

Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts

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Nearly fifteen years ago, in response to the proposals of a Joint Commission on Discovery of the California State Bar and Judicial Council, the California Legislature enacted the Discovery Act of 1986. That legislation made sweeping statutory changes that affected all phases of civil discovery practice in the California state courts. In large part, it codified three decades of case law. In addition, it imported several ideas from other courts, particularly the federal courts. Finally, it created some of its own innovations. At least some of the sweeping changes enacted in 1986 became models for courts in other jurisdictions.

With discovery expenses still occupying the lion's share of pretrial expenses, and discovery disputes still commonplace, the California Law Revision Commission has turned its attention toward possible discovery reform. As its starting point, it has asked for preparation of this paper to provide background research on discovery laws in other jurisdictions in the United States with an eye toward identifying potential innovations for the Commission's consideration.¹

In response to the Commission's request, the author has examined the discovery laws in the other forty-nine states, as well as the District of Columbia, the Commonwealth of Puerto Rico, and the federal courts. As can be expected, in so broad a survey, hundreds of differences appear from California law. Most of these differences are not reported in this paper. Many are relatively minor, such as the number of days that a given jurisdiction permits for an answer to an interrogatory, the number of days of notice before a deposition may be taken, or the amount of space that a propounding party must leave on an interrogatory to accommodate the response. Other differences represent areas where the respective state legislature has either not yet addressed matters covered by the Discovery Act of 1986, or it has taken a different path from that adopted by the California Legislature in that Act.²

Out of this sea of differences, the author has fished those which, in the author's opinion, represent potentially useful approaches to matters not otherwise adequately addressed in the 1986 Discovery Act.³ In general, these approaches seem to offer the potential to do some or all of the following: (1) reduce discovery disputes, either by providing different or clearer expectations of permissible conduct, or by providing better mechanisms for managing disputes; (2) reduce discovery costs; (3) reduce the time spent on discovery; (4) respond to technological innovations; or (5) improve the quality of information produced in response to discovery.⁴

1. The discovery provisions summarized here are those in effect on January 1, 2001.

2. For example, many states require some or all discovery to be filed with the court. Others permit pre-suit discovery in order to investigate whether a claim might be brought. In the author's opinion, these types of "differences" are not "innovations," but, rather, represent rules that were intentionally, and appropriately, rejected by the Discovery Commission and Legislature when they proposed and adopted the Discovery Act of 1986.

3. The author recognizes that local court rules in California and the practices of individual judges throughout the state anticipate many of the suggestions noted below. The author, however, has included them here as they have not otherwise been codified in the Discovery Act of 1986, as amended, as a matter of statewide law.

4. Many of the potential innovations noted below run counter to specific provisions of the Discovery Act of 1986. With rare exception, the author has not gone back and re-examined the reasoning (or the Reporter's Notes) taken by the Discovery Commission and Legislature when they considered the 1986 Act. Matters that run counter

This report proceeds in two parts. The first part addresses those broad rules that apply across-the-board, without regard to particular discovery devices. These rules present the most sweeping potential innovations for California to consider. This part also includes a discussion of mandatory pretrial disclosure; narrowed discovery relevance; mandatory discovery planning; certification of good faith in the conduct of discovery; and increased judicial control over discovery. The second part focuses on each specific discovery device. By far, deposition practice presented the most potential opportunities for California's consideration. Nevertheless, each of the other discovery devices—interrogatories, inspection demands, medical examinations, exchanges of expert witness information, and admission requests—also presented a few possible innovations.

I. POTENTIAL ACROSS-THE-BOARD INNOVATIONS

A. *Mandatory Pretrial Disclosure*

The most significant conceptual change in discovery practice has come from the mandatory pretrial disclosure provisions of Rule 26(a) of the Federal Rules of Civil Procedure. Unlike “discovery,” where the burden lies with the party seeking information to initiate the process via the correct discovery mechanism, “disclosure” places an independent obligation on each party to produce *without a prior request* specific information by specific deadlines. This fundamental shift in pretrial practice has remained controversial, and its adoption by both state and federal courts has been slow.

As originally promulgated in 1993, Rule 26(a) required three sets of pretrial disclosures: (1) initial disclosures, (2) disclosure of expert witness testimony, and (3) pretrial disclosures. As summarized by the Advisory Committee, the rule requires all parties: (1) to exchange information early in the case regarding potential witnesses, documentary evidence, damages, and insurance;⁵ (2) at an appropriate

to such specific provisions are included here because, in the author's opinion, they represent matters that should be reconsidered afresh as part of an overall comprehensive re-evaluation of California civil discovery law. During such a reconsideration, the collective wisdom of the earlier Joint Commission would, of course, be highly relevant.

5. The “Initial Disclosures” included:

- (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
- (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
- (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
- (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment

time during the discovery period, to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts;⁶ and (3) to identify the particular evidence that may be offered at trial, as the trial date approaches.⁷

According to the Committee, the disclosure rules were meant to accomplish two goals: acceleration of the exchange of basic case information and elimination of the paperwork necessary to request such information, with a concomitant reduction in time and expense.⁸ In addition, an unstated but implicit premise, was the fostering of the search for truth. No longer would one party—or more importantly, one party’s client—be limited to the information it requested. Thus, if within the scope of the required disclosures, a party that held the “smoking gun” would be forced to turn over that piece of information regardless of whether the other party’s attorney asked for it.

The disclosure rules generated substantial controversy. Three principal objections were made. First, critics claimed that the system was unfair since it made each party’s duty to disclose independent of the other party’s compliance with its own disclosure obligations. Thus, one party’s failure to disclose did not excuse the other party from disclosing. This, it was argued, would give an unfair advantage to the party who failed to disclose.

Second, critics argued that uncertainty over the scope of the required disclosure would create more paperwork, not less. In particular, they claimed that the triggering language for two of the initial disclosure obligations—“relevant to disputed facts

which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

FED. R. CIV. P. 26(a)(1)(A)-(D) (1993) (amended 2000).

6. The “Expert Witness Testimony” provisions require disclosure of “the identity of any person who may be used at trial to present [expert opinion] evidence.” *Id.* 26(a)(2). Accompanying the revelation of identity is a required report, “prepared and signed by the witness,” containing:

a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Id. 26(a)(2)(B).

7. FED. R. CIV. P. 26 advisory committee reports ¶ 1 (1993). The required “Pretrial Disclosures” include:

- (A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;
- (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition . . . ; [and]
- (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Id. 26(a)(3)(A)-(C).

8. FED. R. CIV. P. 26(a) advisory committee notes ¶¶ 2, 3 (1993).

alleged with particularity in the pleadings”—invited uncertainty, manipulation and motion practice.

Finally, and more fundamentally, critics claimed that the disclosure provisions subverted the adversary system. To comply with the requirements, they argued, a party's attorney would have to first imagine what information the opposing party's attorney would consider relevant, and then turn that very evidence over to opposing counsel. Along the way, counsel would be educating his or her opponent about facts and theories that opposing counsel might never have considered absent the disclosure rules. Smart, hard-working, and often higher-priced counsel would be building the cases for their less-gifted or less-motivated opponents.

Partly due to these criticisms, but largely for other reasons, adoption of the disclosure requirements—even within the federal courts themselves—has been slow. As of 1999, only seven states have adopted them all or in part.⁹ And, until recently, the disclosure provisions were not in effect in roughly half the federal courts.¹⁰ This oddity resulted from the generous “opt-out” provisions of Rule 26(a)(1). That provision allowed district courts, by local rule, to exempt themselves from the disclosure rules. The opt-out provisions sprang from the timing of the 1993 amendments to Rule 26. Those amendments came just a few years after passage of the Civil Justice Reform Act of 1990.¹¹ As mandated by that Act, the district courts were required to develop programs to reduce civil litigation delays. The Advisory Committee recognized that adoption of the mandatory disclosure requirements of Rule 26(a) might interfere with the delay reduction efforts already underway in response to the 1990 Act.¹² Accordingly, it allowed district courts to exempt themselves entirely from Rule 26(a).

Given their inconsistent welcome within the federal courts themselves, it is no surprise that the state courts have been hesitant in experimenting with such changes. Most apparently have adopted “wait and see” approaches. But the waiting period may soon be ending, as the federal Judicial Council has recently approved changes

9. These include: Alaska, Arizona, Colorado, Illinois, Nevada, Texas and Utah. ALASKA R. CIV. P. 26(a); ARIZ. R. CIV. P. 26(b)(5); COLO. R. CIV. P. 26(a); ILL. SUP. CT. R. 222(a) & (d); NEV. R. CIV. P. 16.1(b); TEX. R. CIV. P. ANN. 194.2 (Vernon 2001); UTAH R. CIV. P. 26(a). The Texas provisions, while the most extensive of all, are demand driven, not automatic. In addition, Kansas and New Hampshire require disclosure of the identify of testifying experts upon request. KAN. STAT. ANN. § 60-226(b) (2000); N.H. SUPER CT. R. 35(f). Oregon requires disclosure, upon request, of insurance agreements only. OR. CT. R. CIV. 36(B)(2). In Connecticut, defenses in foreclosure or quiet title proceedings must be disclosed. CONN. R. SUPER. CT. (Civil) §13-19. New York's rules set up “disclosure” requirements, but this is simply New York's nomenclature for standard “discovery” practice. See N.Y. C.P.L.R. 3101 (Consol. 2001).

10. See Donna Stienstra, Federal Judicial Center Report, *Implementation of Disclosure in U.S. District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (1998) at 4, available at <http://www.fjc.gov/newweb/jnetweb.nsf/pages/50.2> (last visited Sept. 4, 2001) (copy on file with *McGeorge Law Review*).

11. Civil Justice Reform Act of 1990, Title 1, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C.A. §§ 471, 472-82).

12. FED. R. CIV. P. 26 advisory committee's notes ¶ 5 (1993).

to Rule 26(a) that make an amended version of mandatory disclosure the uniform rule within the federal courts.

