

First Supplement to Memorandum 2006-7

**Civil Discovery: Miscellaneous Issues
(Additional Comments)**

The Commission has received the following additional comments on the portion of the tentative recommendation relating to the procedure for taking a deposition in California for purposes of an out-of-state proceeding:

- Exhibit p.*
- Richard Best, San Francisco (4/19/06) 1
- Janet Grove, Administrative Office of the Courts (4/18/06) 2

These comments are discussed below.

COMMENTS OF RICHARD BEST

Richard Best, former discovery commissioner for San Francisco Superior Court, writes that it “would be a mistake” to table the Commission’s work on Section 2029.010 pending NCCUSL’s study. Exhibit p. 1. He compliments the Commission’s work on the subject and explains that clarification of the procedural rules is needed without delay:

The LRC has done its usual thorough review, research and analysis. The rules should be finalized and enacted based on comments and research to date. What we need most is a clear and workable rule for the benefit of the courts and litigants. Any major policy issues can be addressed in the future.

Although perfection and thoroughness are desirable, in this case the basic problem is to provide clear rules for accomplishing a non-controversial and somewhat mundane and even ministerial task. Now the rules are unclear and confusing and result in unnecessary expenses and frustration. Everyone agrees and applauds the efforts and proposals of the LRC to date and wants the clarification of C.C.P. 2029. To the extent issues have been raised with regard to interstate practice of law and multi-state litigation, they can be addressed or not; but they should not delay the enactment of a few clear rules on a non-controversial procedure that desperately needs clarification.

Id. The Commission should take Mr. Best’s comments into account in deciding whether to table its work on Section 2029.010 pending completion of NCCUSL’s study of interstate depositions.

COMMENTS PREPARED BY JANET GROVE OF THE
ADMINISTRATIVE OFFICE OF THE COURTS

The Commission also received comments prepared by Janet Grove, an attorney with the Administrative Office of the Courts (“AOC”). See Exhibit pp. 2-4. These comments are based on discussions with AOC personnel and with the Discovery Subcommittee of the Judicial Council’s Civil and Small Claims Advisory Committee (hereafter, “Discovery Subcommittee”). The comments do not represent the position of the Judicial Council or any of its advisory committees or their subcommittees. *Id.* at 1, 3.

The comments address four distinct points:

- (1) The amount of the filing fee for a petition to resolve a dispute relating to a deposition in California for purposes of an out-of-state proceeding.
- (2) A drafting issue relating to the filing fee for issuing a subpoena under Code of Civil Procedure Section 2029.010.
- (3) Concerns about application of the proposed legislation if more than one deposition is taken in California for purposes of the same out-of-state proceeding, and the depositions are in different counties.
- (4) Questions about how a California attorney would issue a subpoena for purposes of an out-of-state case.

Each point is discussed below.

Filing Fee for a Petition to Resolve a Discovery Dispute

California courts charge different first appearance fees for different types of proceedings. For example,

- In general, the first appearance fee is \$180 for each party to a limited civil case seeking \$10,000 or less. The first appearance fee is \$195 for the plaintiff in an unlawful detainer case seeking \$10,000 or less. Code Civ. Proc. § 1161.2; Gov’t Code §§ 70613(b), 70614(b).
- In general, the first appearance fee is \$300 for each party to a limited civil case seeking more than \$10,000 but not exceeding \$25,000. The first appearance fee is \$315 for the plaintiff in an unlawful detainer case seeking more than \$10,000 but not

exceeding \$25,000. Code Civ. Proc. § 1161.2; Gov't Code §§ 70613(a), 70614(a).

- The first appearance fee is \$320 for each party to a family law case or an unlimited civil case (amount in controversy over \$25,000; certain other types of matters). Gov't Code §§ 70611, 70612, 70670.

There are special rules for first appearance fees in probate matters and certain other contexts.

