Study J-505 April 25, 2006

# Second Supplement to Memorandum 2006-7

## Civil Discovery: Miscellaneous Issues (Further Comments and Issues)

Process server Tony Klein has provided comments on the portion of Memorandum 2006-7 relating to the procedure for taking a deposition in California for purposes of an out-of-state case. Mr. Klein's comments are attached as Exhibit pages 1-3 and discussed below. The staff also briefly raises a few new points for the Commission to consider.

### COMMENTS OF TONY KLEIN

Mr. Klein comments on (1) the study of interstate depositions being conducted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and (2) a number of issues he thinks the Commission should consider if it decides to continue with its own study.

**NCCUSL Study of Interstate Depositions**

Mr. Klein "read with some dismay" that the Commission might table its study of Code of Civil Procedure Section 2029.010 pending completion of NCCUSL's study of interstate depositions. Exhibit p. 1. He feels that the Commission has done "a remarkable job in narrowing the issues and designing a proposal that will greatly benefit California courts and foreign counsel conducting discovery in California." *Id*. He would not like to see that effort delayed to 2009, "resulting in 3 more years of confusion and inconsistency." *Id*.

To illustrate the need for action, Mr. Klein mentions that he had an experience in Santa Clara County similar to the one that Michigan attorney Kristen Tsangaris describes in her comments. *Id*. at 3. According to Mr. Klein, in Santa Clara County a litigant must satisfy all of the following requirements to obtain a subpoena under Section 2029.010:

- Retain local counsel.
- Submit a Civil Case Cover sheet signed by local counsel.
- Pay a full filing fee.
- Pay another full filing fee for each additional subpoena issued.

*Id*. He points out that "if poor Ms. Tsangaris had 3 witnesses to depose, it would have cost her $960.00 in filing fees alone, PLUS the retention of local counsel." *Id*. (emphasis in original). In his opinion, every California court "makes it up as they go along" in issuing subpoenas under Section 2029.010, "because the statute isn't clear enough." *Id*. He says "[t]hat is why this clarification is necessary." *Id*.

Mr. Klein also notes that NCCUSL proposals "are advisory only" and California has made modifications to previous NCCUSL work in this area. *Id*. at 1. He "would encourage the Commission to continue with this project because regardless of what the NCCUSL concludes, California will likely proceed in its own direction anyway." *Id*. at 2.

Mr. Klein further observes that the drafts currently being reviewed by the NCCUSL committee do not provide for two "significant developments that may need addressing." *Id*. at 1. These developments are:

(1) **E-filing.** Unlike the Commission's proposal, the drafts NCCUSL is considering do not require authentication of the out-of-state document authorizing discovery. Mr. Klein says that this "may become an issue when courts begin to embrace e-filing more universally." *Id*. at 1-2. He cautions that "[a]ll of these foreign subpoena requests will be originating from outside California and submitting them electronically for issuance will likely be a likewise universal expectation." *Id*. at 2.

(2) **The Health Insurance Portability and Accountability Act ("HIPAA").** Mr. Klein explains that "California's consumer notice subpoena procedure in CCP 1985.3 is 'HIPAA' compliant, but other state's procedures have struggled with it, requiring in some instances a court order or authorization to accompany the subpoena." *Id*. He warns that the NCCUSL committee might need to address HIPAA, yet the drafts currently under consideration fail to do this. *Id*.

For all of these reasons, Mr. Klein, like Richard Best, urges the Commission not to interrupt its work on Section 2029.010. The Commission should **take the advice of these two knowledgeable sources into account in deciding whether to wait for NCCUSL's endproduct before finalizing a recommendation in this area.**

One possibility would be to seek enactment of the Commission's current proposal (as is, or with modifications) and then revisit this topic after NCCUSL completes its study. The Commission could then incorporate any aspects of NCCUSL's proposal that appear to improve on the Commission's efforts. The

Commission could even wait to see how NCCUSL's proposal fares in other jurisdictions before considering the proposal for adoption in California.