In addition to eliminating the “opt-out” option, the 2000 amendments to Rule 26(a) make three key changes to the disclosure obligations. First, they only require disclosure of information “that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”¹³ This reduces the circumstances where the disclosing party will have to help make the opposing party’s claim (or defense) for that opposing party. It also breaks the connection between disclosure and the pleadings. Under the 1993 version of Rule 26(a), disclosure was triggered by allegations made “with particularity” in the pleadings. This link brought on the criticism that disclosure would either change federal pleading practice, or lead to a whole new level of disputes over the meaning of “particularity.” Now, however, disclosure is triggered by the disclosing party’s behavior (i.e., the disclosing party’s decision to “use” certain information to develop its claims or defenses), not the pleading party’s behavior.

Second, following the lead of several states, and the local practice of many federal districts, the rule now exempts a list of eight types of cases.¹⁴ This list is exclusive; neither the district courts nor individual federal judges can develop local rules or standing orders that exempt other classes of cases.¹⁵ Case specific orders, however, remain appropriate.

Finally, the rule now allows a party who contends that disclosure is inappropriate under the circumstances of the case to object to the court.¹⁶ The court must rule on the objection and determine which information, if any, needs to be disclosed by any party.

The few studies that have been done about practice under the disclosure rules suggest that it has met its basic goals without causing the increase in litigation that some had predicted. The Judicial Center sponsored an empirical study that indicated that most attorneys with experience under the system had found the rules workable.¹⁷ The scholarship, however, reflects a broader range of reactions to the rules.¹⁸

13. *Id.* 26(a)(1)(A) & (B) (2000).

14. *Id.* (a)(1)(E). These include: (1) an action for review on an administrative record; (2) a petition for habeas corpus; (3) a prisoner’s action in pro per; (4) an action to enforce or quash an administrative summons or subpoena; (5) an action by the United States to recover benefit payments; (6) an action by the United States to collect on a guaranteed student loan; (7) ancillary proceedings; and (8) an action to enforce an arbitration award.

15. Fed. R. Civ. P. 26 advisory committee’s notes ¶ 20 (2000).

16. FED. R. CIV. P. 26(a)(1)(E).

17. Thomas E. Willging, et al., Federal Judicial Center Report, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* (1997), available at <http://www.fjc.gov/newweb/jnetweb.nsf/pages/50.2> (last visited Sept. 4, 2001) (copy on file with the *McGeorge Law Review*).

18. See, e.g., Anthony J. Divenere & Benita P. Render, *Mandatory Disclosure—Success or Failure?*, 67 CLEVE. B.J. 16 (1996); Rock, Scissors, Paper: *The Federal Rule 26(a)(1) “Gamble” in Iowa*, 80 IOWA L. REV. 363 (1995).

Were the Commission to consider adopting mandatory disclosure provisions, it might consider some of the variations made by the states. For example, Alaska, Colorado and Utah have all exempted broad classes of cases from disclosure.¹⁹ In addition, Alaska and Colorado have created separate disclosure provisions for divorce and domestic relations cases,²⁰ while Arizona has separate rules for medical malpractice cases.²¹ Illinois makes disclosure apply only in cases valued at \$50,000 or less,²² while Colorado has slightly modified its disclosure rules in such “limited monetary claim” actions.²³ Alaska neatly addresses the timing of discovery in cases where disclosure does not apply.²⁴

Three states have addressed the interaction between disclosure obligations, the law of privilege and work product protection. Alaska clarifies that the work product protection applies to matters that would otherwise be required to be disclosed.²⁵ Colorado, while less explicit, has a comparable provision.²⁶ Unlike Alaska, Texas makes the work product protection inapplicable to required disclosure materials.²⁷

Arizona goes further than the federal courts in its disclosure obligations. Unlike the original version of the federal disclosure provision, Arizona has not limited the initial disclosure duty to matters “relevant to facts alleged with particularity.”²⁸ In addition, it expressly imposes a duty of reasonable inquiry prior to disclosure.²⁹ Moreover, in addition to matters required by its federal rule counterpart, it requires disclosure of: (1) “[t]he factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense[;]” (2) “[t]he legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case

19. ALASKA R. CIV. P. 26(a); COLO. R. CIV. P. 26(a); UTAH R. CIV. P. 26(a).

20. ALASKA R. CIV. P. 26(a), 26.1 (divorce). COLO. R. CIV. P. 26(a); Rule 26.1 (domestic relations).

21. ARIZ. R. CIV. P. 26.2(a). These require the plaintiff, within five days of service on the last defendant, to serve upon the defendants “copies of all of plaintiff’s available medical records relevant to the condition which is the subject matter of the action.” *Id.* at 26.2(a)(1). In response, defendants must serve similar copies of all of plaintiff’s records that they have. *Id.* at 26.2(a)(2).

22. ILL. SUP. CT. R. 222(a) & (d).

23. COLO. R. CIV. P. 26.3(c). This rule modifies the time of the general disclosure duties imposed by Colorado Rule 26(a). In addition, in personal injury cases, it states, “the plaintiff shall disclose all health care providers and employers for the past ten years, and the defendant shall disclose the present claim case file, including any evidence supporting affirmative defenses and provide a copy of all insurance policies including each declaration page.” *Id.*

24. ALASKA R. CIV. P. 26(d).

25. *Id.* (a)(1)(d) & (e).

26. COLO. R. CIV. P. 26(a)(6) & 26(e).

27. TEX. R. CIV. P. 194.5.

28. ARIZ. R. CIV. P. 26.1.

29. *Id.* 26.1(b)(3).

authorities[;]”³⁰ and (3) in personal injury or wrongful death cases, the “identity, location, and the facts supporting the claimed liability” of nonparties.³¹

Arizona also differs from its federal model as to the consequences of a failure to disclose. The federal courts absolutely preclude a party at trial from using material that was required to be—but was not—disclosed.³² Arizona, however, allows such a use at trial if good cause is shown.³³ Finally, rather than making disclosure occur in conjunction with a pretrial discovery planning conference, Arizona simply requires disclosure within forty days of the defendant’s answer.³⁴ Late disclosure, however, limits subsequent trial use of the material by the disclosing party.³⁵

30. *Id.* 26.1(a). The complete list includes:

- (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
- (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
- (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness’ expected testimony.
- (4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.
- (5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.
- (6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.
- (7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.
- (8) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.
- (9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party’s possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

31. *Id.* 26(b)(5). In cases valued at less than \$50,000, Illinois also requires disclosure of the factual and legal bases of each claim or defense. ILL. SUP. CT. R. 222(d).

32. FED. R. CIV. P. 37(c)(1). If there was substantial justification or if the failure to disclose was harmless, the material may be used at trial. *Id.*

33. ARIZ. R. CIV. P. 37(c)(1)-(3).

34. *Id.* 26.1(b).

35. *Id.* 37(c)(1)-(3).

Texas currently has the most extensive disclosure provisions of all the states. Unlike the federal model, it does not occur automatically, but is initiated by request.³⁶ Upon request, the opposing party has thirty days to produce:

- (a) the correct names of the parties to the lawsuit;
- (b) the name, address, and telephone number of any potential parties;
- (c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (d) the amount and any method of calculating economic damages;
- (e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;
- (f) for any testifying expert:
 - (1) the expert's name, address, and telephone number;
 - (2) the subject matter on which the expert will testify;
 - (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - (B) the expert's current resume and bibliography;
- (g) any indemnity and insuring agreements described in [another Rule];
- (h) any settlement agreements described in [another Rule];
- (i) any witness statements described in [another Rule];
- (j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;
- (k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party.³⁷

36. TEX. R. CIV. P. 194.1.

37. *Id.* 194.2.

Texas gives defendants who have not yet answered the complaint additional time to answer the disclosure request.³⁸ In addition, if the responsive documents are “voluminous,” the responding party can designate “a reasonable time and place for the production of documents.”³⁹

B. Narrowed Discovery Relevance

For over half a century, the fulcrum upon which broad discovery has rested in the federal courts has been “relevance to the subject matter involved in the pending action.” Incorporated by the federal rulemakers in the original 1938 version of the Federal Rules of Civil Procedure, its broad scope was affirmed by the rulemakers in their 1946 amendments to federal Rule 26. At that time, the rulemakers clarified that relevant discovery materials also included information that was not “admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”⁴⁰

In the Discovery Act of 1956, California adopted verbatim the “relevant to the subject matter” standard.⁴¹ As interpreted by both California and federal courts, this standard permits discovery of matters beyond the specific factual issues raised by the pleadings.⁴²

The breadth of discovery permitted by the “relevant to the subject matter” standard has long been the target of criticism by those who believe that it is responsible for excessive discovery. A quarter century ago, the American Bar Association (ABA) proposed amending the standard to one of “relevance to the issues raised by the claims or defenses of any party.”⁴³ In response, the federal Advisory Committee toyed with a different possible amendment: “relevance to the claim or defense” of a party.⁴⁴ Ultimately, however, it rejected both its own and the ABA’s proposals.⁴⁵

38. *Id.* 194.3(a).

39. *Id.* 194.4.

40. FED. R. CIV. P. 26(b)(1) (1946) (amended 2000).

41. Discovery Act of 1956, ch. 1904, § 3 (current version at CAL. CIV. PROC. CODE § 2016). *See* 1 JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY 579 (Bancroft-Whitney) (1997) (hereinafter HOGAN & WEBER).

42. *See, e.g., Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 390, 15 Cal. Rptr. 90, 108, 364 P.2d 266, 284; *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 632 (D. Ut 1998).

43. *See* Comm. on Rules of Practices & Procedure of the U.S., 85 F.R.D. 539 (1979).

44. Preliminary Draft of Proposed Amendments to the Fed. Rules of Civil Procedure. 77 F.R.D. 613, 627-28 (1978).

45. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms “issues” and “claims or defenses.” It was objected that discovery could not be restricted to issues because one of the purposes of discovery was to determine issues. . . . Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to “shotgun” pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery.

