

Memorandum 2006-46

**Civil Discovery: Deposition in Out-of-State Litigation
(Draft of Recommendation)**

In its study of civil discovery, the Commission has been attempting to clarify the procedures for taking discovery in California for use in an out-of-state case. Attached are the following materials relating to that topic:

- **Attachment #1.** A draft of a final recommendation, which implements decisions made at the October meeting.
- **Attachment #2.** The latest draft of a uniform law on interstate discovery, which is being developed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). This draft implements decisions made by the NCCUSL drafting committee at a meeting in Philadelphia on November 10, 2006.
- **Attachment #3.** A draft that attempts to combine the latest versions of the Commission’s proposal and the uniform law. This draft consists only of proposed legislation and comments; the staff has not yet attempted to prepare an accompanying narrative explanation.

The Commission needs to review these materials and decide whether to approve the draft implementing its October decisions as a final recommendation (with or without revisions), for printing and submission to the Legislature in 2007. If the Commission decides not to take that step, then it should consider whether to combine its current proposal with the uniform law that NCCUSL is developing.

In making those decisions, the Commission should consider a number of different issues and developments. Those points are discussed below.

EXPECTED ADDITIONAL INPUT

The current draft of the Commission’s proposal (Attachment #1) would specify the fee for filing a petition or other paper relating to a dispute over discovery for an out-of-state case. See pp. 9-10, 11, 19-21 (proposed Code Civ. Proc. §§ 2029.060, 2029.070). The fee would vary depending on whether the

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person submitting the paper is a party or a nonparty, whether that person previously paid a first appearance fee, and whether the paper seeks relief or responds to a request for relief.

We are still awaiting input from the Judicial Council on this approach. The Administrative Office of the Courts has organized a group to consider issues relating to filing fees, but that group did not get to this particular issue at its most recent meeting. We do not expect to receive such input from the group before the Commission meets on December 8.

In addition, we were recently informed that the State Bar Committee on Administration of Justice (“CAJ”) has been discussing some of the issues that the Commission considered in October. CAJ’s next meeting is not until December 13. After that meeting, it is likely that CAJ will have additional input for the Commission.

Given the likelihood of additional input from CAJ and the Judicial Council, it may be premature for the Commission to approve a final recommendation at its upcoming meeting.

ISSUES THAT MAY REQUIRE FURTHER ANALYSIS

Several issues may require further analysis before the Commission approves a final recommendation. In particular, we may need to look harder at (1) the proper forum for, and law applicable in, resolving a dispute over discovery for an out-of-state case, (2) the review path for a decision in a dispute over discovery for an out-of-state case, and (3) discovery for an out-of-state arbitration, administrative adjudication, or other nonjudicial proceeding. The Commission may be able to make some headway on these issues at its upcoming meeting, but additional research and analysis might still be necessary.

Forum for and Law Applicable in Resolving a Discovery Dispute

If a dispute arises relating to discovery for an out-of-state case, should the dispute be resolved in a California court or in the out-of-state court where the case is pending? Should the dispute be resolved in accordance with California laws governing discovery? What about other matters, such as whether a communication is privileged or whether a cause of action includes a particular element, making evidence of that element discoverable? If choice-of-law rules are used, which state’s choice-of-law rules apply?

The Commission has previously considered these issues to some extent. Since then, however, the staff has discussed these matters with Richard Long, the Chair of NCCUSL's drafting committee on interstate depositions. In light of that discussion, the staff believes the topic deserves further attention.

The Commission's Current Approach

The preliminary part of the Commission's current draft currently states:

If a dispute arises regarding discovery conducted in California for a proceeding pending elsewhere, it may be necessary for the deponent or a party to seek relief in court. Sometimes it may be most appropriate to seek relief in the out-of-state tribunal, because that tribunal is familiar with the parties, the facts of the case, and the history of the litigation. On other occasions, it may be more appropriate or even necessary to seek relief in a California court (for example, when the dispute involves a deponent without any ties to the out-of-state forum,* or when a deposition is in progress and it would be easiest for the participants to appear before a local court).

*/ If a deponent lacks minimum contacts with an out-of-state forum, it would be unfair and a violation of due process to force the deponent to submit to the jurisdiction of the out-of-state tribunal. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Attachment #1, p. 9.

Similarly, proposed Code of Civil Procedure Section 2029.060 would provide:

2029.060. (a) *Notwithstanding any right that may exist to seek relief in a court of the jurisdiction where the proceeding is pending, 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.*

....

Comment. Section 2029.060 is added to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction. *This section does not preclude a person involved in such a dispute from seeking relief in the out-of-state tribunal instead of in California. But other constraints may apply.* For example, the out-of-state tribunal might lack personal jurisdiction over the deponent. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

....

Attachment #1, pp. 20-21 (emphasis added). The provision does not attempt to dictate which disputes are resolved in which place (California or the jurisdiction where the case is pending). That matter is left to the parties and the constraints of personal jurisdiction.

With regard to what law applies in resolving a discovery dispute, the Commission's proposal would retain existing Code of Civil Procedure Section 2029.010 (with unrelated modifications). Under that provision, a person in California may be compelled to testify and produce tangible things for an out-of-state case "in the same manner as may be employed for the purpose of taking testimony [and producing tangible things] in actions pending in California." The provision does not specifically address what law applies if a dispute arises in connection with such discovery.

NCCUSL's Approach

In contrast to the Commission's proposal, NCCUSL's current draft (Attachment #2) puts more emphasis on resolving a discovery dispute in California rather than in the out-of-state jurisdiction. NCCUSL's draft would also specifically require that any request for a protective order in this context, or to enforce, quash, or modify a subpoena, comply with California law.

Section 6 of NCCUSL's draft would provide:

SECTION 6. APPLICATIONS TO COURT. Any application to the court [motion] for a protective order, or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 *must comply with the laws of this state and be presented in the court in the [county, district, circuit, or vicinage] in which discovery is to be conducted.*

Attachment #2, p. 4 (emphasis added). The preface to the draft makes clear that the intent of this provision is to ensure fairness to the deponent. It explains that "the act is fair to deponents: it provides that motions brought to enforce, quash or modify a subpoena, or for protective orders, *shall be brought in the discovery state and will be governed by the discovery state's laws.*" *Id.* at 13-14 (emphasis added).

The Comment to Section 6 further explains the reasoning underlying the provision:

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's

procedural, evidentiary, and conflict of laws rules. Again, *the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests*, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court *that directly affect the deponent* must be made in the discovery state.

The term “modify” a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court *that affect only the parties to the action* can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

Attachment #2, pp. 19-20 (emphasis added). NCCUSL’s Comment thus draws a distinction between (1) a request for relief that “directly affects the deponent,” which would have to be resolved in California, and (2) a request that “affects only the parties to the action,” which could be resolved in the out-of-state jurisdiction. But the text of Section 6 makes no reference to such a distinction. It seems to unambiguously require that any dispute must be brought in California (the dispute “must ... be presented in the court in which discovery is to be conducted”).

Analysis

In explaining NCCUSL’s approach to the staff, Mr. Long stressed the importance of ensuring fairness to a nonparty deponent. He emphasized that it would be wrong to require such a deponent to litigate an issue far from home, under the rules of a jurisdiction in which the deponent does not reside.

To some extent, the Commission’s proposal acknowledges as much. For example, the Comment to proposed Code of Civil Procedure Section 2029.010 refers to the importance of “protecting the witness from oppressive or abusive discovery.” Attachment #1, p. 17; see also *id.* at 12, n. 65 (“As compared to the out-of-state tribunal, a California court may be more protective of the policy interests that are considered important in California.”). The repeated references

to the constraints of personal jurisdiction likewise reflect sensitivity to the potential unfairness of dragging the witness into a distant forum where the witness has no ties.

But are the constraints of personal jurisdiction enough in this situation? Under the Commission's proposal, a deponent could be compelled to litigate a dispute in the out-of-state tribunal any time personal jurisdiction could be established in that tribunal. Perhaps that is not a sufficient constraint.

Further, the staff is beginning to wonder whether any disputes over a deposition of a nonparty can truly be said to "affect only the parties to the action." NCCUSL's Comment refers to a dispute over relevance, but even that type of dispute would seem to affect a nonparty deponent. If a subject is deemed irrelevant, then the deponent won't have to answer questions about the subject and the deposition will be shorter and less demanding on the deponent than it would otherwise be. It might turn out, however, that the nonparty deponent doesn't care enough about the dispute to want to participate in resolving it in court. Under those circumstances, it might be alright for the parties to resolve the dispute in the out-of-state tribunal instead of in California.

A possible approach would be to require that a dispute be resolved in California unless the nonparty deponent waives that right (in writing or on the record) and allows the parties to resolve the dispute in the out-of-state tribunal. That approach would be simple and clear. The Commission should **consider whether to explore the merits of that approach.**

It might also be advisable to **give further thought to which jurisdiction's procedural, evidentiary, and substantive law should apply in resolving a dispute over discovery for an out-of-state case.** NCCUSL's Comment says that California's "procedural, evidentiary, and conflict of laws rules" should apply. That might be the best approach, but the staff has not had time to fully analyze its implications. In particular, we have questions about:

- How conflict of law rules would operate in this situation.
- Whether California procedural law should apply if a discovery dispute is resolved in the out-of-state tribunal with the deponent's consent.
- Whether California evidentiary law should apply to all disputes over discovery for an out-of-state case. In some instances, would that approach provide an incentive for a person to move to California to take advantage of an evidentiary privilege or exception that is not recognized elsewhere? If so, is that a problem or is it a good means of protecting the state's policy interests? In

resolving these questions, it might be useful to research case law involving conflicts between evidentiary privileges of different jurisdictions.

A representative of NCCUSL's drafting committee is planning to attend the meeting on December 8. We hope that he will be able to explain NCCUSL's approach and reasoning more fully than we have done here. Perhaps dialogue at the meeting will answer the questions posed and make it possible for the Commission to draw final conclusions about what approach to take. The staff thinks it more likely, however, that further research and analysis on at least some of the issues will be necessary.

Review Path for a Decision in a Discovery Dispute

If a superior court resolves a dispute over discovery for an out-of-state case, the losing party or deponent might want to seek review of the superior court's decision. The Commission's current proposal provides for review by way of writ. See proposed Code Civ. Proc. § 2029.100 (Attachment #1, p. 22). The preliminary part explains:

The proposed legislation would permit a party or deponent aggrieved by a decision to seek an extraordinary writ in the appropriate court of appeal. Review by way of writ is proper because the decision would be equivalent to a pretrial ruling on a discovery issue, not a final judgment. The court of appeal is the appropriate tribunal because the superior court proceeding would be treated like an unlimited civil case, due to the potential complexity of the issues.

Attachment #1, p. 13 (footnotes omitted).

The staff has found a California case that takes a different approach: *Warfield v. Medeiros*, 160 Cal. App. 3d 1035, 207 Cal. Rptr. 94 (1984). That case involved a dispute over plaintiffs' request to depose several nonparty witnesses in California for use in an action pending in Hawaii. At the time, such discovery was subject to former Code of Civil Procedure Section 2023, which was quite similar to existing Code of Civil Procedure Section 2029.010. The superior court resolved the dispute in favor of the deponents and the plaintiffs appealed.

On appeal, the threshold issue was whether the superior court's ruling was properly appealable. The court of appeal decided that it was. *Id.* at 98-99. The court explained:

As a general rule no order in a civil action is appealable unless it is embraced within the list of appealable orders prescribed by

statute. Thus, a party normally may not appeal from a discovery order. The rationale for this rule is that in the great majority of cases the delay due to interim review is likely to result in harm to the judicial process by reason of protracted delay and discovery orders may be reviewed on appeal from a judgment on the merits. *However, we think an exception to the general rule exists where, as here, no final review of the underlying action will take place in a California forum.*

In *Adams v. Woods* (1861) 18 Cal. 30, our Supreme Court held that a discovery order by a California Court relating to production of documents for use in an action pending in New York was final and appealable. More recently, some federal appellate courts have held that all discovery orders are appealable when the discovery order is the only matter before the federal district court. The Second Circuit, however, has limited the right to appeal to only those cases where the discovery order is the sole matter before the district court and where, as in this case, the lower court denies discovery of a non-party.