The tentative recommendation proposes that if a dispute arises relating to a deposition being taken in California for purposes of an out-of-state proceeding, the deponent or any party may file a petition for appropriate relief in the superior court of the county where the deposition is being taken. The petitioner and each person responding to the petition would be required to pay a first appearance fee. Under proposed Code of Civil Procedure Section 2029.010(e), “[t]he amount of these first appearance fees shall be as specified in Chapter 5.8 (commencing with Section 70600) of Title 8 of the Government Code *for a proceeding in this state that would be comparable in nature to the out-of-state proceeding in which the deposition is being taken.*” (Emphasis added.)

Ms. Grove asks how a court clerk would determine which first appearance fee would apply. Exhibit p. 1. She points out that court clerks “would not necessarily have information on how much money is at issue in the case, the main factor in determining the amount of a first appearance fee.” *Id.* She also notes that “[t]here may be other pertinent characteristics of the case that the clerk would not know, and differences between how California and the [forum state] classify cases that might make it difficult to determine the fee.” *Id.*

She suggests that charging a flat fee might be preferable to charging the first appearance fee for a comparable California proceeding. *Id.* Not only would a flat fee be easier to implement, but Ms. Grove says it might also “be preferable in terms of fairness ..., since the California court would not be asked to hear the entire case, only to oversee a discovery dispute.” *Id.* The amount of work the court is asked to do might not relate closely to the amount of money at stake. *Id.*

Ms. Grove discussed these points with the Discovery Subcommittee. “[S]everal members agreed with [her] that a flat fee would be preferable.” *Id.* at 2. The Discovery Subcommittee did not discuss what the flat fee should be. *Id.*

The staff finds Ms. Grove’s comments persuasive, particularly her concern about how a clerk would determine the appropriate first appearance fee to charge. If the Commission goes forward with its proposal, **it should revise the**

proposal to set a flat fee. The fee should be stated in the Uniform Civil Fees and Standard Fee Schedule (perhaps as new Gov't Code § 70615) and cross-referenced in proposed new Section 2029.010(e). The amount of the fee should perhaps be a weighted average of the various first appearance fees, based on the number of cases that fall into each category. The Commission would have to explore this matter further with the AOC.

Drafting Issue Relating to the Fee for Issuing a Subpoena Under Section 2029.010

The second point raised in the comments prepared by Ms. Grove is a technical drafting issue. Government Code Section 70626(b) sets a \$20 fee for ten different court services, enumerated in paragraphs (b)(1)-(b)(10). The tentative recommendation proposes to amend this provision to add a new paragraph (b)(6), which would set a \$20 fee for issuing a subpoena to take a deposition in California for purposes of an out-of-state proceeding. Existing paragraphs (b)(6)-(b)(10) would be relabeled as paragraphs (b)(7)-(b)(11). Under this approach, the fee for issuing a subpoena to take a deposition in California for purposes of an out-of-state proceeding (new paragraph (b)(6)) would be adjacent to the fee for issuing a commission to take a deposition outside California for purposes of a proceeding pending in the state (paragraph (b)(5)).

Ms. Grove reports that “members of the AOC’s Finance Division staff believe it would be better to add the issuance of a subpoena to one of the existing paragraphs rather than creating a new paragraph and changing the numbering of the existing subsequent ones.” Exhibit p. 2. Ms. Grove explains that “the new statewide fee schedule and our internal accounting system identify the items for which fees are charged by code citation, including the section and paragraph numbers.” *Id.* Thus, she says it “would be easier if we could avoid having to change numbers at this point.” She suggests that instead of creating new paragraph (b)(6), existing paragraph (b)(5) be revised as follows:

(5) Issuing a commission to take a deposition in another state or place under Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under Section 2029.010 of the Code of Civil Procedure to take a deposition in this state for purposes of a proceeding pending in another jurisdiction.