In the mid-1980s, the California Discovery Commission considered possible changes to the broad scope of discovery relevance. In particular, the Commission considered restricting discovery relevance to the “issues” raised by the standards. Like its federal counterparts, the Discovery Commission ultimately rejected any changes.⁴⁶ Currently, section 2017 of the California Code of Civil Procedure allows discovery

regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.⁴⁷

Two states, however, have adopted the narrower versions of discovery relevance rejected by the federal rulemakers in the late 1970s. Mississippi Rule 26(b)(1) adopted the ABA proposal and restricts discovery to matters relevant to “the issues raised by the claims or defenses” of a party.⁴⁸ In specified actions, Virginia does likewise.⁴⁹ Connecticut Rule 13-2 exemplifies the path not taken by the federal Advisory Committee. Under that provision, discovery must relate to the “claim or defense” of any party.⁵⁰ New York charts a different path altogether. It limits discovery to matters “material and necessary in the prosecution or defense of an action.”⁵¹

In the 2000 amendments to Rule 26(b)(1), the federal rulemakers have reversed their earlier opinions, and have now presumptively embraced the narrower Connecticut-like standard they first considered and rejected in 1978. Under the Rule’s new version, “[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party . . .*”⁵² The rulemakers did not, however, completely embrace the narrower definition. Rather, the new standard applies only to “party-controlled” discovery. The courts, however, “may order discovery of any matter relevant to the subject matter involved in the action” if “good cause” is shown.⁵³

Comm. on Rules of Practice & Procedure. 85 F.R.D. 541 (1979).

46. “The Commission feared that in ‘issue’ standard would produce a dramatic increase both in objections on relevance grounds, and in the need for trial court intervention to resolve these objections.” Reporter’s Notes to Section 2017(a) (quoted in 1 HOGAN & WEBER, *supra* note 41, 580-81).

47. CAL. CIV. PROC. CODE § 2017(a) (West 1998 & Supp. 2001).

48. MISS. R. CIV. P. 26(b)(1).

49. VA. SUP. CT. R. CIV. P. 4:1(e) (e.g., divorce).

50. CONN. R. SUPER. CT. (Civil) § 13-2. The rule further restricts discovery to those matters that are within the “knowledge, possession or power” of the party from whom discovery is sought. In addition, discovery is only permissible where the burden of obtaining the information would be much greater if discovery were not permitted. *Id.*

51. N.Y. C.P.L.R. 3101 (Consol. 2001).

52. FED. R. CIV. P. 26(b)(1) (emphasis added).

53. *Id.*

In explaining its decision to reverse the half-century of broad discovery, the Advisory Committee noted that, despite its many efforts to reduce overbroad discovery, “[c]oncerns about costs and delay of discovery have persisted.”⁵⁴ Its own empirical study suggested that “nearly one-third” of the lawyers surveyed “endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions.” In apparent response to its earlier concerns that a new standard would lead to more discovery litigation, the Committee welcomed more active judicial involvement “in regulating the breadth of sweeping or contentious discovery.”⁵⁵ Nevertheless, it cautioned:

The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter cannot be defined with precision. . . . [¶] The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action.⁵⁶

The 2000 amendments to Rule 26(b)(1) make one additional change to the general scope of discovery. They clarify the relationship between admissibility at trial and discoverability. The concluding sentence of Rule 26(b)(1) now reads: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”⁵⁷ The addition of “relevant” before “information” makes clear that although discoverable information need not itself be “admissible” at trial, it still must meet the test of relevance for discovery. Absent the qualification, the Advisory Committee feared that the language allowing discoverability of information that was not admissible at trial would swallow the other restrictions on discoverability.⁵⁸

C. *Mandatory Discovery Planning*

No California statute or rule requires mandatory discovery planning by the parties or discovery supervision by the courts. Of course, parties may always voluntarily cooperate on discovery planning and, in individual cases, courts may

54. *Id.* advisory committee notes ¶ 28 (2000).

55. *Id.* at ¶ 29.

56. *Id.* at ¶ 30.

57. FED. R. CIV. P. 26(b)(1).

58. *Id.* 26(b)(1) advisory committee notes ¶ 32 (2000).

supervise discovery planning in conjunction with their general case management venues, such as settlement or status conferences. But, as a matter of law, none of these actions are routinely required. Rather, under the 1986 Discovery Act, each party chooses for itself whether, how, and when to engage in the various forms of discovery without regard to what another party has done or plans to do. Indeed, the other party may get no notice of its opponent's strategic decisions until served with a formal discovery demand; advance notice is a matter of opposing counsel's grace. And the recipient of a notice who has objections with the manner or matter for discovery is placed in a reactive position and must decide one of the following: 1) do nothing and see if the other side responds; 2) file objections and then wait to see if the other side moves to compel; or 3) go to court now and demand a protective order.

The 1986 Discovery Act made great progress in requiring the parties to manage their reactions. In virtually every situation where one party objects to the time, place, manner or subject of discovery, that party may not seek judicial intervention until he or she has "met and conferred" with opposing counsel in a good faith attempt to resolve the dispute. But the 1986 Discovery Act does nothing to attempt to avoid possible problems *before* they occur.⁵⁹

In contrast to the Discovery Act's hands-off approach, both the federal rulemakers, and many of the states, have embraced formal discovery planning mechanisms. These mechanisms require the parties to act together to develop a discovery plan to present to the court. The federal rules generally go the farthest in these requirements. Beginning with their 1993 amendments to Rule 26, the rulemakers have required the parties to meet early⁶⁰ in the case

to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for [required disclosures], and to develop a proposed discovery plan.⁶¹

The rule further specifies that the plan must contain four elements: (1) any changes to the required disclosures; (2) "the subjects on which discovery may be

59. Indeed, in its preservation of limited "holds" on a plaintiff's discovery until 10 days after the defendant is served, the 1986 Act actually encourages rapid initiation of discovery by defendants. A defendant who perceives a strategic advantage in initiating discovery before the plaintiff can has little incentive to attempt to cooperate in framing a mutually acceptable discovery plan.

60. Under the 1993 version, the parties needed to meet "as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." The 2000 amendments to Federal Rule 26(f) extend that period to 21 days. FED. R. CIV. P. 26(f).

Under Rule 16(b), a scheduling order must issue "as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." FED. R. CIV. P. 16(b). Combining the provisions of 16(b) and 26(f), the parties' discovery planning meeting must occur within 69 days of a defendant's appearance and within 99 days of service upon a defendant.

61. FED. R. CIV. P. 26(f) (1993) (amended 2000).

needed, when it should be completed, and whether discovery should be conducted in phases or be limited or focused upon particular issues;" (3) any limitations on discovery; and (4) any protective orders and case scheduling orders.⁶² According to the Advisory Committee's notes, the parties "should also discuss . . . what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests."⁶³ The Advisory Committee also acknowledged the possibilities that the parties may not be able to reach agreement. In such cases, resolution of the dispute is left for the court when it issues its initial scheduling orders.⁶⁴ Sanctions are possible for failure to cooperate meaningfully.⁶⁵

To varying extent, discovery planning mechanisms have been adopted by other states. Adoptions generally follow two different models. Like the federal courts, a half-dozen states make planning meetings mandatory in all cases.⁶⁶ In these states, as in the federal courts, absent a court order, discovery may not occur prior to the planning meeting.⁶⁷ More states, however, make the planning meetings optional unless ordered by the courts either *sua sponte* or after motion.⁶⁸ In some of these states, the meetings can become required if either party requests one.⁶⁹

Texas has now upped the federal ante through enactment of the most sweeping mandatory discovery "planning" provisions to be found in this survey. Under Texas law, every case must be governed by a "discovery control plan."⁷⁰ Plaintiffs indicate which of three separate "levels" of discovery will be pursued. Level 1 applies to suits involving \$50,000 or less, unless the parties stipulate otherwise; Level 2 applies to cases of more than \$50,000 except those cases, deemed Level 3, where the court crafts an individual control plan.⁷¹ For each level, the rules specify schedules and presumptive limits. For example, for Level 1, each party is allowed six hours total for all its depositions and twenty-five written interrogatories; this

62. *Id.* The 2000 amendments keep these requirements intact.

63. FED. R. CIV. P. 26(f) advisory committee notes ¶ 49 (1993).

64. *Id.* ¶ 51.

65. *Id.*

66. *See, e.g.*, ALASKA R. CIV. P. 26(f); COLO. R. CIV. P. 16; ILL. SUP. CT. R. 218; NEV. R. CIV. P. 16.1(b); TEX. R. CIV. P. 190; UTAH R. CIV. P. 26(g). *See also* N.C. GEN. STAT. § 1A-5, R.26(f) (requiring mandatory planning conferences only in medical malpractice cases).

67. *Cf.* COLO. R. CIV. P. 26.3(d)(1)(B) (explaining in cases valued at \$50,000 or less, "all forms of discovery may be had immediately after the case is at issue and without completion of the [mandatory conferences]").

68. *See* ALA. R. CIV. P. 26(f); DEL. SUPER. CT. R. CIV. P. 26(f); D.C. SUPER. CT. R. CIV. P. 26(g); HAW. R. CIV. P. 26(f); IOWA R. CIV. P. 124.2; MD. CIRC. CT. R. 2-401; MINN. R. CIV. P. 26.06; MISS. R. CIV. P. 26(c); MONT. R. CIV. P. 26(f); N.M. DIST. CT. R. CIV. P. 26(f); N.C. GEN. STAT. § 1A-5, R. 26 (f) (optional except in medical malpractice cases, where it is required); OKLA. STAT. ANN., tit. 12, § 3226(f). S.C. R. CIV. P. 26(f); TENN. R. CIV. P. 26(f); VT. R. CIV. P. 26(f); WASH. R. SUPER. CT. CIV. P. 26(f); WYO. R. CIV. P. 26(f).