In the instant action, the superior court's denial of plaintiffs' request for discovery was a final judgment, at least within this jurisdiction. *Accordingly, we find an appeal lies from the superior court's order.*

Id. (emphasis added) (citations omitted).

The Commission should **consider whether it finds the court of appeal's reasoning persuasive and whether the Commission's proposal should provide for an appeal, not just a writ.** The staff could do further research on the relevant policy considerations if the Commission would find that useful in deciding how to proceed.

Discovery for an Out-of-State Arbitration, Administrative Adjudication, or Other Nonjudicial Proceeding

At the October meeting, the Commission discussed discovery for an out-of-state arbitration, administrative adjudication, or other proceeding besides litigation. The Commission directed the staff to collect further information on this matter. CLRC Minutes (Oct. 2006), p. 17; see also CLRC Memorandum 2006-41, pp. 18-19. The Commission specifically considered and preliminarily rejected the possibility of modifying its proposal such that a Californian could be subjected to discovery on the basis of a document issued by an out-of-state arbitrator, as opposed to a document issued by an out-of-state court. CLRC Minutes (Oct. 2006), p. 17.

The Commission did not reach any decision, preliminary or otherwise, on a slightly different issue: Whether a Californian should be subjected to discovery

on the basis of a document issued by an out-of-state administrative tribunal. That situation is perhaps more comparable to a court proceeding than an arbitration. There are other issues as well, such as the proper treatment of a subpoena issued by a grand jury, legislature, or other investigative entity in another jurisdiction. A further question is whether a Californian should be subjected to discovery on the basis of a document that is *issued by an out-of-state court* but requests discovery for purposes of an out-of-state arbitration, administrative adjudication, or other nonjudicial proceeding.

The staff has not yet done the requested research on this matter. We understand that CAJ plans to discuss the topic and might provide input on it. Ultimately, it may prove politically advisable to leave the law ambiguous rather than trying to clarify its application to nonjudicial proceedings. But ideally it would be best to fully research and analyze the matter before reaching that conclusion. **This is another reason why it may be premature for the Commission to approve a final recommendation at its upcoming meeting.**

STATUS OF THE NCCUSL STUDY

NCCUSL's drafting committee on interstate discovery met on November 10. The attached draft of its proposal (Attachment #2) incorporates decisions made at that meeting. Mr. Long reports that the drafting committee probably will not meet again; a further meeting does not appear necessary at this point. The draft that the committee submits to NCCUSL for final approval next summer probably will be very similar to the committee's current draft. Mr. Long thinks it likely that NCCUSL will approve a uniform act at its meeting next summer and a final version of the act (incorporating any revisions requested at the meeting) will be available sometime next fall.

This is pretty much the same schedule originally anticipated. See CLRC Memorandum 2006-7, p. 25. When the Commission first learned of NCCUSL's study, it rejected the idea of tabling its own study to await NCCUSL's final product. The thought was that if the Commission waited for NCCUSL's final product, the Commission would not have a proposal ready for introduction in the Legislature until at least 2009. That prediction was based on an assumption that if NCCUSL completed its work in late 2007, the Commission would need about a year to study NCCUSL's final product and determine whether and how to adapt it for use in California.

Since the Commission has been actively reviewing NCCUSL's ongoing work, however, it may not require that long to analyze NCCUSL's final product. The current draft prepared by the NCCUSL drafting committee (Attachment #2) might be quite close to the version NCCUSL approves. If the Commission is inclined to try to combine its own proposal with NCCUSL's proposed legislation, it may be able to complete much of that work before NCCUSL holds its meeting next summer. The staff has already attempted to combine the statutory language and prepare appropriate Comments (see Attachment #3). We would simply prepare a narrative explanation to go with that draft, present the full proposal to the Commission for review, incorporate any changes requested by the Commission, and send out a revised tentative recommendation for comment. The Commission might then be ready to approve a final recommendation shortly after NCCUSL's final product becomes available, making it possible to introduce legislation using NCCUSL's framework in 2008 rather than 2009.

The same time frame might apply if the Commission elects to proceed with its own proposal without trying to fit that proposal into NCCUSL's framework. Because we are expecting additional input from the Judicial Council and CAJ, and a number of issues appear to require further research and analysis, it might not be possible to introduce legislation in 2007 as originally hoped. It may be more advisable to wait until 2008. Thus, **there probably would be no time disadvantage to using NCCUSL's framework.**

PROS AND CONS OF INCORPORATING THE COMMISSION'S PROPOSAL INTO NCCUSL'S FRAMEWORK

There are obvious potential advantages to having a widely-adopted uniform law on interstate discovery. It would facilitate discovery across the nation, enabling litigants to follow the same procedure for obtaining a subpoena, and resolving any associated disputes, wherever they conduct discovery.

In substance, the Commission's proposal has much in common with NCCUSL's approach. Both procedures are designed to be simple and efficient, while still protecting the interests of the person from whom discovery is sought.

A major difference between the two proposals is the level of detail. This would not preclude adoption of NCCUSL's provisions; they could simply be supplemented with additional provisions proposed by the Commission. Attachment #3 shows how this might be done. Commissioners should examine that draft and assess whether they like the approach.

The staff thinks the interest in uniformity makes it a good idea to try to use NCCUSL's framework. If the Commission agrees, we would proceed along the lines discussed above.

SPECIFIC ISSUES RELATING TO USE OF NCCUSL'S FRAMEWORK

If the Commission decides to use NCCUSL's framework, there are a number of specific issues it should consider in addition to the ones previously discussed.

Discovery for an Action Pending in a Foreign Nation

NCCUSL's draft would not apply to discovery for an action pending in a foreign nation. In October, the Commission considered whether its own proposal should be similarly limited. The Commission did not see any reason to do that, particularly because existing Code of Civil Procedure Section 2029.010 already applies to discovery for an action pending in a foreign nation. CLRC Minutes (Oct. 2006), p. 15.

Accordingly, in attempting to fit the Commission's proposal into NCCUSL's framework, the staff covered both (1) discovery for an action pending in a United States jurisdiction other than California, and (2) discovery for an action pending in a foreign nation. We did this by creating two separate articles:

Article 1. Interstate Depositions and Discovery Act

Article 2. International Depositions and Discovery Act

A provision within Article 2 would state that the rules and procedures in Article 1 apply to discovery for an action pending in a foreign nation. See proposed Code Civ. Proc. § 2029.910 on p. 10 of Attachment #3.

An alternative, perhaps better, approach would be to expand NCCUSL's definition of "foreign jurisdiction" (see proposed Code Civ. Proc. § 2029.200(a) on p. 3 of Attachment #3) to include a foreign nation, not just United States jurisdictions other than California. The staff opted against that approach primarily because NCCUSL's act would be entitled the "Uniform *Interstate* Depositions and Discovery Act." (Emphasis added.) It didn't seem appropriate to apply that title to discovery for an action pending in a foreign nation, nor did it seem appropriate to change the title of the act but still refer to it as the California version of the "Uniform Interstate Depositions and Discovery Act." The approach of creating two separate articles would also provide an easy means of providing different treatment of the two different situations if that appears appropriate at some point.

The staff does not feel strongly about which drafting approach to use. **Does the Commission have a preference, or would it like to leave this matter to the staff's discretion?**

Requirement that the Subpoena Contain or Be Accompanied By the Names, Addresses, and Phone Numbers of Counsel and Unrepresented Parties

Section 3(b) of NCCUSL's draft would require that a subpoena issued for discovery in an out-of-state case "contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel." The drafting committee's Comment explains:

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service). The committee is of the opinion that failure to comply with this provision is not a jurisdictional defect, so that failure to comply would not render the service of the subpoena defective.

Attachment #2, pp. 17-18.

As a matter of policy, the staff agrees that the subpoena should contain or be accompanied by the names, addresses, and phone numbers of counsel and unrepresented parties. But we still need to look into the best means of implementing that policy in California. It might be helpful, for instance, to state in a Comment that providing the witness with a copy of the notice of deposition and accompanying proof of service would satisfy the requirement. **We will investigate this if the Commission decides to use NCCUSL's framework.**

Types of Discovery Dispute Covered

In the Commission's current draft, proposed Code of Civil Procedure Section 2029.060 would apply "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” See Attachment #1, p. 19. At the October meeting, the Commission considered whether to replace that phrase with language from a similar provision in the draft then available from NCCUSL, which would have applied to “[a]ny motion to enforce, quash, or modify a subpoena issued” for an out-of-state case. The Commission decided to stick with its own language, because that language clearly encompasses all different types of discovery disputes. CLRC Minutes (Oct. 2006), p. 17.

The NCCUSL drafting committee has since revised its provision. Instead of referring only to a “motion to enforce, quash, or modify a subpoena,” Section 6 of the committee’s current draft refers to “Any application to the court [motion] for a protective order, or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3” Attachment #2, p. 4. The Comment makes clear that the intent is to cover all types of disputes that might arise in connection with discovery for an out-of-state case. It says: “The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, *or for any other dispute relating to discovery under this Act*, must comply with the law of the discovery state.” *Id.* at 19 (emphasis added).

Is NCCUSL’s new statutory text and accompanying Comment sufficient to ensure that all different types of discovery disputes are covered? The staff thinks it probably would be construed that way. Nonetheless, the statutory text alone is perhaps ambiguous as to some disputes, such as a dispute over discovery sanctions. Consistent with the Commission’s general philosophy of addressing key points in the statutory text rather than in a Comment, **we suggest tracking NCCUSL’s statutory text but adding a catchall phrase:** “Any request for a protective order, or to enforce, quash, or modify a subpoena issued under this article, *or any other request to resolve a dispute relating to discovery under this article*, must comply” See proposed Code Civ. Proc. § 2029.600 (Attachment #2, p. 6 (emphasis added)). **The Commission should consider whether it agrees with that approach.**

Respectfully submitted,

Barbara Gaal
Staff Counsel

#J-505

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Deposition in Out-of-State Litigation

[Date To Be Determined]

California Law Revision Commission

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SUMMARY OF RECOMMENDATION

The Law Revision Commission proposes to clarify and refine the procedure for obtaining discovery from a witness in this state for purposes of a proceeding pending in another jurisdiction.

The proposed legislation would:

- Make clear that discovery for an out-of-state proceeding can be taken from an entity located in California, not just from a natural person.
- Eliminate any doubt that such discovery can include a deposition solely for the production of tangible items.
- Expressly allow an inspection of land or other property for purposes of an out-of-state proceeding.
- Permit issuance of a California subpoena to be based on any document from an out-of-state court that commands a person in California to testify or provide other discovery.
- Specify the filing fee and other procedural requirements for obtaining a subpoena from a California court for discovery in an out-of-state proceeding.
- Direct the Judicial Council to prepare a subpoena form and a subpoena application form for use in obtaining discovery for an out-of-state proceeding (or modify an existing form to expressly address that situation).
- Make clear that under specified circumstances local counsel can issue a subpoena for discovery in an out-of-state proceeding.

The proposed legislation would also clarify the procedure for resolving a dispute relating to discovery for an out-of-state proceeding. To resolve such a dispute in a California court, a litigant or deponent would need to file a petition in the superior court for the county in which the discovery is being conducted. The proposed legislation would specify the proper filing fee, hearing date and briefing schedule, and other procedural details.

By providing guidance on these points and related matters, the proposed legislation would help to prevent disputes and inconsistent treatment of litigants. The recommended reforms would not only benefit litigants in out-of-state proceedings, but would also assist California court personnel, process servers, witnesses, and others affected by discovery conducted for out-of-state litigation.

This recommendation was prepared pursuant to Resolution Chapter 1 of the Statutes of 2006.

DEPOSITION IN OUT-OF-STATE LITIGATION

1 The Law Revision Commission is engaged in a study of civil discovery and has
2 issued several recommendations on that topic.¹ In this recommendation, the
3 Commission proposes to revise the law to provide clear guidance on the procedure
4 that litigants, courts, and witnesses are to follow when discovery is taken in
5 California for purposes of an out-of-state proceeding.