Id. **This suggestion makes sense and should be implemented if the Commission goes forward with its proposal.**

Multiple Depositions for Purposes of the Same Out-of-State Proceeding

Next, Ms. Grove's comments raise a number of questions about how the Commission's proposal would apply to multiple depositions in *different California counties* for purposes of the same out-of-state proceeding:

What happens if more than one deposition is taken for the out-of-state case and the depositions are in different counties? Would the applications have to be filed in separate courts? If there were discovery disputes related to both depositions, would first paper filing fees have to be paid in both courts? It would seem to make more sense to have the same court consider both disputes, especially if similar or related issues are involved. If one of the disputes were transferred to the same court as the other dispute so they could be considered together, would this be treated as a transfer of a case to another county? Normally, when a case is transferred, a new first paper filing fee must be paid to the court to which the case is transferred. This doesn't seem very appropriate in this situation.

CCP 2025.250 and 2025.260 set forth location requirements for depositions in California cases. Perhaps the amendments to CCP 2029.010 should be reviewed for consistency with those sections. Perhaps those sections also suggest a way to address the problem of procedure for depositions in multiple locations in California for an out-of-state case.

Exhibit p. 2.

Some of these questions relate to *the procedure for obtaining subpoenas under Section 2029.010* if a party seeks to depose more than one witness and the witnesses are in different counties. Other questions relate to *the procedure for resolving disputes* when more than one deposition is taken for the same out-of-state case and the disputes arise in different counties. These two areas are discussed separately below. The staff then raises some issues about how the Commission's proposal would apply to multiple depositions in *the same California county* for purposes of the same out-of-state proceeding. Finally, the staff raises some questions about the appropriate hearing date and briefing schedule whenever a person asks a California court to resolve a dispute relating to a deposition under Section 2029.010.

Procedure for Obtaining Subpoenas Under Section 2029.010 If a Party Seeks to Depose More than One Witness and the Witnesses Are in Different Counties

Under the Commission's proposal as currently drafted, if a party to an out-of-state case wants a California court to issue a subpoena directing a person to

attend a deposition in California, “the party seeking a deposition shall file an application with the superior court of the county in which the deposition is to be taken.” See proposed Section 2029.010(b). If two depositions are to be taken for purposes of the same out-of-state case, and the depositions are to be in different counties, this language would seem to compel the deposing party to file subpoena applications in two different superior courts.

Is this is problematic? As a matter of logistics and expense, it would be somewhat preferable for the deposing party to be able to obtain both subpoenas from the same superior court than to have to deal with two different courts.

Is it necessary that each subpoena be issued by the superior court in the county in which the deposition is to be taken? Maybe.

From the standpoint of the deponent, it’s important that (1) the deposition be held at a convenient location and (2) any disputes relating to the deposition be resolved at a convenient court. It does not matter to the deponent which court issues the subpoena, so long as that does not affect the location of the deposition or where disputes relating to the deposition are to be resolved.

But it does matter to the deponent *whether the subpoena indicates where disputes relating to the deposition are to be resolved*. That would be accomplished if the subpoena was issued by the court responsible for resolving those disputes and the caption or other indication on the subpoena reflected as much.

The same objective could perhaps also be accomplished if the subpoena was issued by another California court, but bore only the caption of the out-of-state case and included a statement indicating which California court was to resolve any disputes relating to the deposition. It would seem odd, however, for a court to issue a subpoena without indicating somewhere on the subpoena which court issued it. Yet if the subpoena did show which court issued it, the deponent might get confused about which California court to approach in the event of a dispute: the court that issued the subpoena or the court identified as the one responsible for resolving disputes relating to the subpoena.

To prevent such confusion, it seems advisable to **stick with the Commission’s current approach, requiring that each subpoena be issued by the superior court of the county in which the deposition is to be taken**. Although that approach may cause minor inconvenience to the deposing party in some cases, it would help provide clear guidance to witnesses located in California.