69. MINN. R. CIV. P. 26.06, MISS. R. CIV. P. 26(c), MONT. R. CIV. P. 26(f). *Compare* MINN. R. CIV. P. 26.06 (providing comments that show that discovery planning is to be the norm) *with* MISS. R. CIV. P. 26(c) (providing comments that show that discovery planning meetings are to be the exception, not the norm).

70. TEX. R. CIV. P. 190.1

71. *Id.* 190.2, 190.3 & 190.4.

discovery may occur up to thirty days before trial.⁷² For Level 2, each side is given a maximum of fifty hours in depositions and twenty-five interrogatories; this discovery must occur no later than the earlier of thirty days before trial or nine months after the first deposition was held or the first response to written discovery was made.⁷³

California's sole statewide provision on discovery planning is found in Rule 212 of the California Rules of Court. That rule addresses optional case management conferences in general. These conferences "may be held if requested by *all* parties or ordered by the court, either on its own motion or on the noticed motion of a party."⁷⁴ Prior to any such conference, the parties must "meet and confer" to address, among other topics, "preliminary schedules of discovery." Each participant must produce a case management conference statement that "shall discuss the areas of agreement and disagreement between the parties on each of the required subjects."⁷⁵

To date, the little empirical evidence that exists regarding the usefulness or effectiveness of mandatory discovery planning suggests that it can provide benefits with few perceived drawbacks. The 1997 Federal Judicial Center study concluded that of those attorneys who had "met and conferred" to plan discovery, the majority

did not think that meeting and conferring had any effect on litigation expenses, disposition time, fairness, or the number of issues in the case. For those who thought there had been an effect, however, the effect was most often in the desired direction: lower litigation expenses, shortened disposition time, greater procedural fairness, greater outcome fairness, and fewer issues in the case.⁷⁶

California's optional, nonstatutory, vague discovery planning rule deserves closer review.

D. Certification of Compliance

A fourth federal inspired development in discovery law is certification of good faith compliance with discovery rules. Federal Rule 26(g) requires each party or party's attorney to sign disclosure and discovery requests, responses and objections. The signature is "designed to prevent seemingly proper discovery that is grossly disproportionate to the case, unduly burdensome, or intended to harass the opposing

72. *Id.* 190.2(b)(2) & (3). Without a court order, the parties may agree to extend this amount to up to 10 hours total. *Id.* 190.2(b)(2).

73. *Id.* 190.3(b)(2) & (3). If one side designates more than two experts, the other side is given six additional hours of deposition time for each additional designated expert. *Id.* 190.3(b)(2).

74. CAL. R. CT. 212(a) (emphasis added).

75. *Id.* 212(c).

76. Willging, *supra* note 18, at 31-32.

party.”⁷⁷ A signature on a disclosure “constitutes a certification that to the best of the signer’s knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.”⁷⁸ A signature on a discovery request, response or objection certifies that it is

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.⁷⁹

Sanctions, including reasonable attorney’s fees, are imposable for improper certifications.⁸⁰ These sanctions are in addition to sanctions imposable under Rule 37 for failure to make disclosure or to cooperate in discovery.⁸¹

The Rule 26(g) certification provision is similar to the general federal certification requirement set out in Rule 11. The latter governs all papers filed in federal court actions except those involved with discovery. Rule 26, however, tailors the certification standards to the circumstances of discovery and disclosure. Unlike Rule 11, it requires that requests are not “unreasonable” or “unduly expensive or burdensome.” Sanctions, however, are not imposable on the certifying attorney’s law firm, as they can be under Rule 11. Courts may impose Rule 26 sanctions on their own motion; there is no “safe harbor” or withdrawal provision applicable; and unlike the discretionary Rule 11 sanctions, sanctions are mandatory under Rule 26 “unless substantial justification” is shown.

By statute, California adopted Rule 11.⁸² And like its federal counterpart, California’s certification statute does not apply to discovery papers.⁸³ But, unlike the federal system, California has no direct equivalent to Rule 26(g). Instead, the only sanctions in California that are available for noncompliance with the discovery laws are those that are the device-specific equivalents of the sanctions available under federal Rule 37.⁸⁴

77. WILLIAM SCHWARZER, ET AL., *Civil Procedure Before Trial—Federal* 11:260 (The Rutter Group 2001).

78. FED R. CIV. P. 26(g)(1).

79. *Id.* 26(g)(2).

80. *Id.* 26(g)(3).

81. *See* Thibeault v. Square D Co., 960 F.2d 239, 245 (1st Cir. 1992) (providing sanctions under prior version of Rule 26(g) even if no prior discovery order has been violated).

82. CAL. CIV. PROC. CODE § 128.7 (West 1998 & Supp. 2000).

83. *Id.* § 128.7(g) (Supp. 2001).

84. *See generally* 2 JAMES E. HOGAN & GREGORY S. WEBER, CALIFORNIA CIVIL DISCOVERY ch. 14.

To date, only about a dozen states have expressly adopted Rule 26's certification requirements.⁸⁵ In many other states, however, the general certification requirements of their equivalent to Rule 11 would appear to apply to discovery.⁸⁶

E. Judicial Control Over Discovery

Originally, discovery was meant to be self-executing, with minimal judicial involvement. Increasingly, however, courts have taken a more active role in discovery management. This active role includes the resolution of discovery disputes, the enforcement of discovery rules via orders and sanctions, and, more recently, the proactive control of the process, through conferences and scheduling orders.

Both the mechanisms for invoking judicial supervision and the standards to guide that intervention have received some attention in other jurisdictions. For example, as discussed more fully below, many jurisdictions place tighter limits than California on the presumptive number of interrogatories and depositions that can be obtained without permission from the court or opposing counsel. Indeed, one state, Colorado, goes so far as to preclude the parties from stipulating away the presumptive numerical limits—any excess requires judicial permission.⁸⁷ In addition to these limits, several jurisdictions require a much stronger showing than California in order to overcome the presumptive limit. As noted below, California simply requires a propounding party to file a “declaration of need” for additional discovery.⁸⁸ Moreover, California summarizes the courts’ ability to limit discovery in section 2019(b) of the Code of Civil Procedure. Under that section,

The court shall restrict the frequency or extent of use of these discovery methods if it determines either of the following: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.⁸⁹

85. MICH. R. CIV. P. 2.302(g); N.C. Gen. Stat. § 1A-1, R. 26(g); N.D. R. CIV. P. 26(f); OKLA. STAT. ANN. tit. 12, § 3226(g); PA. R. CIV. P. 1023 (in pleading provision); S.C. R. CIV. P. 26(g); TENN. R. CIV. P. 26(a); VT. R. CIV. P. 26(g); VA. SUP. CT. R. CIV. P. 4.1(g); WASH. SUPER. CT. CIV. 26(g); WYO. R. CIV. P. 26(g). *See also* COLO. R. CIV. P. 16(b)(1)(iv) (certifying that counsel has informed the client of the likely discovery expenses); N.J. CT. R. 4:18-4 (certifying that all reports of testifying experts have been turned over to opposing counsel) & 4:23 (certifying that client has been informed that the client is in default for failing to answer interrogatories).

86. *See, e.g.*, ALASKA CT. R. CIV. P. 11 (no provision comparable to FED. R. CIV. P.11(d)).

87. COLO. R. CIV. P. 29. *Cf.* D.C. SUPER. CT. R. CIV. P. 28 (parties may not stipulate to deadline extensions; those are governed exclusively by Rule 16 scheduling orders).

88. CAL. CIV. PROC. CODE § 2030(c) (West 1998 & Supp. 2001) (interrogatories). *Id.* § 2033(c) (admission requests) (West 1998 & Supp. 2001).

89. *Id.* § 2019(b) (West 1998 & Supp. 2001).

These limitations, however, may only be imposed if a party moves for a protective order; the statute does not give the court power to act *sua sponte*.⁹⁰

In contrast, the federal courts provide the prime example of an affirmative showing that must be made to obtain permission. Moreover, Federal Rule 26(b)(2) both sets out the showing required to overcome presumptive limits, and gives the court discretionary authority to place even tighter limits on discovery. That rule provides:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).⁹¹

Colorado echoes the federal provision, but adds an additional consideration: "Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable."⁹² In contrast to the California provision, the federal and Colorado provisions provide more details on the factors necessary to guide the court's discretion. More importantly, they expressly recognize the court's power to act on its own initiative.

Beyond these two general provisions, several additional potential innovations address the mechanics of invoking judicial control. In a practice now widely copied,⁹³ California requires that, in virtually every discovery dispute, the parties

90. *Id.* § 2017(b) (West 1998 & Supp. 2001).

91. FED. R. CIV. P. 26(b)(2) (2000 amendments). In its comments to the 2000 amendments to Federal Rule 26(b), the federal Advisory Committee noted:

The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

92. COLO. R. CIV. P. 26(b)(2)(iv).

93. *E.g.*, FED. R. CIV. P. 37(d).

“meet and confer” in order to attempt to work out the dispute in good faith.⁹⁴ Occasionally, obstreperous opposing counsel block these efforts to “meet and confer.” Many courts have informal standards governing the extent to which one party must attempt to meet the other prior to filing its motions. In one court system, the practical scope of the “meet and confer” obligation has received formal attention in its discovery rules. In the District of Columbia, the requirement is deemed fulfilled if, ten days before filing a discovery motion, counsel sends a letter to opposing counsel proposing a meeting date and makes two follow-up phone calls attempting to negotiate that date.⁹⁵ If, despite these efforts, agreement cannot be reached, the requirement to “meet and confer” is deemed met.