6 Existing Law

7 Code of Civil Procedure Section 2029.010² governs the procedure for deposing³
8 a witness in California for purposes of a proceeding pending in another
9 jurisdiction. The provision applies when an out-of-state court issues a mandate,⁴
10 writ,⁵ letters rogatory,⁶ letter of request,⁷ or commission⁸ requesting that a person
11 in California testify or produce materials for use in an out-of-state case. It states:

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

Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

2. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Code of Civil Procedure Section 2029 without change. See Code Civ. Proc. § 2029.010 Comment.

3. In California, a "deposition" is defined as "a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine." Code Civ. Proc. § 2004. The term "deposition" is used to refer to: (1) a pretrial proceeding in which a witness orally testifies and the answers are transcribed (Code Civ. Proc. §§ 2020.310, 2025.010-2025.620), (2) a pretrial proceeding in which a witness answers written questions under oath (Code Civ. Proc. §§ 2028.010-2028.080), (3) a pretrial proceeding in which a witness testifies and produces documents or other tangible things (Code Civ. Proc. §§ 2020.510, 2025.010-2025.620), and (4) a pretrial proceeding in which a witness is only required to produce business records for copying (Code Civ. Proc. §§ 2020.410-2020.440; Evid. Code §§ 1560-1567).

4. A "mandate" is a "judicial command." Cochran's Law Lexicon (5th ed. 1973).

5. A "writ" is a "court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act." Black's Law Dictionary (8th ed. 2004).

6. The term "letters rogatory" is synonymous with "letter of request." It refers to a "document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case." Black's Law Dictionary 916 (8th ed. 2004).

7. For what constitutes a "letter of request," see *supra* note 6.

8. A "commission" is a "warrant or authority, from the government or a court, that empowers the person named to execute official acts." Black's Law Dictionary (8th ed. 2004).

1 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
2 commission is issued out of any court of record in any other state, territory, or
3 district of the United States, or in a foreign nation, or whenever, on notice or
4 agreement, it is required to take the oral or written deposition of a natural person
5 in California, the deponent may be compelled to appear and testify, and to
6 produce documents and things, in the same manner, and by the same process as
7 may be employed for the purpose of taking testimony in actions pending in
8 California.

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

16 **Inadequacies of Existing Law**

17 Section 2029.010 does not specify the details of the procedure for issuing a
18 subpoena to take a deposition in California for purposes of an out-of-state
19 proceeding. It is not clear from the statutory text what type of paper the deposing
20 party must submit to the court, whether that party must pay a filing fee and, if so,
21 what fee applies, whether an attorney (rather than the court) may issue a subpoena,
22 what format to use for the subpoena, and whether it is necessary to retain local
23 counsel.¹² Because the provision applies to a “natural person,” it is also

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

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

11. State Bar-Judicial Council Report, *supra* note 9, at 59. Section 2029.010 is similar to the Uniform Foreign Depositions Act (“UFDA”), which was approved in 1920 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). Quite a number of states have adopted the UFDA or a variant of it. See, e.g., Fla. Stat. Ann. § 92.251; Ga. Code Ann. § 24-10-110 to 24-10-112; Md. Code Ann., Cts. & Jud. Proc. §§ 9-401 to 9-403; Nev. Rev. Stat. §§ 53.050-53.070; N.Y. C.P.L.R. 3102(e); Ohio Rev. Code Ann. § 2319.09; Ore. R. Civ. Proc. 38(C); S.D. Codified Laws § 19-5-4; Tenn. Code Ann. § 24-9-103; Va. Code Ann. § 8.01-411 to 8.01-412.1; Wyo. Stat. Ann. § 1-12-115; see also La. Rev. Stat. Ann. § 13:3821-13:3822, 13:3824; Mo. Stat. Ann. § 492.270; Mo. R. Civ. Proc. 57.08; Neb. R. Civ. Disc. 28(e); N.D. R. Civ. Proc. 45(a)(3); N.H. Rev. Stat. Ann. §§ 517:18, 517-A:1; S.C. R. Civ. Proc. 28(d); Tex. Civ. Prac. & Rem. Code Ann. § 20.002; Utah R. Civ. Proc. 26(h).

Other states have not adopted the UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 13.

12. Code of Civil Procedure Section 1986 provides some additional guidance but does not fully address the issues raised. It states:

1986. A subpoena is obtainable as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is obtainable from the clerk of the court in

1 questionable whether an organization located in California can be deposed for an
2 out-of-state proceeding. The statute covers a deposition in which the witness is
3 required to produce documents as well as testify, but is ambiguous as to whether it
4 covers a deposition solely for the production of documents. Its applicability to an
5 inspection of land or other premises is also debatable.¹³

6 Further, the statute does not make clear how to seek relief when a dispute arises
7 in a deposition taken in California for purposes of an out-of-state proceeding. The
8 proper enforcement procedure is particularly uncertain when a deposition is taken
9 on notice or agreement without issuance of a California subpoena.

10 Because the statute fails to provide guidance on these points, California courts
11 vary widely in how they handle such matters.¹⁴ This inconsistent and unpredictable
12 treatment is unfair.

which the action or proceeding is pending, or if there is no clerk than from a judge or justice of such court.

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

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

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

(Emphasis added.) Assuming that the last sentence of Section 1986 is meant to apply not only to a deposition subpoena for a California case but also to a deposition subpoena for an out-of-state proceeding, it is consistent with but less detailed than the procedure proposed by the Commission specifically for the latter situation.

13. Like Section 2029.010, the UFDA does not specify the details of the procedure for issuing a subpoena to take a deposition in a state for purposes of a proceeding pending in another state. In contrast, Section 3.02 of the Uniform Interstate and International Procedure Act (“UIIPA”) is more specific in some respects.

The UIIPA was approved by NCCUSL in 1962 and was intended to supersede the UFDA. It has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821-13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). NCCUSL withdrew the UIIPA in 1977. See NCCUSL, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its 105th Year, Table IV, at 578 (1996). For this reason, and because it was not widely adopted, Section 3.02 of the UIIPA is of limited value as a model for nationwide uniformity.

Many states have provisions that do not track either the UFDA or UIIPA Section 3.02. There is great variety among these. See Ala. R. Civ. Proc. 28(c); Alaska R. Civ. Proc. 27(c); Ariz. R. Civ. Proc. 30(h); Ark. R. Civ. Proc. 28(c); Conn. Gen. Stat. § 52-155; Conn. R. Superior Ct. Civ. Proc. § 13-28; Del. Code Ann. tit. 10, § 4311; Haw. Rev. Stat. § 624-27; Idaho R. Civ. Proc. 28(e); Ill. Supreme Ct. R. 204(b); Iowa Code § 622.84; Kan. Stat. Ann. § 60-228(d); Ky. R. Civ. Proc. 28.03; Me. R. Civ. Proc. 30(h); Minn. R. Civ. Proc. 45.04; Miss. R. Civ. Proc. 45(a)(2); Mont. R. Civ. Proc. 28(d); N.J. R. Civ. Prac. 4:11-4; N.M. Stat. Ann. § 38-8-1; N.C. R. Civ. Proc. 28(d); Okla. Stat. Ann. tit. 12, § 2004.1(A)(2); R.I. Gen. Laws § 9-

1 To ensure even-handedness and prevent confusion, the Law Revision
2 Commission proposes to amend the provision to give additional guidance as
3 detailed below. The recommended reforms to clarify and improve the process will
4 not only benefit litigants in out-of-state proceedings, but will also assist California
5 court personnel, process servers, witnesses, and others affected by application of
6 the provision.

7 **Proposed Reforms**

8 The Commission proposes clarifications and improvements relating to: (1) the
9 types of deponent covered by Section 2029.010, (2) the types of discovery to
10 which the provision applies, (3) which out-of-state documents are acceptable, (4)
11 other aspects of the procedure for issuing a subpoena under the statute, (5) the use
12 of local counsel, and (6) the procedure for resolving a dispute arising in
13 connection with discovery under the statute.

14 ***Type of Deponent***

15 By its terms, Section 2029.010 is limited to “the oral or written deposition of a
16 natural person in California” This limitation was deliberately imposed in the
17 Civil Discovery Act of 1986.¹⁵ The drafters’ apparent concern was that some
18 jurisdictions might not permit a deposition of an organization (as opposed to a
19 natural person) and litigants might try to subvert such a restriction by seeking to
20 depose an organization in California instead of the forum state.¹⁶

21 California appears to be unusual and perhaps unique in its approach to this point.
22 The Commission is not aware of any statute comparable to Section 2029.010 that
23 expressly applies only to a deposition of a natural person.

24 As a matter of policy, deposing an organization located in California may be just
25 as important to the pursuit of truth as deposing an individual who resides in
26 California. Consistent with the spirit of comity inherent in Section 2029.010, the
27 Commission recommends revising the statute to apply to the oral or written
28 deposition of any person in California.¹⁷

18-11; Vt. Stat. Ann. tit. 12, § 1248; Wash. Superior Ct. Civ. R. 45(d)(4); W. Va. R. Civ. Proc. 28(d); Wisc. Stat. § 887.24; see also Bushnell, *How To Take an Out-of-State Deposition*, 14 Utah Bar J. 28, 28 (2001) (explaining that “each state has its own peculiar requirements”); Mullin, Jr., *supra* note 10, at 52 (noting “the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities”). There does not seem to be any uniformity in how other states handle the points that require clarification here in California.

14. Email from Tony Klein to Barbara Gaal (July 6, 2005) (CLRC Staff Memorandum 2005-26, Exhibit pp. 1-3); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004) (CLRC Staff Memorandum 2005-26, Exhibit pp. 4-6).

15. State Bar-Judicial Council Report, *supra* note 9, at 59.

16. See *id.*

17. See proposed amendment to Code Civ. Proc. § 2029.010 *infra*.

1 ***Type of Discovery Sought***

2 From the statutory language, it is clear that Section 2029.010 encompasses not
3 only a deposition requiring testimony alone, but also one requiring both testimony
4 and the production of tangible evidence. It is ambiguous, however, whether the
5 language encompasses a deposition in which no testimony is required, only the
6 production of documents or other tangible evidence.¹⁸

7 The provision should be revised to eliminate this ambiguity. Its terms and
8 protections should apply regardless of whether a witness producing tangible
9 evidence is also compelled to testify.¹⁹

10 The provision should also be revised to expressly include a request to inspect
11 land or other premises. This would prevent disputes over whether the provision
12 applies to such a request.²⁰

13 ***Acceptable Out-of-State Documents***

14 By its terms, Section 2029.010 does not apply unless (1) a court of another
15 jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or
16 commission, or (2) the deposition of a natural person in California is required by
17 notice or agreement. If neither of these requirements is satisfied, a California court
18 lacks authority to issue a subpoena under the statute.

