue a subpoena directed to that person [or entity] with identical terms.

SECTION 2. Service of this subpoena [and notice of deposition with proof of service][on the person or entity] shall be made in accordance with the laws of this state.

SECTION 3. Motions to enforce, quash, or modify this subpoena, and motions directed to issues regarding service of this subpoena, shall be presented in the court in the county or district in which the person [or entity] to whom the subpoena is directed resides or is located [or: where discovery is to be conducted], and shall be made in accordance with the laws of this state.

SECTION 4. The [time, place, and manner of the] deposition shall be taken [or production or inspection made] in accordance with the laws of this state.

SECTION 5. Motions made during the taking of the deposition, and motions regarding

the production of books, documents or tangible things, or the inspection of premises, shall be presented in the court in the county or district in which the person [or entity] to whom the subpoena is directed resides or is located, and shall be made in accordance with the laws of this state.]

Alternative B

[SECTION 1. Whenever any subpoena [or subpoena duces tecum] is issued from any court of record in any foreign jurisdiction, commanding the person [or entity] to whom it is directed to attend and give testimony at a deposition, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person [or entity], or to permit inspection of premises, at a time and place therein specified, and that person [or entity] is a resident or is located within this state, such subpoena shall be enforceable in this state.

SECTION 2. The lawyer or party seeking enforcement of a foreign subpoena in this state shall present to the clerk of the court, in the county or district in which that person [or entity] to whom the subpoena is directed resides or is located [or: where discovery is to be conducted], the foreign subpoena [and notice of deposition with proof of service].

SECTION 3. The clerk of the court, upon receipt of the foreign subpoena [and notice of deposition with proof of service], shall forthwith issue a subpoena directed to that person [or entity] with identical terms.

SECTION 4. Service of this subpoena [and notice of deposition with proof of service] on the person [or entity] shall be made in accordance with the laws of this state.

SECTION 5. The [time, place, and manner of the] deposition shall be taken [or

production or inspection made] in accordance with the laws of this state.

SECTION 6. The person [or entity] that has been served with a subpoena [and notice of deposition with proof of service] under this act, and any party to the litigation, shall have the same rights as if the litigation were pending in this state.

SECTION 7. Motions to enforce, quash, or modify this subpoena, and motions directed to issues regarding service of this subpoena, shall be presented in the court in the county or district in which the person [or entity] to whom the subpoena is directed resides or is located [or: where discovery is to be conducted], and shall be made in accordance with the laws of this state.

SECTION 8. Motions made during the taking of the deposition, and motions regarding the production of books, documents or tangible things, or the inspection of premises, shall be presented in the court in the county or district in which the person [or entity] to whom the subpoena is directed resides or is located, and shall be made in accordance with the laws of this state.]

Memorandum

To: NCCUSL Drafting Committee,
Uniform Interstate Depositions and Discovery of Documents Act

From: Thomas A. Mauet, Reporter

Date: February 7, 2006

Re: Changes to draft of uniform act for discussion during the March 17-19, 2006 meeting in Portland, OR

In our December, 2005 meeting we discussed a number of issues and considered a number of changes to the first draft of the uniform act. These include the following:

1. We agreed that the objectives of the uniform act are to set forth a clear, simple, and efficient procedure, that minimizes judicial involvement, that is inexpensive to the litigants, so that the uniform act is adoptable by the substantial majority of states.

2. We agreed that the terms "trial state" and "discovery / deposition state" best describe the jurisdictions involved in these situations. While these terms are not in the draft, they may be used in any later commentary.

3. It was suggested that I check the procedural language of the uniform child support act and the uniform enforcement of foreign judgments act as to service of process language. I have done that, but these acts are quite general and shed little light on these issues.

4. We agreed to keep the phrase "court of record" in the act, and perhaps have a later

commentary explain what it means and why it was chosen. The committee rejected the proposal that the phrase "in accordance with the law of any foreign jurisdiction" be substituted for the "court of record" language.

5. We discussed whether the term "subpoena" should also include "subpoena duces tecum." We agreed that it should, but did not resolve whether it should be part of the act, or whether it should be in a separate definitions section. Accordingly, I have put the term "subpoena duces tecum" in brackets in my draft. If the committee prefers to have a definitions section, that section can state: "The word 'subpoena' as used in this act shall include ..."

6. We discussed whether the term "person" should also include other artificial entities. We agreed that it should, but did not resolve whether it should be part of the act, or whether it should be in a definitions section. Accordingly, I have put the phrase "or entity" in brackets in my draft. If the committee prefers to have a definitions section, that section can state: "The term 'person' as used in this act shall include ..."

7. We discussed whether the deponent should also be served with a notice of deposition as well as the subpoena. Since a subpoena will ordinarily contain only the name, address, and telephone of the lawyer issuing the subpoena, some committee members felt that it would be helpful for a lawyer representing the deponent to know who the other lawyers in the case are. Since a notice of deposition must be served on all lawyers (and any unrepresented parties) of record anyway, requiring that the notice of deposition be served on the deponent would not be a burdensome requirement. Another possibility mentioned: requiring that the parties to the lawsuit and their counsel of record be shown on the subpoena issued in the discovery state. Accordingly, I have put the phrase "and notice of deposition with proof of service" in brackets in my draft. The draft also requires that the notice of deposition and proof of service be filed with the clerk of court and be served on the deponent along with the subpoena. However, in our December meeting the committee did not decide whether to include this language (or similar language) in the draft, did not decide whether to include proof of service, and did not decide on whether the notice must be presented to the clerk of court. I believe the better approach is to require service

of the notice of deposition on the deponent, but not require that the notice of deposition be filed with the clerk of court.

8. We discussed whether the phrase "in the county or district in which that person to whom the subpoena is directed resides or is located" should be replaced with the phrase "where discovery is to be conducted." However, in our December meeting the committee did not decide which version (or other version) is preferable. Accordingly, I have put the phrase "where discovery is to be conducted" in brackets in my draft.

9. We agreed that the draft should not include any language dealing with relevance or privilege issues, because such issues will be determined by the forum jurisdiction's conflicts rules.

10. We agreed that Par. 4 of the draft should include the phrase "time, place, and manner of the" depositions and the phrase "or production made." Accordingly, I have added that language in brackets to that paragraph. In addition, I added the term "or inspection" as well, to better reflect the full breadth of the subpoena power.

11. We discussed whether the draft should be in the form of my first draft, or whether it should be reorganized to more explicitly set forth the duties and rights of the lawyer issuing the subpoena, the clerk of court, and the deponent. Accordingly, I have attached two versions of the draft to this memo. The first version retains the style of my original; the second version is more explicit. (The first paragraph of both versions is patterned on Rule 45 of the Federal Rules of Civil Procedure.) Both versions put the new material in brackets. In our December meeting no decision was made on which approach was preferable, since we did not yet have alternative drafts to consider.