Delaware also addresses the amount of effort required to satisfy the “meet and confer” requirement, although it does not have a “deemed met” standard like the District of Columbia rule. Instead, Delaware specifies that any motion to compel must detail “the dates, time spent, and method of communication with the other party or parties and the results, if any, of such communication.”⁹⁶ In a further effort to reduce the burden on the judiciary, Delaware places tight formal restrictions on motions to compel, including: (1) a four-page limit on both the motion and any response which “shall contain all authorities and facts which the moving party desires to bring to the attention of the Court”; (2) the waiver of any objection by failure to file a response; (3) the prohibition of a written reply to the response; (4) the limit of fifteen minutes total for oral argument, divided equally between the sides; (5) the summary granting, or denial, of the motion, as the case may be, if either side does not show up for the oral argument; (6) a mandatory attorney’s fee of not less than one-hundred dollars against the nonappearing party; and (7) a prohibition against any further filings in the case from the nonappearing party until the fee has been paid.⁹⁷

Maine goes furthest in its control of access to the courts to force intervention. Maine requires prior court approval before a party may file any discovery motion.⁹⁸ In effect, Maine thus gives the courts an opportunity to prescreen the amount of “meeting and conferring” that has occurred in the dispute, and to direct further, perhaps more focused, efforts. Maine, however, relents in one area: where there has been a complete failure to respond to a discovery request, Maine permits *ex parte* rulings.⁹⁹

94. *E.g.*, CAL. CIV. PROC. CODE § 2030(l) (West 1998 & Supp. 2001) (meet and confer prior to filing a motion to compel further responses to interrogatories). The lone exception is when there has been a complete failure to respond. *E.g.*, CAL. CIV. PROC. CODE § 2030(k).

95. D.C. SUPER. CT. R. CIV. P. 26(h).

96. DEL. SUPER. CT. R. CIV. P. 37(e)(1).

97. *Id.* 37(e)(2)-(8).

98. ME. R. CIV. P. 26(g)(1).

99. *Id.* 26(g)(2).

Illinois addresses a plaintiff's strategic manipulation of discovery law through voluntary dismissals. It precludes avoidance of discovery compliance or deadlines by a voluntary dismissal followed by a refile of the case.¹⁰⁰

Several jurisdictions mandate the contents of any motion to compel. These courts require the moving party to either attach or set out in full a copy of the request and the response.¹⁰¹

Sanctions have received attention in many jurisdictions, with several paths charted that are different from the California approach. In general, like most jurisdictions,¹⁰² California envisions a two-step approach to sanctions. In the first step, a party unhappy with a discovery response and unable to work out an informal resolution with opposing counsel, must move to compel further response to discovery.¹⁰³ If that motion is granted, the court ordinarily grants the moving party "a monetary sanction."¹⁰⁴ If the recalcitrant party then disobeys the order compelling further response, the party who obtained the order may seek a second order imposing a harsher sanction, such as the "the imposition of an issue sanction, an evidence sanction, or a terminating sanction In lieu of or in addition to that sanction, the court may impose a monetary sanction."¹⁰⁵

In contrast to this two-step approach, Rhode Island allows its court to make the initial order to compel self-executing. Under that approach, the recalcitrant party's failure to comply with the order within the specified time period will automatically put that party in default or support an order of dismissal.¹⁰⁶

The federal courts, and many states, make a party's complete failure to respond to a discovery request potentially subject to an immediate terminating sanction.¹⁰⁷ New Hampshire and New Jersey take a stronger approach, allowing the demanding party to have the recalcitrant party's conditional default entered.¹⁰⁸

Maryland specifically addresses the circumstances where a court orders a defendant's default for failure to obey a motion to compel. It requires the court to ensure that it has personal jurisdiction over the defendant and then tells the court

100. ILL. SUP. CT. R. 219(e).

101. D.C. SUPER. CT. R. CIV. P. 37(a); IOWA R. CIV. P. 121.1; VT. R. CIV. P. 26(h) (unless reason for motion is complete failure to respond, party moving to compel must concisely describe the case, list verbatim the items of discovery sought or opposed and the reason why it should be allowed or denied).

102. *Compare* FED. R. CIV. P. 37.

103. *E.g.*, CAL. CIV. PROC. CODE § 2030(l) (West 1998) (response to interrogatories).

104. *Id.* The sanctions can be excused if the court finds that the recalcitrant party "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." *Id.*

105. CAL. CIV. PROC. CODE § 2030(l) (West 2001); *cf.* CAL. CIV. PROC. CODE § 2023 (West 1998 & Supp. 2001).

106. R.I. CIV. P. 37(a)(4)(a).

107. FED. R. CIV. P. 37(d); MASS. R. CIV. P. 33(a); N.H. R. CIV. P. 36.

108. N.H. SUPER. CT. R. CIV. P. 36; N.J. CT. R. 4:23-5 (default without prejudice entered; can be cured by "motion to restore pleading" made within 90 days of entry).

what it may consider when setting damages, specifically guaranteeing any right of the plaintiff to a jury trial.¹⁰⁹

A half-dozen states address the award of sanctions against the state itself or one of its political subdivisions. Most which have such provisions preclude the awarding of sanctions absent express statutory authority.¹¹⁰ Idaho, however, indicates that such awards are presumptively proper.¹¹¹

Finally, Arizona, Idaho and Illinois expressly give their courts substantial residual authority to craft sanctions for objectionable conduct. Arizona allows its courts to sanction any “unreasonable, groundless, abusive, or obstructionist conduct.”¹¹² Idaho gives its courts “discretion [to] impose sanctions or conditions, or assess attorney’s fees costs or expenses against a party or the party’s attorney for failure to obey [a discovery] order”¹¹³ Illinois gives its court power to sanction any willful violations of the discovery rules.¹¹⁴

F. *Presuit Discovery*

Like most states, under conditions specified by statute, California allows a person who may become a party to a lawsuit that has yet been filed to petition to the court for an order allowing the preservation of testimony via depositions, inspection demands, and medical examinations.¹¹⁵ It makes any such presuit deposition admissible if taken under the California Code, the federal rules, or “comparable provisions of the laws of another state.”¹¹⁶

Although infrequently used, the text is ambiguous and could be improved; it does not clarify whether the deposition must have been taken under the laws of the state in which it was taken, or just “another state.” Both the federal courts and several other states, however, clarify that such depositions are admissible not if taken just under the laws of another state, but if “it would be admissible in evidence in the courts of the state in which it was taken.”¹¹⁷ Michigan places a caveat on the admissibility of depositions taken under laws of other jurisdictions: the deposition procedure actually used must still have been “in substantial compliance” with Michigan rules.¹¹⁸

109. MD. CIR. CT. R. 2-433.

110. ARK. R. CIV. P. 37(e); HAW. R. CIV. P. 37(e); KY. R. CIV. P. 37.05; MASS. R. CIV. P. 37(e); N.D. R. CIV. P. 37(f).

111. IDAHO R. CIV. P. 37(f). *Cf.* P.R. R. CIV. P. 34.5 (court may award expenses against the commonwealth but not attorney’s fees).

112. ARIZ. R. CIV. P. 26(f).

113. IDAHO R. CIV. P. 37(e).

114. ILL. SUP. CT. R. 219(d).

115. CAL. CIV. PROC. CODE § 2035 (West 1998 & Supp. 2001).

116. *Id.* § 2035(g).

117. FED. R. CIV. P. 27(a)(4); IND. R. CIV. P. 27(A)(4).

118. MICH. CT. R. 2.303(A)(4)(b).

Maine expressly authorizes the recording of a presuit deposition in the registry of deeds.¹¹⁹ Vermont mandates such filing.¹²⁰

Louisiana has extensive provisions governing the issuance of ex parte orders to take the presuit deposition of someone who is about to die or become incapacitated.¹²¹

Finally, Ohio and Oklahoma specify that a petition can be made even if it is not the petitioner but rather his or her heirs or representatives who will be the parties to the action that cannot yet be brought.¹²² Ohio also specifies that the deposition costs must be born by the petitioning party.¹²³

G. Miscellaneous Potential General Innovations

This final section addresses a handful of unrelated provisions that, in and of themselves, would not justify substantial attention, but might be worth considering as part of an overall reconsideration of California discovery law.

Like some states, such as Florida,¹²⁴ California currently imposes no duty upon a party responding to an interrogatory to automatically supplement the information provided in that initial response. Instead, California requires the demanding party to send supplemental interrogatories if it wants to be assured that it has the most current and accurate information.¹²⁵ This provision was evidently adopted in 1986 with some thought, as it was contrary to the then-longstanding federal practice.¹²⁶ As part of any reevaluation of its own discovery law, California should revisit this provision. It remains contrary to current federal law¹²⁷ and the law of a number of other states.¹²⁸

Section 2024 of the California Code of Civil Procedure sets a discovery cut-off that is calculated by counting backwards thirty days from “the date initially set for

119. ME. R. CIV. P. 27(c).

120. VT. R. CIV. P. 27(c).

121. LA. CODE CIV. PROC. ANN. art. 1430 (West 2000).

122. OHIO R. CIV. P. 27; OKLA. STAT. ANN. tit. 12, § 3227 (West 2000).

123. OHIO R. CIV. P. 27.

124. FLA. R. CIV. P. 1.280(e).

125. CAL. CIV. PROC. CODE § 2030(c)(8) (West 1998).

126. See FED. R. CIV. P. 26(e) ¶¶ 61-65 advisory committee’s notes to 1970 amendments.

127. FED. R. CIV. P. 26(e).

128. CONN. R. SUPER. CT. (Civil) 13-15 (must supplement if failure to amend earlier response is a knowing concealment); IOWA R. CIV. P. 122(d) (extensive duties to supplement identities of knowledgeable and expert witnesses and any material claims or defenses); KY. R. CIV. P. 26.05 (like Iowa); LA. CODE CIV. PROC. art. 1428 (West/year) (like Iowa); ME. R. CIV. P. 26(e) (like Iowa); MICH. CT. R. 2.302(e) (like Iowa); MINN. R. CIV. P. 26.05 (duty to supplement information regarding experts and their proposed testimony); N.J. CT. R. 4:17-4 (must supplement interrogatory answers no later than 20 days before the start of trial); NEV. R. CIV. P. 26(b)(4) (like current federal provision); P.R. R. CIV. P. 23.1(d) (“continuing duty” imposed); R.I. R. CIV. P. 26(e) & 33(c) (continuing duty to answer interrogatories); S.C. R. CIV. P. 26(e) (continuing requests under Rules 31, 33, 34 & 36); TEX. R. CIV. P. 193.5; VT. R. CIV. P. 26 (e) (like current federal provision). Cf. ILL. SUP. CT. R. 214 (duty to supplement responses to inspection demands).