19 It may be costly and time-consuming, however, to obtain a letter of request or
20 other document enumerated in the statute. To eliminate unnecessary expense and
21 delay, the Commission proposes to expand the list of acceptable documents to
22 include a subpoena or any other document from an out-of-state court that
23 commands a person in California to testify or provide another form of discovery.²¹

24 ***Other Aspects of the Procedure for Issuance of a Subpoena By a California Court***

25 Aside from having to present one of the enumerated documents, it is not
26 altogether clear what a litigant must do to obtain a subpoena from a California
27 court under Section 2029.010. The requirements reportedly differ from court to
28 court and sometimes even from clerk to clerk.²² In some instances, a clerk will
29 issue a subpoena on mere presentation of the original or a copy of one of the
30 documents listed in the statute. Other times, a court may require greater formality,
31 such as the filing of a formal petition or civil case cover sheet, or attendance at a
32 hearing.²³

18. For key provisions governing such a deposition, see Code Civ. Proc. §§ 2020.010(a)(3), 2020.410-2020.440.

19. See proposed amendment to Code Civ. Proc. § 2029.010 *infra*.

20. See proposed amendment to Code Civ. Proc. § 2029.010 *infra*.

21. *Id.*

22. See sources cited in note 14 *supra*.

23. Like Section 2029.010, many of the comparable statutes of other states are silent regarding the proper procedural approach. The statutes that do address such details vary in the degree of formality they

1 There is also great disparity in the fees California courts charge for issuance of a
2 subpoena to take a deposition in the state for purposes of an out-of-state
3 proceeding. Some courts charge a first appearance fee and at least one court
4 charges multiple first appearance fees if a litigant seeks more than one subpoena.
5 Other courts require more modest fees.²⁴

6 The Commission recommends that the procedure for obtaining a California
7 subpoena for purposes of an out-of-state proceeding be clear, simple, and uniform
8 from county to county. Under the proposed law, it would be sufficient to file a
9 properly completed application with the court clerk and the clerk would issue the
10 subpoena. The proper court for filing the application would be the superior court
11 of the county in which the deposition is to be taken.²⁵ There would be a modest
12 filing fee of \$20 per subpoena,²⁶ comparable to the fee for issuing a commission to
13 take an out-of-state deposition.²⁷

14 The Commission further recommends that the statute direct the Judicial Council
15 to prepare an application form for use in this situation.²⁸ A litigant would be
16 required to use the Judicial Council form once that form becomes available. This
17 would streamline the process for litigants, court clerks, process servers, attorneys,
18 and other affected parties. The proposed law would specify that the application
19 form require the applicant to attach a true and correct copy of the document
20 authorizing the deposition in the out-of-state proceeding.²⁹ Aside from this
21 restriction, the content of the form would be left to the Judicial Council to develop,
22 perhaps drawing on requirements stated in some of the more detailed statutes from
23 other states.³⁰ The intent is to prevent confusion, ensure that court clerks receive

require. In some states, a judge must issue the subpoena, not the court clerk. See, e.g., Mich. R. Civ. Proc. 2.305(E); Ala. R. Civ. Proc. 28(c); Ky. R. Civ. Proc. 28.03; N.C. R. Civ. Proc. 28(d); Wash. Superior Ct. Civ. R. 45(d)(4). Other states use a less complicated approach. See, e.g., Ariz. R. Civ. Proc. 30(h); Mont. R. Civ. Proc. 28(d); Miss. R. Civ. Proc. 45(a)(2); N.D. R. Civ. Proc. 45(a)(3); Utah R. Civ. Proc. 26(h).

24. Email from Tony Klein to Barbara Gaal (July 6, 2005) (CLRC Staff Memorandum 2005-26, Exhibit pp. 1-3); see also Email from Tony Klein to Barbara Gaal (April 25, 2006) (Second Supplement to CLRC Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (CLRC Staff Memorandum 2006-7, Exhibit p. 9).

The Uniform Civil Fees and Standard Fee Schedule Act of 2005 does not expressly address what fee to charge in this situation. See 2005 Cal. Stat. ch. 75.

25. See proposed Code Civ. Proc. §§ 2029.020 and 2029.030 *infra*. See also Code Civ. Proc. § 1986.

26. See proposed amendment to Gov't Code § 70626 *infra*.

27. *Id.*

28. See proposed Code Civ. Proc. § 2029.050(a) *infra*.

29. See proposed Code Civ. Proc. § 2029.050(a) *infra*. A true and correct copy of the required document should be sufficient. It would not be appropriate for the application form to require the original or a certified copy, because the original might not be accessible to the litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

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

1 all necessary information, and draw attention to applicable requirements for taking
2 the requested discovery in California.³¹

3 To further streamline the process, the proposed law would also direct the
4 Judicial Council to prepare one or more subpoena forms that include clear
5 instructions for use in issuance of a subpoena for discovery in an out-of-state
6 proceeding.³² The Judicial Council would have the option of either creating new
7 forms or modifying existing forms to meet this requirement. Again, use of the
8 appropriate form would be mandatory once it becomes available.³³ To ensure that
9 the deponent has key information to seek protection if needed, the subpoena would
10 have to bear the caption and case number of the out-of-state case to which it
11 relates, as well as the name of the superior court that authorized the discovery and
12 has jurisdiction in the event of a problem.

13 *Retention of Local Counsel*

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

17 By statute, a person may not practice law in California unless the person is an
18 active member of the State Bar.³⁴ A recently adopted rule of court makes clear,
19 however, that under specified conditions it is permissible for an attorney duly

31. These objectives might be achieved by a simple form that would:

- Include a space at the top for indicating the caption and case number of the out-of-state case.
- Include another space for indicating the name of the court in which the application is filed.
- State that the applicant is requesting issuance of a subpoena pursuant to Code of Civil Procedure Sections 2029.020-2029.030.
- Require the applicant to attach the document from the out-of-state tribunal requesting discovery.
- Require the applicant to declare under penalty of perjury that the attached document is a true and correct copy of what it purports to be.
- Require the applicant to attach a California subpoena that is ready for the court to issue with identical terms as the out-of-state document.
- Perhaps also alert the applicant to requirements such as the necessary filing fee, California rules governing service of process, and applicable witness fees.

32. See proposed Code Civ. Proc. § 2029.050(b) *infra*.

33. In many respects, the existing subpoena forms are already suitable for use when a person seeks to depose a California witness for purposes of an out-of-state proceeding. But portions of those forms are not. For instance, it is unclear what caption and case number to include, and some of the statutory references in some of the forms are plainly inapplicable to a deposition for purposes of an out-of-state proceeding (e.g., the form Deposition Subpoena for Personal Appearance includes a box for indicating that “This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).”) Although the necessary adjustments may be minor, it would be beneficial to have the Judicial Council review the subpoena forms with out-of-state litigation in mind.

34. Bus. & Prof. Code § 6125.

1 licensed to practice in another state to perform litigation tasks in California on a
2 temporary basis for a proceeding pending in another jurisdiction.³⁵

3 The drafters of this rule specifically considered the situation in which an out-of-
4 state attorney deposes a witness in California for purposes of an out-of-state
5 proceeding.³⁶ Thus, if a party is represented by an out-of-state attorney in an out-
6 of-state proceeding under the conditions specified in the rule, the party does not
7 have to retain local counsel to be able to depose a witness in California. Further, if
8 a party is self-represented in an out-of-state proceeding, the party does not have to
9 retain local counsel to be able to depose a witness in California.³⁷ Local counsel
10 may be needed, however, if a discovery dispute arises in a deposition for an out-
11 of-state proceeding and it is necessary to appear in a California court to resolve the
12 dispute.

13 Because these matters are already governed by other law, there is no need to
14 address them in proposed statutory revisions. To assist persons involved in
15 discovery for an out-of-state case, however, a Comment to one of the proposed
16 new provisions would refer to the relevant authorities.³⁸

17 *Issuance of a Subpoena By Counsel*

18 For an action pending in California, an attorney of record may issue a subpoena
19 instead of having to obtain a subpoena from the court.³⁹ Section 2029.010 does not
20 specify, however, whether an attorney may issue a subpoena to depose a witness
21 in California for a proceeding pending in another jurisdiction.

22 The Commission proposes to add a new provision that would make clear that an
23 active member of the California Bar retained to represent a party in an out-of-state
24 proceeding may issue a deposition subpoena pursuant to the statute for purposes of
25 that proceeding.⁴⁰ The proposed law would not extend that privilege to an out-of-

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

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

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

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

38. See proposed Code Civ. Proc. § 2029.040 Comment *infra*.

39. Code Civ. Proc. § 1985(c).

40. See proposed Code Civ. Proc. § 2029.040 *infra*.

1 state attorney. It seems reasonable to require the involvement of either a California
2 court or a California attorney to issue process under the authority of the State of
3 California.⁴¹

4 ***Discovery Dispute***

5 If a dispute arises regarding discovery conducted in California for a proceeding
6 pending elsewhere, it may be necessary for the deponent or a party to seek relief in
7 court. Sometimes it may be most appropriate to seek relief in the out-of-state
8 tribunal, because that tribunal is familiar with the parties, the facts of the case, and
9 the history of the litigation. On other occasions, it may be more appropriate or
10 even necessary to seek relief in a California court (for example, when the dispute
11 involves a deponent without any ties to the out-of-state forum,⁴² or when a
12 deposition is in progress and it would be easiest for the participants to appear
13 before a local court). Section 2029.010 does not provide guidance on the proper
14 procedure to follow when relief is sought in California.

15 The proposed law would eliminate this ambiguity. It would require the person
16 desiring relief to file a petition in the superior court of the county in which the
17 deposition is being taken.⁴³ The petitioner would have to pay a first appearance
18 fee,⁴⁴ as would each person who responds to the petition.⁴⁵ The amount of these
19 first appearance fees would be \$320, the same as the corresponding first
20 appearance fees for an unlimited civil case pending in a California court.⁴⁶ This fee

41. Contrary to the proposed approach, Iowa seems to permit an out-of-state attorney to issue a subpoena under Iowa authority that is directed to a witness within the state. See Iowa Code Ann. § 622.84(1). That appears to be an unusual position.

42. If a deponent lacks minimum contacts with an out-of-state forum, it would be unfair and a violation of due process to force the deponent to submit to the jurisdiction of the out-of-state tribunal. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

43. See proposed Code Civ. Proc. § 2029.060 *infra*. A request for relief pursuant to this section would be denominated a “petition,” not a “motion,” because there would not be a pending California case in which to file a “motion.”

For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Code of Civil Procedure Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California. See proposed Code Civ. Proc. § 2029.060(f) *infra*.

44. See proposed Code Civ. Proc. § 2029.060(b) *infra*.

45. See proposed Code Civ. Proc. § 2029.060(d) *infra*.

46. See proposed Code Civ. Proc. § 2029.060(b),(d) *infra*; Gov’t Code §§ 70611, 70612.

The Commission considered the possibility of varying the amount charged depending on the nature of the out-of-state case. For example, if the out-of-state case were comparable to a limited civil case, the fee would be the same as the first appearance fee for a limited civil case; if the out-of-state case were comparable to an unlimited civil case, the fee would be the same as the first appearance fee for an unlimited civil case. The Commission rejected this approach because there might be disputes over whether

1 amount is appropriate because resolving the dispute might involve difficult choice-
2 of-law issues or other complications arising because the discovery in question is
3 being conducted for an out-of-state case, not a California case. Additionally,
4 although the matter consists of a discovery dispute rather than an entire case, it
5 may require at least as much effort for the court to resolve as many cases that are
6 filed in California.⁴⁷

7 A special rule would apply to a person who is not a party to the out-of-state
8 case. If such a person were the petitioner, the fee for filing the petition would be
9 \$40, the same as for a discovery motion in a California case.⁴⁸ If such a person
10 were responding to a petition, there would be no fee for filing the response.⁴⁹ This
11 would parallel the treatment of a nonparty in a California case.⁵⁰

12 To ensure that all documents relating to the same out-of-state case are filed
13 together (including the subpoena application, subpoena, and documents relating to
14 any subsequent discovery dispute), the petition and any response to it would have
15 to bear the caption and case number of the out-of-state case.⁵¹ To ensure that all
16 persons involved in a dispute know which California court is handling the dispute,
17 the first page of the petition or any response would also have to include the name
18 of the court in which the document is filed.⁵² In addition, the proposed law would
19 require the superior court to assign a California case number.⁵³

20 Further, the proposed law would clarify the briefing schedule and notice
21 requirements that apply to a petition for relief pertaining to discovery in an out-of-
22 state case. Those matters would be governed by Code of Civil Procedure Section
23 1005, the same as for a discovery motion in a case pending within the state.⁵⁴

24 ***Subsequent Discovery Dispute in Same Case and County***

25 On occasion, more than one discovery dispute relating to a particular out-of-
26 state case might arise in the same county. In some instances, both disputes might
27 involve the same disputants in the same roles (petitioner or respondent). Other

an out-of-state case is comparable to a particular type of California proceeding and because it would be difficult for a court clerk to make such determinations.