Procedure for Resolving Disputes When More Than One Deposition is Taken For the Same Out-of-State Case and the Disputes Arise in Different Counties

The other questions posed about multiple depositions relate to the procedure for resolving a dispute that arises in a deposition under Section 2029.010. Under the tentative recommendation as currently drafted, if such a dispute arises, “the deponent or a party to the proceeding may file a petition for ... appropriate relief in the superior court of the county in which the deposition is being taken.”

That court should be convenient for the deponent, assuming that the deposition must be taken within the mileage restrictions specified in Code of Civil Procedure Sections 2025.250 and 2025.260. As discussed at pages 18-21 of Memorandum 2006-7 (available from the Commission, www.clrc.ca.gov), CAJ members disagreed about application of the mileage restrictions. In the same vein, the attached comments suggest reviewing the Commission’s proposal for consistency with those restrictions. Exhibit p. 2. However, the staff believes that Section 2029.010, as it currently exists and as the Commission proposes to amend it, is already intended to compel compliance with those mileage restrictions when taking a California deposition for purposes of an out-of-state proceeding. That intent could perhaps be made more clear, as discussed at pages 24-25 of Memorandum 2006-7. But it seems unlikely that the Legislature intended a litigant in an out-of-state case to have greater latitude than a litigant in a California case in determining where to depose a California witness.

If that is correct, it has implications for the hypothetical posed in the attached comments, in which more than one deposition is taken for an out-of-state case and the depositions are in different counties. Ms. Grove states that if a dispute arises in each deposition, “[i]t would seem to make more sense to have the same court consider both disputes, especially if similar or related issues are involved.” Exhibit p. 2. If the disputes were combined before a single court as suggested, however, that might entail inconvenience for one of the deponents, forcing the deponent to litigate the dispute in a distant court rather than one nearby.

The staff’s thought in drafting the Commission’s proposal was that if discovery disputes arose in different California counties relating to the same out-of-state proceeding, it would be necessary to file a petition for relief in each county, but perhaps one petition could be transferred and consolidated with the other pursuant to Code of Civil Procedure Sections 403 and 1048(a). Factors such as the convenience of the deponents and similarity of the issues could be considered in deciding whether to order transfer and consolidation.

This thought was not articulated in the tentative recommendation nor specifically raised with the Commission. If the Commission proceeds with its proposal, **it might want to add language articulating this concept.**

In doing so, the Commission should provide guidance on whether the \$50 transfer fee for making up and transmitting the transcript and papers (Gov't Code Section 70618) would apply and, if so, who should pay that fee. The staff sees no reason to excuse payment of that fee by the person requesting the transfer (there should be no transfer fee if the transfer is on the court's own motion).

However, Section 70618 also requires payment of "a further sum equal to the uniform fee for filing in the court to which the case is transferred." Ms. Grove states that "[t]his doesn't seem very appropriate in this situation." Exhibit p. 2. The staff tends to agree. The transferring court will have received a fee for filing the petition that is transferred, as well as a fee for filing each response to that petition. Similarly, the transferee court will have received a fee for filing the petition that is not transferred, as well as a fee for filing each response to that petition. The \$50 transfer fee should cover the transfer costs. It would be overkill to charge any more fees. If anything, the transferring court should give some of the fee revenue to the transferee court, because its workload is being reduced. But that probably would not be worth the effort: It would be administratively burdensome and the workload impact on the courts should even out over time, as Section 2029.010 disputes are transferred back and forth between them.

Procedure for Resolving Disputes When More Than One Deposition is Taken For the Same Out-of-State Case and the Disputes Arise in the Same County

The above discussion addresses the hypothetical posed by Ms. Grove, in which more than one deposition is taken for an out-of-state case and the depositions are in *different counties*. In considering that hypothetical, however, the staff thought of questions regarding how the Commission's proposal would apply when more than one deposition is taken for an out-of-state case and the depositions are in *the same county*.