This two-phase approach would help to provide guidance in the near future on procedural matters in need of clarification, while also affording the benefits of uniformity and NCCUSL's insights. The staff is concerned, however, that the two-phase approach might entail significant, perhaps unwarranted duplication of effort. The Commission would have to go through its study process twice and probably shepherd two proposals through the legislative process. The Judicial Council might also have to repeat the process of preparing Judicial Council forms and rules. Litigants and courts might find it disruptive to learn one set of new procedures, only to have them replaced not long afterwards with another set of procedures.

It may be better to avoid this disruption and duplication of effort by preparing a single legislative proposal, after NCCUSL completes its study. As with all uniform acts, the Commission would need to study NCCUSL's proposal closely before recommending it for adoption in California, and could modify the proposal as needed (or even deviate from it altogether) to best serve the interests of the state, its citizens, and others who would be affected by the legislation.

**Issues for the Commission to Consider If It Goes Forward With Its Study**

If the Commission decides to go forward with its study, it should consider a number of additional points raised by Mr. Klein.

*Issuance of a Subpoena Under Section 2029.010 By a California Attorney*

Proposed new Section 2029.010(d) 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.

Although Mr. Klein likes the economy of allowing a California attorney to issue a subpoena under the statute, he sees "a few hitches." Exhibit p. 2. He explains that allowing a California attorney to issue the subpoena "would require him or her to become an attorney of record." *Id*. He says this could complicate the process and increase litigation costs "because as an attorney of record counsel may be called upon to answer questions or may be compelled to be brought up to speed on the case." *Id*.

Mr. Klein is correct that being an attorney of record entails responsibilities and demands some degree of familiarity with a case. But the tentative recommendation does not propose to *require* that a California attorney issue a subpoena under Section 2029.010. Rather, that procedure would be *optional*. An out-of-state litigant who does not want to retain local counsel could simply obtain such a subpoena from a California court under proposed new Section 2029.010(b)-(c). In some cases, however, it may be advantageous to hire local counsel to assist in a case (e.g., to interview local witnesses, conduct local depositions, or the like). If an out-of-state litigant elects to retain local counsel, then proposed new Section 2029.010(d) would give that litigant the option of having local counsel issue a subpoena under the statute, instead of seeking the subpoena from a court. Because the out-of-state litigant would have a choice of which procedure to follow, the Commission's approach would not boost litigation costs: the out-of-state litigant could use whichever procedure is most cost-effective in the particular circumstances of the pending case. Thus, **proposed new Section 2029.010(d) does not need to be revised to minimize litigation costs.**

*Inclusion of a Case Number on a Subpoena Issued Under Section 2029.010*

At page 10 of the First Supplement to Memorandum 2006-7 (available from the Commission, www.clrc.ca.gov), the staff suggests that when a court or attorney issues a subpoena under Section 2029.010, it should not be necessary to assign a California case number to the matter. Mr. Klein recommends that this approach "be limited to either non-record subpoenas or those that do not request consumer or employment records." Exhibit p. 2. He explains that if consumer or employment records are subpoenaed, "[t]hose subpoenas require notice to the consumer (CCP 1985.3) and employees (CCP 1985.6) that the records are being subpoenaed, and provide a mechanism for making an objection to the court." *Id*. Mr. Klein fears that "[w]ithout a court file number, an objecting consumer or employee would be compelled to file a petition AND a notice of objection to bring the court into the fray." *Id*. (emphasis in original).

This is a good point. **The Commission needs to be careful to coordinate the procedures under Section 2029.010 with the special procedures for subpoenaing consumer records and employment records.** Code of Civil Procedure Section 1985.3(g) provides:

> (g) *Any consumer whose personal records are sought by a subpoena duces tecum and who is a party* to the civil action in which this

> subpoena duces tecum is served *may*, prior to the date for production, *bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum*. Notice of the bringing of that motion shall be given to the witness and deposition officer at least five days prior to production. The failure to provide notice to the deposition officer shall not invalidate the motion to quash or modify the subpoena duces tecum but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records.
>
> *Any other consumer or nonparty whose personal records are sought by a subpoena duces tecum may*, prior to the date of production, *serve on the subpoenaing party, the witness, and the deposition officer, a written objection* that cites the specific grounds on which production of the personal records should be prohibited.
>
> *No witness or deposition officer shall be required to produce personal records after receipt of notice that the motion has been brought by a consumer, or after receipt of a written objection from a nonparty consumer*, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected.
>
> The party requesting a consumer's personal records *may bring a motion under Section 1987.1 to enforce the subpoena* within 20 days of service of the written objection. The motion shall be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the personal records and the consumer or the consumer's attorney.