47. Frequently, the only action in a California case will be the filing of pleadings and perhaps taking of some discovery, followed by settlement. Nonetheless, each party must pay a first appearance fee, even though the case consumes few judicial resources. Resolving a dispute regarding discovery for an out-of-state case may actually be more burdensome on a California court than a typical California case.

48. See proposed Code Civ. Proc. § 2029.060(b), (d) *infra*.

49. *Id.*

50. Only a party or an intervenor must pay a first appearance fee in a California case. See, e.g., Gov't Code §§ 70611, 70612.

51. See proposed Code Civ. Proc. § 2029.060(e) *infra*.

52. *Id.*

53. *Id.*

54. See proposed Code Civ. Proc. § 2029.080 *infra*.

1 times, there might be little or no overlap between the first dispute and a
2 subsequent dispute: the disputants might be different⁵⁵ or their roles might be
3 reversed.⁵⁶

4 Regardless of which situation occurs, the superior court should be aware of all
5 previous actions it has taken with regard to the out-of-state case. This is necessary
6 to promote efficiency and fairness and to minimize inconsistent results.

7 By requiring use of the out-of-state caption and case number on all documents
8 relating to an out-of-state case, the proposed legislation would facilitate that
9 objective.⁵⁷ To further ensure that all documents relating to the same out-of-state
10 case are filed together, the first page of any subsequent petition would have to
11 include the same California case number that the court assigned to the first petition
12 filed in connection with the out-of-state case.⁵⁸

13 The proposed legislation would also make clear what filing fee applies when
14 multiple discovery disputes relating to the same out-of-state case arise in the same
15 county. If a disputant is a party to the out-of-state case and has not previously paid
16 a first appearance fee, the disputant would have to pay such a fee.⁵⁹ But if a
17 disputant is not a party to the out-of-state case, or has previously paid a first
18 appearance fee, the disputant would only have to pay \$40 for filing a petition and
19 would not have to pay anything for filing a response.⁶⁰ To assist in determination
20 of the appropriate fees, the first page of a subsequent petition would have to
21 clearly indicate that it is not the first petition filed in the county pertaining to the
22 out-of-state case.⁶¹

23 ***Subsequent Discovery Dispute in Another County***

24 At times, two or more discovery disputes relating to the same out-of-state case
25 might arise in different counties. In that situation, the proposed legislation would
26 require that each petition for relief be filed in the superior court of the county in
27 which the discovery in question is being conducted.⁶² This approach is necessary

55. For example, the first dispute might be between the plaintiff in an out-of-state case and a California deponent who refuses to produce a particular document; the second dispute might be between a defendant in the out-of-state case and a different deponent.

56. For example, a deponent might seek a protective order with regard to a particular document requested by the plaintiff in the out-of-state case; later, the plaintiff might move to compel the same deponent to answer a particular question at the deposition.

57. See proposed Code Civ. Proc. §§ 2029.030(b)(1), 2029.040(b)(1), 2029.060(e)(1), 2029.070(e)(1) *infra*. If the caption on a petition were based on the names and roles of the disputants instead, documents relating to the same out-of-state case might be placed in different files, causing confusion or other adverse consequences.

58. See proposed Code Civ. Proc. § 2029.070(e)(3) *infra*.

59. See proposed Code Civ. Proc. § 2029.070(c), (d) *infra*.

60. See proposed Code Civ. Proc. § 2029.070(c), (d) *infra*.

61. See proposed Code Civ. Proc. § 2029.070(b) *infra*. See also Code Civ. Proc. § 1991.

62. See proposed Code Civ. Proc. § 2029.060(a) *infra*.

1 to avoid forcing a California witness to appear in a court far away from where the
2 witness resides.

3 In appropriate circumstances, a petition could be transferred and consolidated
4 with a petition pending in another county.⁶³ In determining whether to order a
5 transfer, a court should consider factors such as convenience of the deponent and
6 similarity of issues.

7 ***Deposition on Notice or Agreement***

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

15 Often, if a dispute arises regarding a deposition pursuant to notice or agreement
16 that is taken in California for an out-of-state case, the disputants will be able to
17 seek relief in the out-of-state forum.⁶⁴ In some instances, however, it may be
18 preferable for a deponent or party to the out-of-state case to seek relief in a
19 California court. In particular, the proximity of a California court to the place of
20 deposition may be a significant factor.⁶⁵

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

63. See Code Civ. Proc. §§ 403 (transfer), 1048(a) (consolidation); see also Gov’t Code § 70618 (transfer fees).

64. A witness who can be deposed on notice generally will be a party deponent and thus will be subject to the jurisdiction of the out-of-state tribunal.

65. The importance of providing a convenient forum for resolution of any discovery dispute helps to explain why Section 2029.010 encompasses a deposition on notice or agreement. The UFDA and many statutes modeled on the UFDA also encompass a deposition on notice or agreement. See sources cited in note 11 *supra*.

It is a burden on the California court system to have to resolve a dispute relating to a deposition in California for purposes of an out-of-state proceeding. But Section 2029.010 reflects a policy decision that other factors outweigh that burden. In particular, the following considerations may justify the policy decision underlying the statute:

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

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

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

1 enforce discovery rights and obligations relating to a deposition on notice or
2 agreement taken in California for an out-of-state case — would entail needless
3 paperwork, expense, and expenditure of judicial and litigant resources in the many
4 instances in which no discovery dispute occurs. The proposed legislation would
5 thus make clear that if a party to an out-of-state case deposes a witness in this state
6 by properly issued notice or by agreement, the deponent or any party may seek
7 relief in a California court regardless of whether the deposing party obtained a
8 subpoena from a California court.⁶⁶

9 ***Review of Superior Court Decision in Discovery Dispute***

10 A further issue is how to obtain appellate review of a superior court decision
11 resolving a dispute relating to discovery for an out-of-state case. The proposed
12 legislation would permit a party or deponent aggrieved by a decision to seek an
13 extraordinary writ in the appropriate court of appeal.⁶⁷ Review by way of writ is
14 proper because the decision would be equivalent to a pretrial ruling on a discovery
15 issue, not a final judgment. The court of appeal is the appropriate tribunal because
16 the superior court proceeding would be treated like an unlimited civil case, due to
17 the potential complexity of the issues.⁶⁸

18 **Effect of the Proposed Reforms**

19 The procedure for obtaining discovery from a California resident for use in out-
20 of-state litigation should be clear and simple, while still protecting the interests of
21 the public generally and the deponent in particular. The clarifications proposed by
22 the Commission would help to achieve justice, prevent confusion, and make the
23 statute more workable for all concerned.

66. See proposed Code Civ. Proc. § 2029.090 *infra*.

67. See proposed Code Civ. Proc. § 2029.100 *infra*. The proposed provision is modeled on Code of Civil Procedure Sections 400 (writ of mandate to review order on motion to change place of trial) and 403.080 (writ of mandate to review order on reclassification motion).

68. See discussion of “Discovery Dispute” *supra*.

PROPOSED LEGISLATION

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Code Civ. Proc. § 2029.010 (amended). Deposition in action pending outside California

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

3 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, ~~or~~
4 commission, subpoena, or other document, however denominated, commanding a
5 person to appear and testify, or to produce documents, tangible things, land, or
6 other property for inspection, is issued out of any court of record in any other
7 state, territory, or district of the United States, or in a foreign nation, or whenever,
8 on notice or agreement, it is required to take the oral or written deposition of a
9 ~~natural~~ person in California, or a deposition for the inspection and production of
10 documents, tangible things, land, or other property, the deponent may be
11 compelled to appear and testify, and to produce ~~documents and things~~ documents,
12 tangible things, land, or other property for inspection, in the same manner, and by
13 the same process as may be employed for the purpose of taking testimony or
14 producing documents, tangible things, land, or other property for inspection in
15 actions pending in California.

16 **Comment.** Section 2029.010 is amended to encompass any document, however denominated,
17 that is issued by a court of record of another jurisdiction and commands a person to appear and
18 testify, or to produce documents or other property, for purposes of a proceeding pending in that
19 jurisdiction. In the spirit of comity, this amendment is designed to make it simpler, easier, and
20 less expensive for an out-of-state litigant to depose a witness located in California, while still
21 protecting the witness from oppressive or abusive discovery.

22 The section is also amended to apply to an organization located in California, not just an
23 individual found in the state.

24 The section is further amended to make clear that it includes (1) a deposition for the production
25 of documents or other items, even if the deponent is not required to testify, and (2) a deposition
26 involving inspection of land or other property.

27 **Code Civ. Proc. § 2029.020 (added). Application for subpoena**

28 SEC. _____. Section 2029.020 is added to the Code of Civil Procedure, to read:

29 2029.020. To obtain a subpoena or subpoena duces tecum under this chapter, the
30 party seeking a deposition shall file an application with the superior court of the
31 county in which the deposition is to be taken.

32 **Comment.** Section 2029.020 is added to clarify the procedure for obtaining a California
33 subpoena or subpoena duces tecum to depose a witness in this state for purposes of a proceeding
34 pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court
35 issuing it, the procedure is designed to be simple and expeditious.

36 See also Sections 2029.030 (issuance of subpoena by clerk of court), 2029.040 (issuance of
37 subpoena by local counsel), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or
38 agreement).

39 **Code Civ. Proc. § 2029.030 (added). Issuance of subpoena by clerk of court**

40 SEC. _____. Section 2029.030 is added to the Code of Civil Procedure, to read:

41 2029.030. (a) On receiving a properly completed application under Section
42 2029.020, and payment of the filing fee specified in Section 70626 of the

1 Government Code, the clerk of court shall issue the requested subpoena or
2 subpoena duces tecum.

3 (b) A subpoena or subpoena duces tecum issued under this section shall satisfy
4 both of the following conditions:

5 (1) It shall bear the caption and case number of the out-of-state case to which it
6 relates.

7 (2) It shall state the name of the court that issues it.

8 **Comment.** Section 2029.030 is added to clarify the procedure for obtaining a California
9 subpoena or subpoena duces tecum to depose a witness in this state for purposes of a proceeding
10 pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court
11 issuing it, the procedure is designed to be simple and expeditious.

12 See also Sections 2029.020 (application for subpoena), 2029.040 (issuance of subpoena by
13 local counsel), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or agreement).

14 **Code Civ. Proc. § 2029.040 (added). Issuance of subpoena by local counsel**

15 SEC. _____. Section 2029.040 is added to the Code of Civil Procedure, to read:

16 2029.040. (a) Notwithstanding Sections 1986 and 2029.020, if a party to a
17 proceeding pending in another jurisdiction retains an attorney licensed to practice
18 in this state, who is an active member of the State Bar, and the requirements of
19 Section 2029.010 are satisfied, that attorney may issue a subpoena or subpoena
20 duces tecum under this chapter.

21 (b) A subpoena or subpoena duces tecum issued under this section shall satisfy
22 both of the following conditions:

23 (1) It shall bear the caption and case number of the out-of-state case to which it
24 relates.

25 (2) It shall state the name of the superior court for the county in which the
26 deposition is to be taken.

27 **Comment.** Section 2029.040 is added to make clear that if certain conditions are satisfied,
28 local counsel may issue process compelling a California witness to appear at a deposition for an
29 action pending outside California. The section does not specify whether a party to out-of-state
30 litigation must retain local counsel to obtain a subpoena or subpoena duces tecum under this
31 chapter. For guidance on that point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also
32 Report of the California Supreme Court Multijurisdictional Practice Implementation Committee:
33 Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task
34 Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In
35 general, a party to out-of-state litigation may take a deposition in California without retaining
36 local counsel if the party is self-represented or represented by an attorney duly admitted to
37 practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119,
38 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own
39 interests regardless of State Bar membership...”); Cal. R. Ct. 966; Final Report and
40 Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery
41 dispute arises in connection with such a deposition and a party to out-of-state litigation wants to
42 appear in a California court with respect to the dispute.

43 See also Sections 2029.020 (application for subpoena), 2029.030 (issuance of subpoena by
44 clerk of court), 2029.050 (Judicial Council forms), 2029.090 (deposition on notice or agreement).