The tentative recommendation already addresses this point to some extent. Proposed new Section 2029.010(e) would provide:

(e) If a dispute arises relating to a deposition that a party is taking in this state for purposes of a proceeding pending in another jurisdiction, the deponent or a party to the proceeding may file a petition for a protective order or to compel discovery or obtain

other appropriate relief in the superior court of the county in which the deposition is being taken. On filing the petition, the petitioner shall pay a first appearance fee. On responding to the petition, each person who responds shall pay a first appearance fee. The amount of these first appearance fees shall be as specified in Chapter 5.8 (commencing with Section 70600) of Title 8 of the Government Code for a proceeding in this state that would be comparable in nature to the out-of-state proceeding in which the deposition is being taken. *If another dispute later arises relating to a deposition being taken in the same county for purposes of the same out-of-state proceeding, a party or deponent who has already paid a first appearance fee does not have to pay another first appearance fee under this section.*

(Emphasis added.)

The italicized language would make clear that a party or deponent who has already paid a first appearance fee to a superior court in connection with a Section 2029.010 discovery dispute does not have to pay another first appearance fee to that court if another discovery dispute later arises in the same case. The language could readily be modified if the Commission decides to use a flat fee approach instead of charging the first appearance fee for a comparable California case.

But the italicized language would leave a number of questions unanswered:

- If more than one dispute arises in the same county in connection with an out-of-state case, what should the document seeking relief with regard to the second (or later) dispute be called? Is it a petition? A motion? Something else? Does it matter if the disputes relate to the same deposition or to different depositions?
- Should there be any fee for filing that document, such as the \$40 motion fee under Government Code Section 70617(a)?
- What case number and caption should be used on the document? The same as on the first dispute? Does it matter if the disputes relate to the same deposition or to different depositions?

If the Commission proceeds with its proposal, **it should revise the proposal to clarify these points.**

On initial consideration, the staff thinks that if more than one dispute arises in the same county in connection with an out-of-state case, practicality requires that the disputes be **given the same California case number and bear the same caption.** Documents filed in connection with the disputes should be **placed in the same case file.**

How can this be accomplished? Perhaps the easiest solution would be to require that

- (1) Any subpoena issued or petition filed under Section 2029.010 must bear the caption of the out-of-state case to which it relates. Any response to a petition filed under Section 2029.010, or other document relating to the petition, must also bear the caption of the out-of-state case to which it relates. Any such subpoena, petition, response, or other document must also indicate the California court in which it is issued or filed.
- (2) A California case number need not be assigned simply for issuing a subpoena under Section 2029.010. But if a dispute arises in connection with a deposition taken under Section 2029.010, and a petition to resolve the dispute is filed in a California court, a California case number must be assigned. Any documents relating to the petition must bear that case number.
- (3) If another dispute later arises in the same county with respect to the same out-of-state case, a new petition should be filed, bearing the same California case number as the previous one. The fee for filing the new petition should be \$40, the same as the fee for filing a motion. It would be incorrect to call this document a motion instead of a petition, because there is no complaint on file in California and thus no case in which to bring a motion. Any response or other document filed in connection with the new petition must bear the same California case number as the petition.

It would be helpful to have input from the AOC and court personnel about whether this approach sounds workable and whether it could be improved in any way. The Commission's proposal could be revised as appropriate.

Hearing Date and Briefing Schedule for a Petition to Resolve a Dispute Relating to a Deposition Under Section 2029.010

Considering the AOC's comments prompted the staff to realize that the tentative recommendation fails to make clear (1) how much notice would be required for a hearing on a petition to resolve a dispute relating to a deposition under Section 2029.010, and (2) what briefing schedule would apply to such a petition. It seems reasonable to apply the normal notice requirements and briefing schedule for a discovery motion, which are specified in Code of Civil Procedure Section 1005. If the Commission goes forward with its proposal, the proposal should be revised to **make clear that the requirements of Code of Civil Procedure Section 1005 apply to a petition to resolve a dispute relating to a deposition under Section 2029.010.**