the trial of the action.”¹²⁹ Several states, however, determine the end of the discovery period by the passage of time *from* certain events rather than time *before* other events. These methods offer parties the incentive to move cases forward. Georgia ends discovery six months after the defendant files its answer.¹³⁰ New Jersey requires discovery to begin within forty days from the end of the time allowed for the last responsive pleading; it must end within one-hundred and fifty days of service upon the defendant.¹³¹ Puerto Rico has the tightest discovery schedule of all. It requires discovery to be completed within sixty days of the service of the answer.¹³² Finally, for cases valued at more than \$50,000, Texas requires discovery to end at the earlier of thirty days before trial or nine months after either the first deposition was taken or the first answer to written discovery was served, whichever came first.¹³³

Three states have work product provisions worth noting. Illinois allows the court to apportion the costs of any attorney work product that is otherwise discoverable.¹³⁴ In an exception to the work product protection, Minnesota allows any person or party to obtain a copy of any person’s prior statement.¹³⁵ Pennsylvania echoes that approach. It authorizes any person to get a photostatic copy of a prior statement that person made, or any party made, or a witness made, regardless of how it was recorded.¹³⁶ Pennsylvania’s general work product protection, however, is worded strongly. Like the federal provision,¹³⁷ and unlike California,¹³⁸ it expressly extends beyond an *attorney’s* work to protect from discovery the work of other party representatives.¹³⁹ It also expressly bars from disclosure such classic attorney work product as case valuation, analyses of the merits of claims or defenses, and strategy and tactics.¹⁴⁰ Moreover, for nonattorney party representatives, the express bar extends to “disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.”¹⁴¹

129. CAL. CIV. PROC. CODE § 2024(a) (West 1998 & Supp. 2001).

130. GA. SUPER. CT. R. 5.1 (2000).

131. N.J. CT. R. 4:17-2 (service of initial interrogatories), 4:24-1 (completion of discovery).

132. P.R. R. CIV. P. 23.4.

133. TEX. R. CIV. P. 190.3(b)(1)(B)(ii).

134. ILL. SUP. CT. R. 201(b)(2).

135. MINN. R. CIV. P. 26.02(c).

136. PA. R. CIV. P. 4003.4.

137. FED. R. CIV. P. 26(b)(3).

138. CAL. CIV. PROC. CODE § 2017 (West 1998 & Supp. 2001) (attorney’s work product). The work product of other party representatives, however, is protected through the requirement that “good cause” exist for an inspection demand. *See* HOGAN & WEBER, *supra* note 41, at § 13.3.

139. PA. R. CIV. P. 4003.3.

140. *Id.*

141. *Id.*

Other provisions worth noting are: Illinois calculates time periods not in multiples of five days but in multiples of seven. This calculation makes it easier to relate compliance schedules with calendar weeks.¹⁴²

Nevada allows later joined parties to formally demand copies of all prior discovery responses;¹⁴³ New York has provisions within its discovery rules addressing the appointment of referees;¹⁴⁴ Oregon has a specific provision authorizing the court to shift a responding party's discovery costs to the requesting party "to prevent hardship."¹⁴⁵

II. POTENTIAL DEVICE-SPECIFIC INNOVATIONS

A. *Deposition Practice*

Of all the discovery devices, deposition practice has by far received the most extensive attention by federal and state courts across the country. Courts that have been concerned about problems in deposition practice have made a half-dozen major changes, and many more minor changes.

1. *Presumptive Limits on the Number of Depositions*

Current California law permits only a single deposition of a natural person.¹⁴⁶ It places no other presumptive limits on the number of depositions that may be taken in a case.¹⁴⁷ The lack of presumptive limits on deposition practice contrasts with the presumptive limits California places on other discovery devices, such as interrogatories and admission requests.

In comparison, since 1993, the federal rules have presumptively limited depositions to ten per side.¹⁴⁸ That is, all of the plaintiffs collectively may take only ten depositions; all of the defendants collectively may take only ten; and all third-parties collectively may take only ten. According to the Advisory Committee, this limit "emphasize[s] that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case."¹⁴⁹

142. See, e.g., ILL. SUP. CT. R. 215(c) (21 day period for completion of medical examiner's report); *id.* at 216(c) (matters deemed admitted unless response to admission request made within 28 days of service of request).

143. NEV. R. CIV. P. 26(h).

144. N.Y. C. P. L.R. § 3104 (McKinney 2001).

145. OR. R. CIV. P. 36(c).

146. CAL. CIV. PROC. CODE § 2025(t) (West 1998 & Supp. 2001). For good cause shown, an additional deposition of a natural person may be taken. *Id.* Cf. S.C. R. CIV. P. 30(a)(2) (one deposition limit applies to organizations as well).

147. A party, of course, may move for a protective order to challenge the propriety of any individual deposition. See, e.g., CAL. CIV. PROC. CODE § 2025(i)(1) (West 1998 & Supp. 2001); *cf.* CAL. CIV. PROC. CODE § 2019(b) (West 1998 & Supp. 2001).

148. FED. R. CIV. P. 30(a)(2)(A).

149. FED. R. CIV. P. 30 advisory committee's note ¶ 3 (1993).

With only a couple exceptions, the specific federal limits have not been copied by the states.¹⁵⁰ Rather, of the states that have placed presumptive limits on the number of depositions have placed much more stringent limits. Alaska limits depositions to three per side, not counting depositions of parties and testifying experts.¹⁵¹ Colorado goes even further. It limits each side to a total of three, of which one can be of an adverse party and two may be of other persons.¹⁵² Arizona and Illinois take a different path. Arizona puts no limits on the total number of depositions, but, absent agreement or court order, it does not allow any depositions of nonparties, other than experts or custodians of documents.¹⁵³ Similarly, in cases valued at less than \$50,000, Illinois only allows depositions of parties and testifying treating physicians and opinion witnesses.¹⁵⁴

Texas takes a very different approach. It puts no limit on the number of depositions; rather, it puts a limit on the total number of hours of deposition that each side can take. In cases valued \$50,000 or less, it allows each party six hours total for examination and cross-examination of witnesses.¹⁵⁵ In other cases, it limits the total deposition time to fifty hours per *side*, with additional time permitted if the opposing side designates more than two experts as trial witnesses.¹⁵⁶

2. Presumptive Limits on the Lengths of Depositions

California statutes put no presumptive limit on the length of a deposition. A party or nonparty deponent who believes that a deposition either has, or will, take too much time, must move for a case-specific protective order.¹⁵⁷

In contrast, at least seven states have placed presumptive limits on the lengths of depositions. In Alaska, absent court order or stipulation, depositions of parties, independent expert witnesses and treating physicians may last only six hours.¹⁵⁸ All other depositions may presumptively last no more than three hours.¹⁵⁹ Oklahoma and

150. See UTAH R. CIV. P. 30(a)(2) (following federal model); WYO. R. CIV. P. 30(a)(2) (same).

151. ALASKA R. CIV. P. 30(a)(2)(A). It also limits the total number of expert witnesses to 3 per side. ALASKA R. CIV. P. 26(a)(2)(D).

152. COLO. R. CIV. P. 26(b)(2).

153. ARIZ. R. CIV. P. 30(a).

154. ILL. SUP. CT. R. 222(f)(2)(a)-(b).

155. TEX. R. CIV. P. 190.2(c)(2). The parties may agree among themselves to expand this to 10 hours per side, but need court permission to exceed that limit. *Id.*

156. TEX. R. CIV. P. 190.3(b)(2). For each expert beyond two, an additional 6 hours of deposition time is permitted. *Id.* More complicated cases, where discovery is controlled by court orders, may have very different limits. See TEX. R. CIV. P. 190.4.

157. See, e.g., CAL. CIV. PROC. CODE § 2025(i)(5) (West 1998 & Supp. 2001).

158. ALASKA R. CIV. P. 30(d)(2).

159. *Id.* A party seeking to overcome the presumption must show the court, among other matters, that “the complexity of the case, the number of parties likely to examine a deponent, and the extent of relevant information possessed by the deponent” justify a longer length. *Id.*

Texas have similar six hour limits.¹⁶⁰ Arizona places even tighter limits. Absent stipulation or order, no deposition of any witness, including experts, may last more than four hours.¹⁶¹ In cases valued at less than \$50,000, Illinois places stringent deposition limits. It presumptively limits all depositions to three hours.¹⁶² Maine and Montana provide more generous limits. In both of those states, absent stipulations or orders to the contrary, depositions are limited to eight hours.¹⁶³

The decision by these states to presumptively limit the length of a deposition has recently received a federal imprimatur. Under the 2000 amendments to federal Rule 30, a deposition may presumptively last only for “one day of seven hours.”¹⁶⁴ The limitation does not include “reasonable breaks during the day for lunch and other reasons, and . . . the only time to be counted is the time occupied by the actual deposition.”¹⁶⁵ Additional time may be ordered “if needed for a fair examination of the deponent or if the deponent or another person, or another circumstance, impedes or delays the examination.”¹⁶⁶ As examples of cases where more time may well be justified, the Advisory Committee included depositions using interpreters, questions about numerous or lengthy documents which the deponent had not read in advance, multi-party cases where different parties have a need to examine the witness from different perspective, and depositions of expert witnesses.¹⁶⁷

3. Deposition Behavior

The California discovery statutes have two provisions governing deposition misconduct in general and the making of objections in particular. Under section 2025(n) of the California Code of Civil Procedure, a deposition may be stopped to allow a party or the deponent to “move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party.”¹⁶⁸ The statute gives no examples of specific bad faith or unreasonable conduct. Section 2025(m) addresses the circumstances when an objection must be made in order to avoid a waiver of the grounds for the objection should the deposition be used as evidence in a subsequent

160. OKLA. STAT. ANN. tit. 12, § 3230(A)(3). The deposition must be held between 8:00 a.m. and 5:00 p.m. on weekdays. *Id.* TEX. R. CIV. P. 199.5(c) (breaks not included).