1 **Code Civ. Proc. § 2029.050 (added). Judicial Council forms**

2 SEC. _____. Section 2029.050 is added to the Code of Civil Procedure, to read:
3 2029.050. On or before January 1, 2009, the Judicial Council shall do all of the
4 following:

5 (a) Prepare an application form to be used for purposes of Section 2029.020.
6 The application form shall require the applicant to attach a true and correct copy of
7 the mandate, writ, letters rogatory, letter of request, commission, or other
8 document authorizing the deposition. As soon as the application form becomes
9 available, every applicant shall use the form.

10 (b) Prepare one or more new subpoena forms that include instructions for use in
11 issuance of a subpoena under Section 2029.030 or 2029.040. Alternatively, the
12 Judicial Council may modify one or more existing subpoena forms to include
13 instructions for use in issuance of a subpoena under Section 2029.030 or
14 2029.040. As soon as a Judicial Council form becomes available, use of the form
15 is mandatory.

16 **Comment.** Section 2029.050 is new. The Judicial Council is to prepare forms to facilitate
17 compliance with this chapter.

18 **Note.** Section 2029.050 would set a deadline of January 1, 2009, for the Judicial Council to
19 prepare the required forms. This deadline is premised on enactment of the proposed legislation in
20 2007, with an effective date of January 1, 2008. That would give the Judicial Council one year to
21 prepare the forms. The deadline would have to be adjusted if the proposed legislation was not
22 introduced in the Legislature until 2008 or later.

23 **Code Civ. Proc. § 2029.060 (added). Procedure for resolving discovery dispute**

24 SEC. _____. Section 2029.060 is added to the Code of Civil Procedure, to read:
25 2029.060. (a) Notwithstanding any right that may exist to seek relief in a court
26 of the jurisdiction where the proceeding is pending, if a dispute arises relating to a
27 deposition that a party is taking in this state for purposes of a proceeding pending
28 in another jurisdiction, the deponent or a party to the proceeding may file a
29 petition for a protective order or to compel discovery or obtain other appropriate
30 relief in the superior court of the county in which the deposition is being taken.

31 (b) On filing a petition under subdivision (a), a petitioner who is a party to the
32 out-of-state proceeding shall pay a first appearance fee as specified in Section
33 70611 of the Government Code. A petitioner who is not a party to the out-of-state
34 proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617
35 of the Government Code.

36 (c) The court in which the petition is filed shall assign it a case number.

37 (d) On responding to a petition under this section, a party to the out-of-state
38 proceeding shall pay a first appearance fee as specified in Section 70612 of the
39 Government Code. A person who is not a party to the out-of-state proceeding may
40 file a response without paying a fee.

41 (e) Any petition, response, or other document filed under this section shall
42 satisfy all of the following conditions:

1 (1) It shall bear the caption and case number of the out-of-state case to which it
2 relates.

3 (2) The first page shall state the name of the court in which the document is
4 filed.

5 (3) The first page shall state the case number assigned by the court under
6 subdivision (c).

7 (f) A request for relief pursuant to this section shall be referred to as a petition
8 notwithstanding any statute under which a request for the same relief would be
9 referred to as a motion or by another term if it was brought in a proceeding
10 pending in this state.

11 **Comment.** Section 2029.060 is added to clarify the procedure for using a California court to
12 resolve a dispute relating to discovery conducted in this state for purposes of a proceeding
13 pending in another jurisdiction. This section does not preclude a person involved in such a dispute
14 from seeking relief in the out-of-state tribunal instead of in California. But other constraints may
15 apply. For example, the out-of-state tribunal might lack personal jurisdiction over the deponent.
16 See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe*
17 *Co. v. Washington*, 326 U.S. 310 (1945).

18 A request for relief pursuant to this section is properly denominated a “petition,” not a
19 “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records
20 of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written
21 objection to production as authorized by the statute. To obtain production, the subpoenaing party
22 would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g)
23 prescribes for a case pending in California.

24 See also Sections 2029.070 (subsequent discovery dispute in same case and county), 2029.080
25 (hearing date and briefing schedule), 2029.090 (deposition on notice and agreement), 2029.100
26 (writ petition).

27 **Code Civ. Proc. § 2029.070 (added). Subsequent discovery dispute in same case and county**

28 SEC. _____. Section 2029.070 is added to the Code of Civil Procedure, to read:

29 2029.070. (a) If a petition has been filed under Section 2029.060 and another
30 dispute later arises relating to a deposition being taken in the same county for
31 purposes of the same out-of-state proceeding, the deponent or a party to the
32 proceeding may file a petition for appropriate relief in the same superior court as
33 the first petition.

34 (b) The first page of the petition shall clearly indicate that it is not the first
35 petition filed in that court that relates to the out-of-state case.

36 (c) If the petitioner in the new dispute is not a party to the out-of-state case, or is
37 a party who previously paid a first appearance fee under this chapter, the petitioner
38 shall pay a motion fee as specified in subdivision (a) of Section 70617 of the
39 Government Code. If the petitioner in the new dispute is a party to the out-of-state
40 case but has not previously paid a first appearance fee under this chapter, the
41 petitioner shall pay a first appearance fee as specified in Section 70611 of the
42 Government Code.

43 (d) If a person responding to the new petition is not a party to the out-of-state
44 case, or is a party who previously paid a first appearance fee under this chapter,
45 that person is not required to pay a fee for responding. If a person responding to

1 the new petition is a party to the out-of-state case but has not previously paid a
2 first appearance fee under this chapter, that person shall pay a first appearance fee
3 as specified in Section 70612 of the Government Code.

4 (e) Any petition, response, or other document filed under this section shall
5 satisfy all of the following conditions:

6 (1) It shall bear the caption and case number of the out-of-state case to which it
7 relates.

8 (2) The first page shall state the name of the court in which the document is
9 filed.

10 (3) The first page shall state the same case number that the court assigned to the
11 first petition relating to the out-of-state case.

12 **Comment.** Section 2029.070 is added to clarify the procedure that applies when two or more
13 discovery disputes relating to the same out-of-state proceeding arise in the same county. To
14 promote efficiency and fairness and minimize inconsistent results, all documents relating to the
15 same out-of-state case are to be filed together, bearing the same California case number.

16 Section 2029.070 does not apply when discovery disputes relate to the same out-of-state case
17 but arise in different counties. In that situation, each petition for relief must be filed in the
18 superior court of the county in which the deposition is being taken. See Section 2029.060(a); see
19 also Section 1991. In appropriate circumstances, a petition may be transferred and consolidated
20 with a petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation);
21 see also Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court
22 should consider factors such as convenience of the deponent and similarity of issues.

23 See also Sections 2029.060 (procedure for resolving discovery dispute), 2029.080 (hearing date
24 and briefing schedule), 2029.090 (deposition on notice and agreement), 2029.100 (writ petition).

25 **Code Civ. Proc. § 2029.080 (added). Hearing date and briefing schedule**

26 SEC. _____. Section 2029.080 is added to the Code of Civil Procedure, to read:

27 2029.080. A petition under Section 2029.060 or Section 2029.070 is subject to
28 the requirements of Section 1005 relating to notice and to filing and service of
29 papers.

30 **Comment.** Section 2029.080 is added to clarify the proper hearing date and briefing schedule
31 for a petition under Section 2029.060 or 2029.070. The petition is to be treated in the same
32 manner as a discovery motion in a case pending within the state.

33 **Code Civ. Proc. § 2029.090 (added). Deposition on notice or agreement**

34 SEC. _____. Section 2029.090 is added to the Code of Civil Procedure, to read:

35 2029.090. If a party to a proceeding pending in another jurisdiction seeks to
36 depose a witness in this state by properly issued notice or by agreement, it is not
37 necessary for that party to obtain a subpoena or subpoena duces tecum under this
38 chapter to be able to seek relief under Section 2029.060 or 2029.070. The
39 deponent or any other party may also seek relief under Section 2029.060 or
40 2029.070 in those circumstances, regardless of whether the deponent was
41 subpoenaed under this chapter.

42 **Comment.** Section 2029.090 is added to clarify how this chapter applies when a party to a
43 proceeding pending in another jurisdiction seeks to depose a witness in this state by properly
44 issued notice or by agreement.

1 **Code Civ. Proc. § 2029.100 (added). Writ petition**

2 SEC. _____. Section 2029.100 is added to the Code of Civil Procedure, to read:

3 2029.100. (a) If a superior court issues an order granting or denying or otherwise
4 resolving a petition under Section 2029.060 or 2029.070, a party or deponent
5 aggrieved by the order may petition the appropriate court of appeal for an
6 extraordinary writ.

7 (b) Immediately after filing a writ petition in a court of appeal under this section,
8 the petitioner shall file a copy of it in the superior court that issued the challenged
9 order.

10 (c) Pending its decision on the writ petition, the court of appeal may stay the
11 order of the superior court, the deposition that is the subject of that order, or both.

12 (d) Immediately after the court of appeal decides the writ petition and its order
13 on the petition becomes final, the clerk of the court of appeal shall file a copy of
14 the final order with the clerk of the superior court.

15 **Comment.** Section 2029.100 is added to clarify the procedure for reviewing a decision of a
16 superior court on a dispute arising in connection with discovery under this chapter. The provision
17 is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial)
18 and 403.080 (writ of mandate to review order on reclassification motion).

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

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

21 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
22 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
23 68085.1.

24 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
25 sale, a writ of possession, a writ of prohibition, or any other writ for the
26 enforcement of any order or judgment.

27 (2) Issuing an abstract of judgment.

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

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

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

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

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

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

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

40 (1) Issuing an order of sale.

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

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

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

8 (5) Issuing a commission to take a deposition in another state or place under
9 Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under
10 Section 2029.030 to take a deposition in this state for purposes of a proceeding
11 pending in another jurisdiction.

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

14 (7) Filing an affidavit of publication of notice of dissolution of partnership.

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

17 (9) Filing an affidavit under Section 13200 of the Probate Code, together with
18 the issuance of one certified copy of the affidavit under Section 13202 of the
19 Probate Code.

20 (10) Filing and indexing all papers for which a charge is not elsewhere provided,
21 other than papers filed in actions or special proceedings, official bonds, or
22 certificates of appointment.

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

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November 20, 2006

VIA FACSIMILE (650) 494-1827

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Interstate Depositions and Discovery

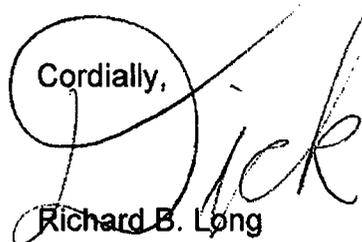
Dear Barbara:

I enclose a copy of the latest version of our Act with the Preface and Comments as currently revised by reporter Tom Mauet.

Please note that in the Comments to Section 6, Professor Mauet has addressed two of the concerns of your Commissioners: adding the words "or for may other dispute relating to discovery under this Act" and, in the last paragraph, discussing the rights of the parties to apply for appropriate relief in the trial state.

I look forward to hearing from you following the meeting of your Commission on December 8th.

Cordially,



Richard B. Long

RBL:kal
Enclosure

cc: Prof. Thomas Mauet – w/enc. via facsimile (620) 621-9140
Patrick DeBlase, Esq. – w/enc. via facsimile (310) 854-0812

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign jurisdiction" means the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, or any of the United States other than this state.

(2) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(3) "Subpoena" means a court order regardless of title requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

SECTION 3. ISSUING A SUBPOENA. (a) A party may present a

subpoena issued from a court of record of a foreign jurisdiction to a clerk of court in the [county, district, circuit, or vicinage] in which discovery is sought to be conducted in this state.

(b) When a party presents a subpoena issued from a court of record of a foreign jurisdiction to the clerk of court in this state, the clerk shall immediately issue a subpoena to the party who requested it for service upon the person to whom the foreign subpoena is directed. The subpoena shall incorporate the terms used in the foreign jurisdiction subpoena and shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel.