Issuance of a Subpoena Under Section 2029.010 By a California Attorney

The last point Ms. Grove raises relates to proposed new Section 2029.010(d), which would state:

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

Ms. Grove reports that members of the Discovery Subcommittee “raised some questions about how a California attorney would issue a subpoena for an out-of-state case.” Exhibit p. 2. If a case “is from another state, and no case has been filed in a California court, what case number and caption would be used, what form would the filing take, and what court would have jurisdiction to enforce it?” *Id.*

Ms. Grove says that she “may not have fully understood the subcommittee members’ concerns, or there may not have been time for them to fully describe the issues.” *Id.* In her own opinion, after briefly reviewing the statutes, “there is not a significant problem.” *Id.* She explains:

The subpoena would show the case name and number and the name of the out-of-state court. If the deposition is completed without a dispute, there is no need for a California court to be involved. If there is a need to compel discovery or other dispute, then a petition could be filed in a California court under CCP 2029.010(e). These matters could be clarified in the statute and/or the implementing rules and forms.

Id. at 3.

The staff agrees with the Discovery Subcommittee that the procedure for a California attorney to issue a subpoena under Section 2029.010 needs to be clear and easy-to-follow. The staff also agrees with Ms. Grove that the Commission’s proposal is designed to accomplish that goal, if not immediately upon enactment then as soon as the Judicial Council prepares the rules and forms described in proposed new Section 2029.010(g).

However, we previously mentioned that a subpoena issued under Section 2029.010 should indicate where disputes relating to the deposition are to be resolved. If the Commission pursues its proposal, **it should attempt to ensure that this information is provided not only when a court issues a subpoena**

under Section 2029.010, but also when such a subpoena is issued by a California attorney.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

COMMENTS OF RICHARD BEST

From: Rich Best
Subject: CCP 2029
Date: April 19, 2006
To: Barbara Gaal

I hope I misunderstood, but I was concerned that the staff recommendation at the bottom of page 29 of your April 17, 2006 memo was to table this revision in toto pending the development of uniform law proposals. I believe that would be a mistake.

The LRC has done its usual thorough review, research and analysis. The rules should be finalized and enacted based on comments and research to date. What we need most is a clear and workable rule for the benefit of the courts and litigants. Any major policy issues can be addressed in the future.

Although perfection and thoroughness are desirable, in this case the basic problem is to provide clear rules for accomplishing a non-controversial and somewhat mundane and even ministerial task. Now the rules are unclear and confusing and result in unnecessary expenses and frustration. Everyone agrees and applauds the efforts and proposals of the LRC to date and wants the clarification of C.C.P. 2029. To the extent issues have been raised with regard to interstate practice of law and multi-state litigation, they can be addressed or not; but they should not delay the enactment of a few clear rules on a non-controversial procedure that desperately needs clarification.

Thanks for your consideration and a particular thanks for the efforts you have devoted to this matter.

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Richard E. Best

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**COMMENTS PREPARED BY JANET GROVE OF THE
ADMINISTRATIVE OFFICE OF THE COURTS**

From: Janet Grove
Subject: Comments on civil discovery proposal
Date: April 18, 2006
To: Barbara Gaal
Cc: Patrick O'Donnell

Hi Barbara,

This email describes the comments we discussed on the Law Revision Commission's tentative recommendation on "Civil Discovery: Miscellaneous Issues," dated September 2005. The comments address the amendments proposed to clarify the law on deposing a witness in California for purposes of a proceeding in another jurisdiction.

The Discovery Subcommittee of the Civil and Small Claims Advisory Committee reviewed the proposal briefly at its meeting on February 17, 2006. I raised several questions about the proposal for the subcommittee to consider. Although the subcommittee did not decide to make any official comments or any recommendations to the full Civil and Small Claims Advisory Committee, its discussion brought up some issues that may be helpful to consider for possible revision of the proposal. I also discussed some of the fee-related portions with staff in the AOC's Finance Division. The subcommittee's discussion and the comments of AOC staff, of course, do not constitute the views of the Judicial Council, which has not yet considered or taken a position on the proposal.