161. ARIZ. R. CIV. P. 30(d). The four hours may be spread over two days. Absent a stipulation or order to the contrary, a deposition noticed for a given day continues the next day until done. ARIZ. R. CIV. P. 30(c).

162. ILL. SUP. CT. R. 222(a), (f)(2).

163. ME. R. CIV. P. 30(d)(2); MONT. R. CIV. P. 30(b)(8).

164. FED. R. CIV. P. 30(d)(2).

165. FED. R. CIV. P. 30(d) advisory committee’s note ¶ 3 (2000).

166. *Id.*

167. *Id.*

168. CAL. CIV. PROC. CODE § 2025(a).

proceeding.¹⁶⁹ It does not, however, specifically address the misuse of deposition objections. A frequent misuse is pointed coaching of the witness.

In contrast, both the federal courts and an increasing number of states have language to address the improper use of objections during deposition testimony. Louisiana simply reserves all objections to deposition testimony.¹⁷⁰ Texas limits objections to three: “objection, leading,” “objection, form,” and “objection, non-responsive.”¹⁷¹ These objections are waived if not stated “as phrased.”¹⁷² Maryland does not require the grounds of objections to be stated, unless a request for grounds is made by any party.¹⁷³ In addition, if an objection “reasonably could have the effect of coaching or suggesting to the deponent how to answer, then the deponent, at the request of any party, shall be excused from the deposition during the making of the objection.”¹⁷⁴ Michigan requires a party who knows that it will be asserting a privilege at a deposition to move to prevent the taking of the deposition or be subject to specified costs.¹⁷⁵

The federal rule now states:

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to [move for a protective order].¹⁷⁶

Similar provisions are found in Alaska, Arizona, Oregon, Maryland, Texas, Washington and South Carolina, with Maryland further expressing its concern in the form of its official Guidelines for Discovery.¹⁷⁷ In addition, six of these states,

169. See CAL. CIV. PROC. CODE § 2025(m)(1)-(3), (u)(1) (West 1998 & Supp. 2001) (citing such examples as privilege, cure of defects, and lack of competency as grounds for objection).

170. LA. CODE CIV. PROC. ANN. art. 1443(d) (West 2000).

171. TEX. R. CIV. P. 199.5(e).

172. *Id.*

173. MD. R. DISCOVERY 9.

174. *Id.*

175. MICH. R. CIV. PROC. 2.306(D)(3).

176. FED. R. CIV. P. 30(d)(1).

177. ALASKA R. CIV. P. 30(d)(1); ARIZ. R. CIV. P. 32(d)(3)(d)-(e); OR. R. CIV. P. 39(d)(3). These provisions draw largely from the pre-2000 version of the Federal Rule. Neither the Alaska nor the Arizona rule requires the objecting party to state the grounds for the objection unless requested by the questioning party. MD. R. CIV. P. 2-415(a). See MD. R. DISCOVERY 8(c). Texas’ provisions come from its recent substantial revision to its discovery law. TEX. R. CIV. P. 199.5(e). Argumentative or suggestive objections or explanations waive any objections. *Id.* South Carolina enacted its deposition conduct provisions in 2000. S.C. R. CIV. P. 30(j). These state:

- (1) At the beginning of each deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness’ own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions.
- (2) All objections, except those which would be waived if not made at the deposition under [another

rule], and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to [another rules] shall be preserved.

- (3) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under [another rule]. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under [another rule] within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.
- (4) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.
- (5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.
- (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.
- (7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.
- (8) Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.
- (9) Violation of this rule may subject the violator to sanctions under [another rules].

Id.

Washington's provisions resemble a simpler version of South Carolina's provisions. WASH. R. CIV. P. 30(h).

These state:

- (1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.
- (2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.
- (3) Instructions Not to Answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.
- (4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.
- (5) Private Consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

as well as Delaware, address off-the-record conferences. Alaska and Arizona specifically prohibit “continuous and unwarranted off-the-record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition”¹⁷⁸ Maryland’s Discovery Guidelines make it “presumptively improper” for a deponent’s attorney “to initiate a private conference with a deponent” except to determine whether to assert a privilege.¹⁷⁹ Guideline 6 then describes the specific information required of any party who does assert such a privilege.¹⁸⁰ Delaware prohibits any consultations or conferences between the deponent and counsel during the deposition, including recesses of up to five days, except to discuss assertions of privilege or compliance

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- (6) Courtroom Standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

Id.

178. *Id.*

179. MD. R. DISCOVERY 8(e).

180. *Id.* 6. The guideline specifies:

Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:

- (a) The attorney asserting the privilege shall identify during the deposition the nature of the privilege (including work product) which is being claimed; and
- (b) The following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of the allegedly privileged information:
 - (1) For oral communications:
 - (i) the name of the person making the communication and the names of the persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communications;
 - (ii) the date and place of the communication; and
 - (iii) the general subject matter of the communication.
 - (2) For documents, to the extent the information is readily obtainable from the witness being deposed or otherwise:
 - (i) the type of document, e.g., letter or memorandum;
 - (ii) the general subject matter of the document;
 - (iii) the date of the document; and
 - (iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other;
 - (3) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the deposition.
- (c) After a claim of privilege has been asserted, the attorney seeking disclosure should have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exception to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

Id.

with a court order.¹⁸¹ Texas also bars conferences except to discuss assertions of privilege. Unlike Delaware, however, Texas does allow “private conferences . . . during agreed recesses and adjournments.”¹⁸² Texas also sets out a general “trial behavior” standard.¹⁸³

In addition to these specific prohibitions, several courts are moving towards more detailed listing of appropriate and inappropriate deposition conduct. As noted already, Maryland has developed a series of guidelines for the conduct of discovery. Guidelines 8 and 9 address the conduct of depositions. Guideline 9 simply encourages attorneys who are objecting to the form of a deposition question, “if requested, to state the reason for the objection.”¹⁸⁴ Guideline 8, however, lists a half-dozen presumptively improper deposition tactics. In addition to the two noted above, two others are specific enough to give real guidance to counsel on impermissible conduct. They are: asking questions that misstate or mischaracterize a witness’ previous answer; and insisting “upon an answer to a multiple-part question after objection.”¹⁸⁵

Closer to home, the federal district court for the Central District of California has also published “Civility and Professional Guidelines”¹⁸⁶ for attorneys who practice before it. Section four of that document sets out eight guidelines for deposition practice. Among other matters, attorneys commit: to only take depositions where actually needed to obtain information or to perpetuate testimony; not to engage in any conduct during a deposition that would be inappropriate in the presence of a judge; not to make irrelevant inquiries into a deponent’s personal affairs or question a deponent’s integrity; to limit objections to those that are “well-founded and necessary to protect [the] client’s interests” recognizing “that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought;” and not to coach witnesses through deposition objections or otherwise.¹⁸⁷

181. DEL. R. CIV. P. 30(d)(1). Under this rule:

From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered.

Id.

182. TEX. R. CIV. P. 199.5(d).

183. “The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial.” *Id.*

184. MD. R. DISCOVERY 9.

185. *Id.* 8(a), (b).

186. See SCHWARZER ET AL., *supra* note 77, at 11:17.2 (2001) (quoting “Civility and Professionalism Guidelines” Central District of California, <http://www.cacd.uscourts.gov>).

187. *Id.*

4. Deposition Scheduling

Several states have some deposition scheduling provisions worth noting. Many states, including California, place a brief “hold” on the initiation of deposition practice by plaintiffs. During this time, the defendant may notice a deposition, but the plaintiff may not. Like Indiana, New Hampshire, and Puerto Rico, California places the hold at twenty days.¹⁸⁸ At least eight states use a longer hold.¹⁸⁹ Two add to the usual circumstances when judicial permission is needed before a party may take a deposition. In Massachusetts, a party must obtain judicial permission if “there is no reasonable likelihood that recovery will exceed \$50,000 if the plaintiff prevails”¹⁹⁰ or if “there has been a hearing before a master.”¹⁹¹ In Michigan, permission is required “only if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney.”¹⁹² The statute then details five circumstances under which a “reasonable time is deemed to have elapsed.”¹⁹³ These include four specific actions to defend the case and a fifth: the passage of twenty-eight days after service.¹⁹⁴ A third state, Illinois, specifically precludes the scheduling of depositions on weekends or holidays, absent stipulation or judicial order.¹⁹⁵ Additionally, jurisdictions with discovery “guidelines” also include admonitions on deposition scheduling.¹⁹⁶ Finally, in contrast to California practice, the filing of a motion for a protective order in Colorado, New Mexico, New York and Wyoming automatically stays the taking of a deposition.¹⁹⁷

5. Depositions By “Remote Electronic Means”

In addition to the attempts to respond to perceived problems with deposition conduct, other jurisdictions have revised their rules to adapt to new technological developments. Unlike many state and the federal courts, California has no separate

188. CAL. CIV. PROC. CODE § 2025(b) (West 1998 & Supp. 2001); IND. R. CIV. P. 30(a); N.H. R. CIV. P. 38 (applies to both plaintiffs and defendants); P.R. R. CIV. P. 27.1.

189. One state, New Jersey, imposes a 35 day hold. N.J. CT. R. 4:14-1. At least 6 states impose a 30 day hold: MONT. R. CIV. P. 30(a); NEB. R. CIV. P. 30(a); N.M. DIST. CT. R. CIV. P. 1-030(A); N.D. R. CIV. P. 30(a); OKLA. STAT. tit.12, § 3230(A)(2)(a)(2) (2000); R.I. SUPER. CT. R. CIV. P. 30(a). One state—Michigan—imposes a 28 day hold. MICH. CT. R. 2.306(A)(1)(e). Cf. OHIO R. CIV. P. 30(B) (no hold at all).

190. MASS. R. CIV. P. 30(a)(ii).

191. *Id.* 30(a)(iv).