SECTION 4. SERVING A SUBPOENA. A party seeking to serve a subpoena issued by a clerk of court under Section 3 must serve the subpoena in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITIONS, PRODUCTION, AND INSPECTIONS. When a subpoena issued under Section 3 commands a person to:

- (1) attend and give testimony at a deposition,
 - (2) produce designated books, documents, records, or tangible things, or
 - (3) permit inspection of premises,
- the time and place and the manner of the taking of the

deposition, the production, or the inspection must comply with [cite applicable rules or statutes of this state].

SECTION 6. APPLICATIONS TO COURT. Any application to the court [motion] for a protective order, or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the laws of this state and be presented in the court in the [county, district, circuit, or vicinage] in which discovery is to be conducted.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 8. EFFECTIVE DATE. This [act] takes effect ____.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Preface

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida,

Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the

testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

- a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and

provides that a subpoena may be issued to a witness "to attend and give testimony 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 to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While

most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a

subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

Section 2 - Comments

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the

jurisdiction of the trial state, a subpoena is never necessary.

Section 3 - Comments

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party

in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no

need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given

that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service). The committee is of the opinion that failure to comply with this provision is not a jurisdictional defect, so that failure to comply would not render the service of the subpoena defective.

Section 5 - Comments

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery

state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

Section 6 - Comments

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

DRAFT LEGISLATION COMBINING NCCUSL
AND CLRC PROPOSALS (12/1/06)

Note. In the following table of contents, provisions that consist partially or entirely of NCCUSL language are shown in **gray**.

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1 **Note.** In the following draft, NCCUSL’s language is shown in **gray**. In some places, we have
2 made minor deviations from NCCUSL’s language to conform to stylistic conventions for drafting
3 California statutes (e.g., alphabetical rather than numerical labeling of subdivisions; capitalization
4 of the first word of each paragraph; avoidance of semicolons). These places are shown in **gray**
5 despite the minor deviations from NCCUSL’s language. An ellipsis within a gray area (**the ...**
6 **Interstate**) indicates where one or more words within a phrase proposed by NCCUSL have been
7 omitted.

8 **Heading of Chapter 12 (commencing with Section 2029.010) (amended)**
9 SECTION 1. The heading of Chapter 12 (commencing with Section 2029.010)
10 of Title 4 of Part 4 of the Code of Civil Procedure is amended to read:

1 CHAPTER 12. DEPOSITION DISCOVERY IN ACTION PENDING
2 OUTSIDE CALIFORNIA

3 **Comment.** To improve clarity, the heading of Chapter 12 is amended to replace the reference
4 to “Deposition” with a reference to “Discovery.” This change helps to emphasize that the chapter
5 applies not only to an oral deposition, but also to other forms of discovery. For example, the
6 chapter applies to a deposition solely for the production of business records (see Sections
7 2020.010(a)(3), 2020.410-2020.440), yet some jurisdictions might not refer to such a procedure
8 as a “deposition.”

9 **Code Civ. Proc. § 2029.010 (repealed). Deposition in action pending outside California**

10 SEC. 2. Section 2029.010 of the Code of Civil Procedure is repealed.

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

18 **Comment.** Former Section 2029.010 is superseded by enactment of the Interstate Depositions
19 and Discovery Act (Sections 2029.100-2029.800) and the International Depositions and
20 Discovery Act (Sections 2029.900-2029.910).

21 **Code Civ. Proc. §§ 2029.100-2029.800 (added). Interstate Depositions and Discovery Act**

22 SEC. 3. Article 1 (commencing with Section 2029.100) is added to Chapter 12
23 of Title 4 of Part 4 of the Code of Civil Procedure, to read:

24 Article 1. Interstate Depositions and Discovery Act

25 **§ 2029.100. Short title**

26 2029.100. This article may be cited as the ... Interstate Depositions and
27 Discovery Act.

28 **Comment.** Section 2029.100 is the similar to Section 1 of the Uniform Interstate Depositions
29 and Discovery Act (as of November 2006), which is under consideration by the National
30 Conference of Commissioners on Uniform State Laws. The article that includes the provision is
31 similar to the Uniform Interstate Depositions and Discovery Act, but also includes additional
32 material. The entire article may be referred to as the “Interstate Depositions and Discovery Act.”
33 The portions of the article that are drawn from the Uniform Interstate Depositions and Discovery
34 Act may collectively be referred to as the “Uniform Interstate Depositions and Discovery Act:
35 California Version.” See Section 2029.700 (uniformity of application and construction).

36 This article applies to discovery for purposes of an action pending in another jurisdiction of the
37 United States. See Section 2029.200 (definitions). The International Depositions and Discovery
38 Act (Sections 2029.900-2029.910) governs discovery for purposes of an action pending in a
39 foreign nation. Previously, both types of discovery were governed by former Section 2029.010
40 (deposition in action pending outside California).

1 § 2029.200. Definitions

2 2029.200. In this act:

3 (a) “Foreign jurisdiction” means the District of Columbia, Puerto Rico, the
4 United States Virgin Islands, any territory or insular possession subject to the
5 jurisdiction of the United States, or any of the United States other than this state.

6 (b) “Person” means an individual, corporation, business trust, estate, trust,
7 partnership, limited liability company, association, joint venture, public
8 corporation, government or governmental subdivision, agency or instrumentality,
9 or any other legal or commercial entity.

10 (c) “Subpoena” means a court order regardless of title requiring a person to do
11 any of the following:

12 (1) Attend and give testimony at a deposition.

13 (2) Produce and permit inspection and copying of designated books, documents,
14 or tangible things in the possession, custody, or control of the person.

15 (3) Permit inspection of premises under the control of the person.

16 **Comment.** Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions
17 and Discovery Act (as of November 2006), which is under consideration by the National
18 Conference of Commissioners on Uniform State Laws.

19 Subdivision (a) limits the scope of this article; the rules apply only to discovery in an action
20 pending in a jurisdiction of the United States. For discovery in an action pending in a foreign
21 nation, see Sections 2029.900-2029.910. Previously, both types of discovery were governed by
22 former Section 2029.010 (deposition in action pending outside California).

23 Subdivision (b) defines “person” broadly. This is consistent with the general code-wide
24 definition in Section 17 (“the word ‘person’ includes a corporation as well as a natural person”).
25 For guidance on interpreting other provisions of this code referring to a “person,” see *Hassan v.*
26 *Mercy American River Hospital*, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623
27 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes
28 corporation or non-corporate entity “is ultimately a question of legislative intent”); *Diamond*
29 *View Limited v. Herz*, 180 Cal. App. 3d 612, 616-19, 225 Cal. Rptr. 651 (1986) (“[T]he
30 preliminary definition contained in section 17 is superseded when it obviously conflicts with the
31 Legislature’s subsequent use of the term in a different statute.”); *Oil Workers Int’l Union v.*
32 *Superior Court*, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is
33 “person” for purpose of statutes in Code of Civil Procedure governing contempt).

34 To facilitate discovery under this article, subdivision (c) defines “subpoena” broadly. The term
35 includes not only a document denominated a “subpoena,” but also a mandate, writ, letters
36 rogatory, letter of request, commission, or other court document that requires a person to testify at
37 a deposition, produce documents or other items, or permit inspection of property.

38 § 2029.300. Issuance of subpoena by clerk of court

39 2029.300. (a) To obtain a subpoena under this article, a party seeking discovery
40 for a proceeding pending in a foreign jurisdiction shall do all of the following, in
41 the superior court of the county in which the discovery is to be conducted:

42 (1) File the original or a true and correct copy of a subpoena issued by a court of
43 record of a foreign jurisdiction.

44 (2) File an application requesting that the superior court issue a subpoena with
45 the same terms as the subpoena issued by a court of record of a foreign
46 jurisdiction.

1 (3) Pay the filing fee specified in Section 70626 of the Government Code.

2 (b) When a party files a subpoena issued from a court of record of a foreign
3 jurisdiction with the clerk of court under subdivision (a) and satisfies the other
4 requirements of subdivision (a), the clerk shall immediately issue a subpoena to
5 the party who requested it for service upon the person to whom the foreign
6 subpoena is directed. The subpoena shall incorporate the terms used in the foreign
7 jurisdiction subpoena and shall contain or be accompanied by the names,
8 addresses, and telephone numbers of all counsel of record and of any party not
9 represented by counsel.

10 (c) A subpoena issued under this section shall satisfy both of the following
11 conditions:

12 (1) It shall bear the caption and case number of the out-of-state case to which it
13 relates.

14 (2) It shall state the name of the court that issues it.

15 **Comment.** Section 2029.300 is added to clarify the procedure for obtaining a California
16 subpoena to obtain discovery from a witness in this state for use in a proceeding pending in
17 another United States jurisdiction. For the benefit of the party seeking the subpoena and the court
18 issuing it, the procedure is designed to be simple and expeditious.

19 Subdivision (b) is similar to Section 3 of the Uniform Interstate Depositions and Discovery Act
20 (as of November 2006), which is under consideration by the National Conference of
21 Commissioners on Uniform State Laws. Subdivisions (a) and (c) address additional procedural
22 details.

23 See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.390 (Judicial
24 Council forms), 2029.640 (deposition on notice or agreement), 2029.910 (discovery in action
25 pending in foreign nation).

26 **§ 2029.350. Issuance of subpoena by local counsel**

27 2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a
28 proceeding pending in a foreign jurisdiction retains an attorney licensed to practice
29 in this state, who is an active member of the State Bar, and that attorney receives
30 the original or a true and correct copy of a subpoena issued by a court of record of
31 a foreign jurisdiction, the attorney may issue a subpoena under this article,
32 incorporating the terms used in the foreign jurisdiction subpoena.

33 (b) A subpoena issued under this section shall satisfy both of the following
34 conditions:

35 (1) It shall bear the caption and case number of the out-of-state case to which it
36 relates.

37 (2) It shall state the name of the superior court of the county in which the
38 discovery is to be conducted.

39 **Comment.** Section 2029.350 is added to make clear that if certain conditions are satisfied,
40 local counsel may issue process compelling a California witness to appear at a deposition for an
41 action pending in another United States jurisdiction. The section does not specify whether a party
42 to out-of-state litigation must retain local counsel to obtain a subpoena under this article. For
43 guidance on that point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also Report of the
44 California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report
45 and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on

1 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a
2 party to out-of-state litigation may take a deposition in California without retaining local counsel
3 if the party is self-represented or represented by an attorney duly admitted to practice in another
4 jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr.
5 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests
6 regardless of State Bar membership....”); Cal. R. Ct. 966; Final Report and Recommendations,
7 *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in
8 connection with such a deposition and a party to out-of-state litigation wants to appear in a
9 California court with respect to the dispute.

10 See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.390 (Judicial
11 Council forms), 2029.640 (deposition on notice or agreement), 2029.910 (discovery in action
12 pending in foreign nation).

13 § 2029.390. Judicial Council forms

14 2029.390. On or before January 1, 2010, the Judicial Council shall do all of the
15 following:

16 (a) Prepare an application form to be used for purposes of Section 2029.300. As
17 soon as the application form becomes available, every applicant shall use the form.

18 (b) Prepare one or more new subpoena forms that include clear instructions for
19 use in issuance of a subpoena under Section 2029.300 or 2029.350. Alternatively,
20 the Judicial Council may modify one or more existing subpoena forms to include
21 clear instructions for use in issuance of a subpoena under Section 2029.300 or
22 2029.350. As soon as a Judicial Council form becomes available, use of the form
23 is mandatory.

24 **Comment.** Section 2029.390 is new. The Judicial Council is to prepare forms to facilitate
25 compliance with this article.

26 **Note.** Section 2029.390 would set a deadline of January 1, 2010, for the Judicial Council to
27 prepare the required forms. This deadline is premised on enactment of the proposed legislation in
28 2008, with an effective date of January 1, 2009. That would give the Judicial Council one year to
29 prepare the forms. The deadline would have to be adjusted if the proposed legislation was not
30 introduced in the Legislature until 2009 or later.

31 § 2029.400. Service of subpoena

32 2029.400. A party seeking to serve a subpoena issued ... under this article must
33 serve the subpoena in compliance with the law of this state, including, without
34 limitation, Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2.