1. Regarding the amount of the initial fee to be paid by each party when there is a discovery dispute (4th sentence of CCP 2029.010(e), discussion on pages 7-8): a flat fee may be preferable to determining the fee by the method described in the draft. The draft says that the amount of the filing fee will be "as specified in Chapter 5.8 . . . for a proceeding in this state that would be comparable in nature to the out-of-state proceeding in which the deposition is being taken." How would the court clerks determine this? They would not necessarily have information on how much money is at issue in the case, the main factor determining the amount of a first appearance fee. There may be other pertinent characteristics of the case that the clerk would not know, and differences between how California and the home state of the case classify cases that might make it difficult to determine the fee. For these reasons, a flat fee may be preferable. A flat fee may be preferable in terms of fairness as well as ease of implementation, since the California court would not be asked to hear the entire case, only to oversee a discovery dispute. The amount of work the court would be asked to do is less likely to be related to the amount of money at issue in the full case.

I raised this issue with the Discovery Subcommittee, and several members agreed with me that a flat fee would be preferable. They did not discuss what amount would be appropriate.

2. For the amendment to Government Code section 70626(b) (discussed on page 6), members of the AOC's Finance Division staff believe it would be better to add the issuance of a subpoena to one of the existing paragraphs rather than creating a new paragraph and changing the numbering of the existing subsequent ones. This is because the new statewide fee schedule and our internal accounting system identify the items for which fees are charged by code citation, including the section and paragraph numbers. It would be easier if we could avoid having to change numbers at this point. Instead, paragraph (5) could be amended as follows:

(5) Issuing a commission to take a deposition in another state or place under Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under Section 2029.010 of the Code of Civil Procedure to take a deposition in this state for purposes of a proceeding pending in another jurisdiction.

3. What happens if more than one deposition is taken for the out-of-state case and the depositions are in different counties? Would the applications have to be filed in separate courts? If there were discovery disputes related to both depositions, would first paper filing fees have to be paid in both courts? It would seem to make more sense to have the same court consider both disputes, especially if similar or related issues are involved. If one of the disputes were transferred to the same court as the other dispute so they could be considered together, would this be treated as a transfer of a case to another county? Normally, when a case is transferred, a new first paper filing fee must be paid to the court to which the case is transferred. This doesn't seem very appropriate in this situation.

CCP 2025.250 and 2025.260 set forth location requirements for depositions in California cases. Perhaps the amendments to CCP 2029.010 should be reviewed for consistency with those sections. Perhaps those sections also suggest a way to address the problem of procedure for depositions in multiple locations in California for an out-of-state case.

4. Members of the Discovery Subcommittee also raised some questions about how a California attorney would issue a subpoena for an out-of-state case. (CCP 2029.010(d), discussed on page 7.) Under CCP 1985(c) an attorney "who is the attorney of record in an action or proceeding, may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending . . . or upon the taking of a deposition in an action or proceeding pending therein" But if the case is from another state, and no case has been filed in a California court, what case number and caption would be used, what form would the filing take, and what court would have jurisdiction to enforce it?

I may not have fully understood the subcommittee members' concerns, or there may not have been time for them to fully describe the issues. However, my own opinion after briefly reviewing the statutes is that there is not a significant problem. The subpoena would show the case name and number and the name of the out-of-state court. If the deposition is completed without a dispute, there is no need for a California court to be involved. If there is a need to compel discovery or other dispute, then a petition could be filed in a California court under CCP 2029.010(e). These matters could be clarified in the statute and/or the implementing rules and forms.

Thank you for the opportunity to comment on the proposal. Please contact Patrick O'Donnell or me if you would like to discuss these issues further. As indicated before, these comments do not represent the position of the Judicial Council or any of its advisory committees or their subcommittees.

Janet

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