

Third Supplement to Memorandum 2008-12

2008 Legislative Program: AB 2193 (Tran)

Assembly Bill 2193 (Tran) would implement the Commission's recommendation on *Deposition in Out-of-State Litigation* (Dec. 2007). The bill is scheduled to be heard in the Senate Judiciary Committee on June 10, 2008. In reviewing the bill for the upcoming hearing, committee staff raised a few issues, which are discussed below.

Filing Fee for Non-Party Petitioner in Discovery Dispute

Among other things, AB 2193 would make clear what filing fees apply when discovery is taken in California for an out-of-state case, a discovery dispute arises, and a person petitions for relief in a California court. The fee amount for filing a paper relating to such a dispute would vary, depending on whether the person filing the paper is a party to the out-of-state case or a non-party, whether the person previously paid a first appearance fee, and whether the person is seeking relief or responding to a request for relief.

Committee staff expressed concern about one particular fee — the fee that would apply when discovery is sought in California for an out-of-state case, a discovery dispute arises, and a non-party petitions for relief in a California court.

In that relatively uncommon situation, AB 2193 currently says that the non-party "shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code." That would parallel the treatment of a non-party who seeks relief in a California court when a discovery dispute arises in a California case. The motion fee specified in Government Code Section 70617 is \$40.

Committee staff think that fee is too low and the parallel treatment is inappropriate. Their point is that when a non-party seeks relief with respect to discovery for an out-of-state case, the California court must create a court file and take steps to initiate a California case. In contrast, when a non-party seeks relief with respect to discovery for a California case, a court file already exists and it is not necessary to create a new one.

Any California Law Revision Commission document referred to in this memorandum 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.

That is a good point. To properly account for the burden on court resources, committee staff suggested that the filing fee in the former situation be changed from \$40 to about \$80-\$100. That would be much less than the fee charged when a party files a California case (over \$300), but more than the normal \$40 motion fee. The court is not being asked to adjudicate an entire case, only the discovery dispute, so a fee in this range seems appropriate.

The general concept of changing the fee is acceptable to the author, so long as the fee is \$80, not more. Based on communications thus far, we do not anticipate any resistance from the Judicial Council, which supports AB 2193. The staff recommends that the Commission **approve the general concept of changing the fee to \$80.**

Specific language to implement that concept is still under discussion, but needs to be resolved by the June 10 hearing. The staff has suggested the following revisions of proposed Code of Civil Procedure Section 2029.610, proposed Code of Civil Procedure Section 2029.620, and the Commission's proposed amendment of Government Code Section 70626:

Code Civ. Proc. § 2029.610 (added). Fees and format of papers relating to discovery dispute

2029.610. (a) On filing a petition under Section 2029.600, a petitioner who is a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70611 of the Government Code. A petitioner who is not a party to the out-of-state proceeding shall pay ~~a motion fee as specified in subdivision (a) of Section 70617~~ the fee specified in subdivision (c) of Section 70626 of the Government Code.

....

Code Civ. Proc. § 2029.620 (added). Subsequent discovery dispute relating to same out-of-state case in same county

2029.620. (a) If a petition has been filed under Section 2029.600 and another dispute later arises relating to discovery being conducted in the same county for purposes of the same out-of-state proceeding, the deponent or other disputant may file a petition for appropriate relief in the same superior court as the previous petition.

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

(c)(1) If the petitioner in the new dispute is ~~not~~ a party to the out-of-state case, ~~or is a party~~ case who previously paid a first appearance fee under this article, the petitioner shall pay a motion fee as specified in subdivision (a) of Section 70617 of the

Government Code. If the petitioner in the new dispute is a party to the out-of-state case but has not previously paid a first appearance fee under this article, the petitioner shall pay a first appearance fee as specified in Section 70611 of the Government Code.

(2) If the petitioner in the new dispute is not a party to the out-of-state case, the petitioner shall pay the fee specified in subdivision (c) of Section 70626 of the Government Code, unless the petitioner previously paid that fee. If the petitioner previously paid the fee specified in subdivision (c) of Section 70626 of the Government Code, the petitioner shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code.

....

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

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

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

....

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

(1) Issuing an order of sale.

....

(c) The fee for filing a first petition under Section 2029.600 or 2029.620 of the Code of Civil Procedure, when the petitioner is not a party to the out-of-state case, is eighty dollars (\$80). Amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

This language is acceptable to the author. The staff recommends that the Commission **approve the revisions shown above**. If alternative language is requested by committee staff, the Judicial Council, or anyone else, the staff will consult with the Commission Chair.

A revision of the Comment to Government Code Section 70626 is also needed, along the following lines:

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

Subdivision (c) is added to specify the fee applicable when discovery is taken in this state for an out-of-state case, and a person

who is not a party to the out-of-state case petitions for relief in this state. This fee applies only to the first petition that a non-party files in a particular superior court. If that person files another petition in the same court relating to the same out-of-state case, a motion fee is payable under Section 70617(a). See Code Civ. Proc. § 2029.620(c)(2).

The comments to proposed Code of Civil Procedure Sections 2029.610 and 2029.620 do not require revision.

Reimbursement of the Filing Fee if the Non-Party Prevails

The staff of the Senate Judiciary Committee also inquired whether a non-party who petitions for relief under proposed Code of Civil Procedure Section 2029.600 or 2029.620 would be able to obtain reimbursement of the filing fee if the non-party prevails in the discovery dispute.

In response, Commission staff explained that the intent of AB 2193 is to apply California's discovery law when discovery is sought from a California resident for an out-of-state case. That would include the normal rules regarding recovery of filing fees and other court costs by the prevailing party (Code Civ. Proc. §§ 1032, 1033.5).

On re-reading the bill, however, we realized that the language on this point could be improved. In particular, proposed Code of Civil Procedure Section 2029.500 would be more clear if revised as follows:

§ 2029.500. Deposition, production, and inspection [UIDDA § 5]

2029.500. Titles 3 (commencing with Section 1985) and 4 (commencing with Section 2016.010) of Part 4, and any other law or court rule of this state governing ~~the time, place, or manner of~~ a deposition, a production of documents or other tangible items, or an inspection of premises, including any law or court rule governing payment of court costs or sanctions, apply to discovery under this article.

Comment. Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350 and to discovery taken in this state pursuant to properly issued notice or by agreement.

Background from Uniform Act

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.

[Adapted from UIDDA § 5 comment.]

These revisions are acceptable to the author. The staff recommends that the Commission **approve the revisions of proposed Section 2029.500 shown above.** Again, if alternative language is requested by committee staff, the Judicial Council, or anyone else, the staff will consult with the Commission Chair.

Respectfully submitted,

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