35 **Comment.** With references to California law inserted as contemplated, Section 2029.400 is
36 similar to Section 4 of the Uniform Interstate Depositions and Discovery Act (as of November
37 2006), which is under consideration by the National Conference of Commissioners on Uniform
38 State Laws. Section 2029.400 applies not only to a subpoena issued by a clerk of court under
39 Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350.

40 § 2029.500. Deposition, production, and inspection

41 2029.500. When a subpoena issued under this article commands a person to dp
42 any of the following, the time and place and the manner of the taking of the
43 discovery must comply with the law of this state, including, without limitation,
44 Title 4 (commencing with Section 2016.010) of Part 4:

- 1 (a) Attend and give testimony at a deposition.
- 2 (b) Produce designated books, documents, records, or tangible things.
- 3 (c) Permit inspection of premises.

4 **Comment.** With references to California law inserted as contemplated, Section 2029.500 is the
5 similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (as of November
6 2006), which is under consideration by the National Conference of Commissioners on Uniform
7 State Laws. Section 2029.500 applies not only to a subpoena issued by a clerk of court under
8 Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350.

9 **§ 2029.600. Law applicable to request for resolution of discovery dispute**

10 2029.600. Any request for a protective order, or to enforce, quash, or modify a
11 subpoena issued ... under this article, or any other request to resolve a dispute
12 relating to discovery under this article, must comply with the law of this state and
13 be presented in the superior court in the county in which discovery is to be
14 conducted.

15 **Comment.** Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and
16 Discovery Act (as of November 2006), which is under consideration by the National Conference
17 of Commissioners on Uniform State Laws.

18 See also Sections 2029.610 (procedure for resolving discovery dispute), 2029.620 (subsequent
19 discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule),
20 2029.640 (deposition on notice or agreement), 2029.650 (writ petition).

21 **§ 2029.610. Procedure for resolving discovery dispute**

22 2029.610. (a) If a dispute arises relating to discovery that a party is conducting
23 in this state for purposes of a proceeding pending in a foreign jurisdiction, the
24 deponent or a party to the proceeding may file a petition for a protective order or
25 to compel discovery or obtain other appropriate relief in the superior court of the
26 county in which the discovery is being conducted.

27 (b) On filing a petition under subdivision (a), a petitioner who is a party to the
28 out-of-state proceeding shall pay a first appearance fee as specified in Section
29 70611 of the Government Code. A petitioner who is not a party to the out-of-state
30 proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617
31 of the Government Code.

32 (c) The court in which the petition is filed shall assign it a case number.

33 (d) On responding to a petition under this section, a party to the out-of-state
34 proceeding shall pay a first appearance fee as specified in Section 70612 of the
35 Government Code. A person who is not a party to the out-of-state proceeding may
36 file a response without paying a fee.

37 (e) Any petition, response, or other document filed under this section shall
38 satisfy all of the following conditions:

39 (1) It shall bear the caption and case number of the out-of-state case to which it
40 relates.

41 (2) The first page shall state the name of the court in which the document is
42 filed.

1 (3) The first page shall state the case number assigned by the court under
2 subdivision (c).

3 (f) A request for relief pursuant to this section shall be referred to as a petition
4 notwithstanding any statute under which a request for the same relief would be
5 referred to as a motion or by another term if it was brought in a proceeding
6 pending in this state.

7 **Comment.** Section 2029.610 is added to clarify the procedure for using a California court to
8 resolve a dispute relating to discovery conducted in this state for purposes of a proceeding
9 pending in another United States jurisdiction.

10 A request for relief pursuant to this section is properly denominated a “petition,” not a
11 “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records
12 of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written
13 objection to production as authorized by the statute. To obtain production, the subpoenaing party
14 would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g)
15 prescribes for a case pending in California.

16 See also Sections 2029.600 (law applicable to discovery dispute), 2029.620 (subsequent
17 discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule),
18 2029.640 (deposition on notice and agreement), 2029.650 (writ petition).

19 **§ 2029.620. Subsequent discovery dispute in same case and county**

20 2029.620. (a) If a petition has been filed under Section 2029.610 and another
21 dispute later arises relating to discovery being conducted in the same county for
22 purposes of the same out-of-state proceeding, the deponent or a party to the
23 proceeding may file a petition for appropriate relief in the same superior court as
24 the first petition.

25 (b) The first page of the petition shall clearly indicate that it is not the first
26 petition filed in that court that relates to the out-of-state case.

27 (c) If the petitioner in the new dispute is not a party to the out-of-state case, or is
28 a party who previously paid a first appearance fee under this article, the petitioner
29 shall pay a motion fee as specified in subdivision (a) of Section 70617 of the
30 Government Code. If the petitioner in the new dispute is a party to the out-of-state
31 case but has not previously paid a first appearance fee under this article, the
32 petitioner shall pay a first appearance fee as specified in Section 70611 of the
33 Government Code.

34 (d) If a person responding to the new petition is not a party to the out-of-state
35 case, or is a party who previously paid a first appearance fee under this article, that
36 person does not have to pay a fee for responding. If a person responding to the
37 new petition is a party to the out-of-state case but has not previously paid a first
38 appearance fee under this article, that person shall pay a first appearance fee as
39 specified in Section 70612 of the Government Code.

40 (e) Any petition, response, or other document filed under this section shall
41 satisfy all of the following conditions:

42 (1) It shall bear the caption and case number of the out-of-state case to which it
43 relates.

1 (2) The first page shall state the name of the court in which the document is
2 filed.

3 (3) The first page shall state the same case number that the court assigned to the
4 first petition relating to the out-of-state case.

5 **Comment.** Section 2029.620 is added to clarify the procedure that applies when two or more
6 discovery disputes relating to the same out-of-state proceeding arise in the same county. To
7 promote efficiency and fairness and minimize inconsistent results, all documents relating to the
8 same out-of-state case are to be filed together, bearing the same California case number.

9 Section 2029.620 does not apply when discovery disputes relate to the same out-of-state case
10 but arise in different counties. In that situation, each petition for relief must be filed in the
11 superior court of the county in which the deposition is being taken. See Sections 2029.600,
12 2029.610(a). In appropriate circumstances, a petition may be transferred and consolidated with a
13 petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also
14 Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should
15 consider factors such as convenience of the deponent and similarity of issues.

16 See also Sections 2029.600 (law applicable to discovery dispute), 2029.610 (procedure for
17 resolving discovery dispute), 2029.630 (hearing date and briefing schedule), 2029.640 (deposition
18 on notice and agreement), 2029.650 (writ petition).

19 **§ 2029.630. Hearing date and briefing schedule**

20 2029.630. A petition under Section 2029.610 or Section 2029.620 is subject to
21 the requirements of Section 1005 relating to notice and to filing and service of
22 papers.

23 **Comment.** Section 2029.630 is added to clarify the proper hearing date and briefing schedule
24 for a petition under Section 2029.610 or 2029.620. The petition is to be treated in the same
25 manner as a discovery motion in a case pending within the state.

26 **§ 2029.640. Deposition on notice or agreement**

27 2029.640. If a party to a proceeding pending in a foreign jurisdiction seeks
28 discovery from a witness in this state by properly issued notice or by agreement, it
29 is not necessary for that party to obtain a subpoena under this article to be able to
30 seek relief under Section 2029.610 or 2029.620. The deponent or any other party
31 may also seek relief under Section 2029.610 or 2029.620 in those circumstances,
32 regardless of whether the deponent was subpoenaed under this chapter.

33 **Comment.** Section 2029.640 is added to clarify how this article applies when a party to a
34 proceeding pending in another United States jurisdiction seeks discovery from a witness in this
35 state by properly issued notice or by agreement.

36 **§ 2029.650. Writ petition**

37 2029.650. (a) If a superior court issues an order granting or denying or otherwise
38 resolving a petition under Section 2029.610 or 2029.620, a party or deponent
39 aggrieved by the order may petition the appropriate court of appeal for an
40 extraordinary writ.

41 (b) Immediately after filing a writ petition in a court of appeal under this section,
42 the petitioner shall file a copy of it in the superior court that issued the challenged
43 order.

1 (c) Pending its decision on the writ petition, the court of appeal may stay the
2 order of the superior court, the discovery that is the subject of that order, or both.

3 (d) Immediately after the court of appeal decides the writ petition and its order
4 on the petition becomes final, the clerk of the court of appeal shall file a copy of
5 the final order with the clerk of the superior court.

6 **Comment.** Section 2029.650 is added to clarify the procedure for reviewing a decision of a
7 superior court on a dispute arising in connection with discovery under this article. The provision
8 is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial)
9 and 403.080 (writ of mandate to review order on reclassification motion).

10 **§ 2029.700. Uniformity of application and construction**

11 2029.700. (a) Sections 2029.100, 2029.200, 2029.300(b), 2029.400, 2029.500,
12 2029.600, 2029.800, and this section, collectively, constitute and may be referred
13 to as the “Uniform Interstate Depositions and Discovery Act: California Version.”

14 (b) In applying and construing this uniform act, consideration must be given to
15 the need to promote uniformity of the law with respect to its subject matter among
16 the states that enact it.

17 **Comment.** Subdivision (a) of Section 2029.700 provides a convenient means of referring to
18 the sections within this article that are drawn from the Uniform Interstate Depositions and
19 Discovery Act (as of November 2006), which is under consideration by the National Conference
20 of Commissioners on Uniform State Laws. The entire article may be referred to as the “Interstate
21 Depositions and Discovery Act.” See Section 2029.100 & Comment.

22 Subdivision (b) is similar to Section 7 of the Uniform Interstate Depositions and Discovery
23 Act.

24 **§ 2029.800. Effective date**

25 2029.800. This act takes effect on January 1, 2009.

26 **Comment.** Section 2029.800 is the same as Section 8 of the Uniform Interstate Depositions
27 and Discovery Act (as of November 2006), which is under consideration by the National
28 Conference of Commissioners on Uniform State Laws.

29 **Note.** The effective date of January 1, 2009, is premised on enactment of the proposed
30 legislation in 2008. The effective date will need to be adjusted if the proposed legislation is not
31 introduced in the Legislature until 2009 or later.

32 **Code Civ. Proc. §§ 2029.900-2029.910 (added). International Depositions and Discovery Act**

33 SEC. 4. Article 2 (commencing with Section 2029.900) is added to Chapter 12
34 of Title 4 of Part 4 of the Code of Civil Procedure, to read:

35 Article 2. International Depositions and Discovery Act

36 **§ 2029.900. Short title**

37 2029.900. This article may be cited as the International Depositions and
38 Discovery Act.

39 **Comment.** Section 2029.900 is new. As the name “International Depositions and Discovery
40 Act” suggests, this article applies to discovery for purposes of an action pending in a foreign

1 nation. For the provisions governing discovery for purposes of an action pending in another
2 United States jurisdiction, see Sections 2029.100-2029.800 (Interstate Depositions and Discovery
3 Act). Previously, both types of discovery were governed by former Section 2029.010 (deposition
4 in action pending outside California).

5 **§ 2029.910. Discovery in action pending in foreign nation**

6 2029.910. Notwithstanding subdivision (a) of Section 2029.200, the rules and
7 procedures specified in Article 1 (commencing with Section 2029.100) apply
8 when a party to an action pending in a foreign nation seeks discovery in this state.

9 **Comment.** Section 2029.910 makes clear that the rules and procedures governing discovery
10 for an action pending in another United States jurisdiction also apply to discovery for an action
11 pending in another nation.

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

13 SEC. 4. Section 70626 of the Government Code is amended to read:

14 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
15 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
16 68085.1.

17 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
18 sale, a writ of possession, a writ of prohibition, or any other writ for the
19 enforcement of any order or judgment.

20 (2) Issuing an abstract of judgment.

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

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

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

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

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

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

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

33 (1) Issuing an order of sale.

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

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

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

41 (5) Issuing a commission to take a deposition in another state or place under
42 Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under

1 Section 2029.300 to take a deposition in this state for purposes of a proceeding
2 pending in another jurisdiction.

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

5 (7) Filing an affidavit of publication of notice of dissolution of partnership.

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

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

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

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