(Emphasis added.) Code of Civil Procedure Section 1985.6(f) is similar.

Under these provisions, *service* of a written objection "on the subpoenaing party, the witness, and the deposition officer" is sufficient to protect a nonparty from having to produce records absent a court order or agreement of the parties. Serving such an objection would not seem to require a California case number. Mr. Klein's concern that a consumer or employee would have to *file* both a written objection and a petition under proposed new Section 2029.010(e) to challenge the production of records appears to be misplaced.

But Sections 1985.3(g) and 1985.6(f) refer repeatedly to bringing motions of various kinds. Under proposed new Section 2029.010(e), the mechanism for resolving a discovery dispute would be to file a petition, not to bring a motion. **Language should be added to Sections 1985.3(g) and 1985.6(f) clarifying that a petition, not a motion, should be filed if a dispute arising under those statutes pertains to a deposition in California for purposes of a proceeding pending elsewhere.** If the Commission proceeds with its study, the staff will attempt to draft appropriate language and present it to the Commission for review.

*Proper County to Issue a Subpoena Under Section 2029.010*

At pages 23-24, Memorandum 2006-7 mentions that the NCCUSL committee on interstate depositions is debating whether a subpoena for such a deposition should be sought from (1) the court where the witness resides or is located, or (2) the court where the discovery is to be conducted. Mr. Klein writes that the "debate as to the proper county (where the witness resides or where discovery is to be conducted) is currently covered in CCP 1986(b), stating that the subpoena 'may be obtained from the clerk of the superior court of the county in which the witness is to be examined.'" Exhibit p. 2. In his view, the "permissible 'may' in the statute implies that a clerk could issue a subpoena to a witness to be examined in another county." *Id*.

The staff thinks it more likely that the permissive "may" is used to indicate that obtaining a subpoena is not mandatory, it is an optional step but necessary to invoke the subpoena power of a California court. Regardless of the proper interpretation of Section 1986(b), the Commission's proposal is to require that a subpoena under Section 2029.010 be issued by the superior court of the county in which the deposition is to be taken. See proposed new Section 2029.010(b)-(c).

As explained at pages 5-6 of the First Supplement to Memorandum 2006-7, that approach might help provide clear guidance to the deponent regarding which court to approach in the event of a dispute. The staff thus recommended and continues to recommend **sticking with the requirement that a subpoena under Section 2029.010 be issued by the superior court of the county in which the deposition is to be taken.** We do not feel strongly about this, however, and can see some advantages of the alternative approach described by Mr. Klein, under which any California court could issue a subpoena under Section 2029.010, regardless of where the deposition was to be held.

*Commission Issued By a Court in Another Jurisdiction*

Section 2029.010 refers, among other things, to a "commission" issued by a court of another jurisdiction. Mr. Klein explains that the "commission" in this context "is a document that is issued by a foreign court that authorizes the person from another jurisdiction to administer an oath." Exhibit p. 2. For example, "because a California Notary has no authority to administer an oath in a foreign state, that authority is granted as needed so that when the deposition is evidenced in the other state it meets that state's oath requirements." *Id*.

Mr. Klein reports that he "often see[s] commissions directed to courts, and attorneys, and some worded so vaguely that they really don't commission

anyone." *Id*. In fact, he thinks it is such a common practice "that the court clerks (who are probably the one person contacted by the out-of-state litigant) regularly issue the subpoenas without reading them." *Id*. at 2-3.

It is unfortunate that sloppy practice appears to be the norm in this context. To the extent it creates problems, a litigant or deponent could seek relief, either in the out-of-state tribunal or in a California court pursuant to proposed new Section 2029.010(e). **No revision of the Commission's proposed legislation appears necessary to deal with this matter.** It might be helpful, however, if the preliminary part (narrative portion) of that proposal discussed the purpose of a commission issued by an out-of-state tribunal. The staff could draft some language along these lines for the Commission to consider.

*Form for Issuance of a Subpoena Under Section 2029.010*

Is it necessary to create a special form for a subpoena issued under Section 2029.010? Mr. Klein does not think so. He writes:

> Currently, there are 3 Judicial Council deposition subpoena forms. Creating another foreign deposition subpoena for less than 1% of those being issued seems to be a waste of resources. Any of the current subpoena forms could indicate that the foreign case is pending somewhere on the face of the subpoena with words such as "Pending in the Circuit Court of the County of Miami-Dade, FL #123456". That way, the current subpoena forms could be continue to be used.

Exhibit p. 3.

The tentative recommendation proposes to give the Judicial Council the option of either preparing a new subpoena form for a subpoena issued under Section 2029.010, or "modify[ing] one or more existing subpoena forms to include clear instructions for use in issuance of a subpoena" under Section 2029.010(c) or (d). See proposed new Section 2029.010(g)(2). In a phone conversation with the staff, Janet Grove of the Administrative Office of the Courts ("AOC") indicated that she had not heard any objections to that aspect of the Commission's proposal when she sought input on it within the AOC and Judicial Council groups. While that is not an official position of the Judicial Council, for the time being it appears that the Commission's proposed language regarding preparation of subpoena forms is probably alright. If the Commission goes forward with its proposal, **it should not make any changes in that language at this time.**

## STAFF ISSUES

Having given more thought to the Commission's proposed revisions of Section 2029.010 and the comments received, the staff would like to raise two new points for the Commission to consider.

*Discovery Dispute: Entry of Judgment and Appellate Review*

Proposed new Section 2029.010(e) would set forth the procedure for having a California court resolve a dispute relating to a deposition taken in California for purposes of an out-of-state proceeding. As previously discussed, the procedure would involve filing a petition seeking specified relief. At pages 5-10, the First Supplement to Memorandum 2006-7 discusses potential complications arising if there are multiple disputes relating to discovery in California for purposes of the same out-of-state proceeding.

One point not covered in that discussion is the potential for multiple rulings from which a party or deponent might want to appeal. Should there be multiple judgments and multiple appeals, or only one judgment and one appeal? Should all such appeals be to the court of appeal, rather than the appellate division, as the Commission's proposal would seem to require? If the Commission goes forward with its proposal, **it should examine and clearly address these points.**

*Drafting Approach*

As presently drafted, the Commission's proposal would expand existing Section 2029.010. The existing material would become subdivision (a); subdivisions (b)-(g) would be added.

In response to the comments from interested persons, the staff has suggested various possible revisions of the Commission's proposal. If the Commission decides to make those or other revisions, **it might be preferable to add several new sections to the codes (Sections 2029.020, 2029.030, etc.), instead of lengthening existing Section 2029.010.** Unless the Commission otherwise directs, the staff will use its discretion on this point in the event that the Commission elects to proceed with its proposal.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

# COMMENTS OF TONY KLEIN

From: Tony Klein <psinstitute@comcast.net>
Subject: Memorandum 2006-7 — CCP 2029 Foreign Deposition Subpoena Comments
Date: April 24, 2006
To: <bgaal@clrc.ca.gov>

Barbara:

Thank you for the materials you have sent. I have been receiving them at the various addresses you have for me.

I read with some dismay that the Commission is considering to table its work on CCP 2029.010 pending the outcome of the NCCUSL. The Commission has done what I feel is a remarkable job in narrowing the issues and designing a proposal that will greatly benefit California courts and foreign counsel conducting discovery in California. A delay would push that effort into 2009 resulting in 3 more years of confusion and inconsistency.

The NCCUSL's proposals are advisory only, and have been adopted and subsequently modified by California legislatures in 1957 (inadvertently removed), 1959, 1986, and 1989. (I contacted Phil Isenberg, the head of the Judicial Committee when CCP 2029 was amended in the 1989 Civil Omnibus Bill because his file was missing from the California State Archives. He emailed me back saying he didn't remember why but provided me with a list of names of those who may remember something about why some language was amended out of the statute (1) the witness resided within 75 miles of the place where he or she was being compelled to appear, 2) the testimony or documents were relevant, and 3) the evidence could be used in the forum action.) I have been unable to find the email he sent to me, but will forward it to you if I do find it.)

The language in the most current 2 NCCUSL proposals retain most of the provisions in prior versions, and excepting service of a notice and proof of service, and both alternatives are similarly covered in the current California law and the Commission's September proposal.

What the NCCUSL has not provided for are 2 significant developments that may need addressing.

One is the advent of e-filing, which, admittedly, may not be an appropriate issue for them to address. Although an authentication of the enabling documents is not contemplated in

their proposals, it may become an issue when courts begin to embrace e-filing more universally. All of these foreign subpoena requests will be originating from outside California and submitting them electronically for issuance will likely be a likewise universal expectation.

Another issue the NCCUSL proposals do not address is the Health Insurance Portability and Accountability Act (HIPAA). A significant percentage of foreign subpoenas are for medical records. California's consumer notice subpoena procedure in CCP 1985.3 is "HIPAA" compliant, but other state's procedures have struggled with it, requiring in some instances a court order or authorization to accompany the subpoena.

So I would encourage the Commission to continue with this project because regardless of what the NCCUSL concludes, California will likely proceed in its own direction anyway.

If the Commission does continue with this project, I have some additional comments.

I like the economy of allowing a California attorney to issue the foreign deposition subpoena, but I see a few hitches. Currently, CCP 1985 allows an attorney of record to issue a subpoena. Allowing a California attorney to issue the foreign deposition would require him or her to become an attorney of record. This could actually complicate the process because as an attorney of record counsel may be called upon to answer questions or may be compelled to be brought up to speed on the case. This could actually increase the costs of litigation.

If no case number is issued, for instance, if a California lawyer were to issue the subpoena instead of going to court, the subpoenas issued should be limited to either non-record subpoenas or those that do not request consumer or employment records. Those subpoenas require notice to the consumer (CCP 1985.3) and employees (CCP 1985.6) that their records are being subpoenaed, and provide a mechanism for making an objection to the court. Without a court file number, an objecting consumer or employee would be compelled to file a petition AND a notice of objection to bring the court into the fray.

The debate as to the proper county (where the witness resides or where discovery is to be conducted) is currently covered in CCP 1986(b), stating that the subpoena "may be obtained from the clerk of the superior court of the county in which the witness is to be examined." The permissible "may" in the statute implies that a clerk could issue a subpoena to a witness to be examined in another county.

The "commission" in this context is a document that is issued by a foreign court that authorizes the person from another jurisdiction to administer an oath. For instance, because a California Notary has no authority to administer an oath in a foreign state, that authority is granted as needed so that when the deposition is evidenced in the other state it meets that state's oath requirements. In practice, I often see commissions directed to courts, and attorneys, and some worded so vaguely that they really don't commission anyone. It seems to be such a common practice that the court clerks (who are probably

the one person contacted by the out-of-state litigant) regularly issue the subpoenas without reading them.

The Commission has suggested that a special subpoena form might be needed for these subpoenas. Currently, there are 3 Judicial Council deposition subpoena forms. Creating another foreign deposition subpoena for less than 1% of those being issued seems to be a waste of resources. Any of the current subpoena forms could indicate that the foreign case is pending somewhere on the face of the subpoena with words such as "Pending in the Circuit Court of the County of Miami-Dade, FL, #123456". That way, the current subpoena forms could be continued to be used.

Finally, as a sidebar to Kristen Tsangaris' experience in Santa Clara County, I have had a similar experience, and it illustrates why resolution of this issue is so vital. Santa Clara is the only county in California I have encountered that requires a California lawyer to become involved. The court requires a Civil Case Cover Sheet signed by a California lawyer, and a full filing fee, as though it is a California case. This has never been required since 1872, when this procedure was first introduced in California. The foreign case will never be a California case, yet it is treated as one. Santa Clara also requires a new case for EACH subpoena, so if poor Ms. Tsangaris had 3 witnesses to depose, it would have cost her $960.00 in filing fees alone, PLUS the retention of local counsel.

I attempted to contact the staff attorney at the court and the clerk refused to disclose the name. Therefore, I have been unable to review the phantom research and authority for the court's policy. Frankly, every court makes it up as they go along because the statute isn't clear enough. That is why this clarification is necessary.

Tony Klein