192. MICH. CT. R. 2.306(a)(1).

193. *Id.*

194. *Id.* The four specified actions are: a) the filing of an answer; b) the filing of an appearance; c) the defendant’s formal action seeking discovery; and d) the filing of certain motions. *Id.*

195. ILL. SUP. CT. R. 72(b).

196. For example, Maryland’s Guideline 7 urges counsel to clear deposition dates with opposing counsel and clients ahead of time, and makes any agreed to schedule presumptively binding, requiring a new agreement in order to be changed. MD. R. DISCOVERY 7(c).

197. COLO. R. CIV. P. 121, 1-12; N.M. R. CIV. P. 1-030(G)(3) (if filed within 3 days of deposition, deponent excused from attendance at deposition); N.Y. C. P. L.R. 3103; WYO. R. CIV. P. 26(c)(4).

provision on depositions by telephone or other “remote electronic means.” Although a telephonic or teleconference deposition would be permissible under California rules by stipulation of counsel, there is no express provision giving any party a right to attend or take such a deposition. Similarly, while a court has considerable authority to fashion protective orders, there is no express statutory authority for a court to order that a deposition be taken by telephone. In addition, there is no express direction given on such practical questions as the location of the deposition or the required presence of the deposition officer.

The federal courts have resolved any uncertainties by expressly authorizing the taking of depositions via “telephone or other remote electronic means.”¹⁹⁸ Under the federal rules, such a deposition is permissible either by stipulation or by court order. For purposes of determining who is an appropriate deposition officer or for filing motions to compel further testimony, a telephonic deposition is “taken in the district and at the place where the deponent is to answer questions.”¹⁹⁹

Over a dozen states have provisions addressing telephonic depositions.²⁰⁰ Most of these allow the practice either by stipulation or court order. Maryland only allows them by stipulation. Florida only allows them by court order. Several go beyond the rather terse provisions of their federal counterpart and add useful additional material. For example, Colorado and Texas specify that the officer who swears the deponent need not be the person who records the testimony. This would allow the provision of separate swearing and recording “officers” in separate locations.²⁰¹ Texas also allows the parties to be at the place where the witness will answer the questions, even if the party noticing the deposition will not be there.²⁰² Iowa specifies that the deposing party must pay all costs incurred that are attributable to the telephonic format. It also prohibits the subsequent taxation of these costs. In addition, Iowa specifically requires the deposing party to send copies of any exhibits that will be discussed in the deposition to other parties before the deposition.

The most extensive additional provisions are found in Nevada, Illinois and Virginia. To the basic federal formula, Nevada Rule 30(b)(7) adds:

Unless otherwise stipulated by the parties: (A) the party taking the deposition shall arrange for the presence of the officer before whom the

198. FED. R. CIV. P. 30(b)(7).

199. *Id.* Cf. OR. R. CIV. P. 38(A)(2) (deposition taken in Oregon if either the deponent or the person administering the oath is in Oregon) 39(c)(7) (oath may be administered telephonically); TEX. R. CIV. P. 199.1(b) (electronic deposition taken under Texas law is taken at the place where the witness is located).

200. COLO. R. CIV. P. 30(b) and 30(f)(1); FLA. R. CIV. P. 1.310(b)(7); GA. CODE ANN. § 9-11-30(b)(4) (2000); HAW. R. CIV. P. 30(b)(7); ILL. SUP. CT. R. 206(h); IOWA R. CIV. P. 140(g); MD. CIRC. CT. R. CIV. P. 2-417; MISS. R. CIV. P. 30(b)(1)(7); NEV. R. CIV. P. 30(b)(7); N.M. DIST. CT. R. CIV. P. 1-030(B)(7); N.D. R. CIV. P. 30(b)(7); OR. R. CIV. P. 38, 39; S.C. R. CIV. P. 30(b)(7); TEX. R. CIV. P. 199.1; TENN. R. CIV. P. 30.02(7).

201. Texas specifies that the “officer” may be at the noticing party’s location, not the deponent’s location, provided that the witness is placed under oath by someone present with the deponent and authorized to administer oaths in the jurisdiction of the deponent’s location. TEX. R. CIV. P. 199.

202. *Id.* 199.

deposition will take place; (B) the officer shall be physically present at the place of the deposition [i.e., where the deponent is physically located]; (C) the party taking the deposition shall make the necessary telephone connections at the time scheduled for the deposition. Nothing in this paragraph shall prevent a party from being physically present at the place of the deposition, at the party's own expense.²⁰³

Similarly, Illinois' recently enacted provision adds to the basic provisions:

Except as otherwise provided [in this paragraph], the rules governing the practice, procedures and use of depositions shall apply to remote electronic means depositions.

- (1) The deponent shall be in the presence of the officer administering the oath and recording the deposition, unless otherwise agreed by the parties.
- (2) Any exhibits or other demonstrative evidence to be presented to the deponent by any party at the deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition.
- (3) Nothing in this paragraph . . . shall prohibit any party from being within the deponent during the deposition, at that party's expense; provided, however, that a party attending a deposition shall give written notice of that party's intention to appear at the deposition to all other parties within a reasonable time prior to the deposition.
- (4) The party at whose instance the remote electronic means deposition is taken shall pay all costs of the remote electronic means deposition, unless otherwise agreed by the parties.²⁰⁴

Finally, Virginia rolls its provision regarding "remote electronic means" into a general provision regarding "audio-visual means."²⁰⁵ It expressly includes, without limitation, "videoconferencing and teleconferencing" within those means.²⁰⁶

6. *Audio and Video Recording of Depositions*

Section 2025(l) of the California Code of Civil Procedure extensively addresses the audio or video recording of depositions. Many states now have comparable provisions. Several points from these other statutes and rules are worth noting for

203. NEV. R. CIV. P. 30(b)(7).

204. ILL. SUP. CT. R. 206(h) (2001).

205. VA. SUP. CT. R. CIV. P. 4:7A(a).

206. *Id.*

possible adoption in California. At least eight states dispense with the requirement that, absent agreement or an order to the contrary, an electronically recorded deposition also be stenographically recorded.²⁰⁷ In such cases, for example, where there is no simultaneous stenographic transcript made, Virginia expressly eliminates the requirement that the transcript be submitted to the deponent for correction and signing.²⁰⁸

Almost the same number of states also expressly specify that electronically recorded deposition costs may be taxed.²⁰⁹

Five states require that a digital clock or other electronic timer appear in the screen at all times.²¹⁰

Ten states have provisions governing procedures for objecting to videotaped testimony, for editing tapes in response to rulings on objections, and for resolving discrepancies between the electronic recording and any stenographic transcription.²¹¹

Six states have provisions regarding the focus of the camera's attention. Alaska Rule 30.1 requires that the deponent be videotaped seated at a table and shot only from the waist up.²¹² Kentucky Rule 30.02 requires that the videotape operator receive a copy of Rule 30.02.²¹³ At the election of the noticing party, at the beginning of the taping, the operator must either focus on, and identify, each attorney, party and witness present, or may read a statement introducing the parties

207. ARK. R. CIV. P. 32(c); KY. R. CIV. P. 30.02(4)(c); ME. R. CIV. P. 30(b)(4)(F) ("The method of recording specified in the notice by the party noticing the deposition shall constitute the only official record of the deposition"). MONT. R. CIV. P. 30(h)(1)(a); N.D. R. CIV. P. 30.1(a)(1); R.I. R. CIV. P. 30(b)(2) & (3); TENN. R. CIV. P. 30.02(4)(b); VA. SUP. CT. R. CIV. P. 4:7A(D)(1).

208. *Id.* 4:7A(b).

209. ALASKA R. CIV. P. 30.1(e); MASS. R. CIV. P. 30(A); MICH. CT. R. 2.315(I); MONT. R. CIV. P. 30(h)(5); N.D. R. CIV. P. 30.1(e); TENN. R. CIV. P. 30.02(4)(b). *Cf.* WASH. R. SUP. CT. CIV. P. 30(b)(8)(D) (absent stipulation, costs of videotaping may not be taxed).

210. MASS. R. CIV. P. 30A(c)(6); MICH. CT. R. 2.315(c)(2); MONT. R. CIV. P. 30(h)(4)(f); N.D. R. CIV. P. 30.1(d)(6); TENN. R. CIV. P. 30.02(4)(B)(VI). *See also* ALASKA R. CIV. P. 30.1(d)(7) & (8) (requiring written counter log; permitting use of on-screen digital timer).

211. ALASKA R. CIV. P. 30.1(d)(11) (original must be preserved if editing order issued); KY. R. CIV. P. 30.02(4)(d)(c) & (e); ME. R. CIV. P. 30(b)(4) (all recording methods must "permit editing for use at trial in a manner that will allow the expeditious removal of objectionable and extraneous material without significant disruption in presentation of the edited testimony to a jury"); MASS. R. CIV. P. 30A(g) & (j); MONT. R. CIV. P. 30(h)(4)(i) (like Alaska); N.D. R. CIV. P. 30.1(d)(8) (must preserve original if court issues editing order); S.C. R. CIV. P. 30(h)(8)-(9) (extensive provisions); TENN. R. CIV. P. 30.02(4)(b)(vii) & (ix); VA. SUP. CT. R. CIV. P. A(b)(3) (no editing permitted without a court order); WASH. R. CIV. P. 30(b)(8)(G).

212. ALASKA R. CIV. P. 30.1.

213. KY. R. CIV. P. 30.02(4)(a). South Carolina requires that the equipment operator certify that he or she is familiar with the requirements of South Carolina's provisions on audio-visual deposition recording. S.C. R. CIV. P. 30(h)(13).

and attorneys present.²¹⁴ To prevent “unfair or undue influence upon the words of the witness,” the camera must

remain stationary at all times during the deposition and will not “zoom” in or out on the witness excepting those times during the deposition when the witness is displaying, for the jury’s viewing, exhibits or other pieces of demonstrative proof that can only be fairly and reasonably seen on the videotape by use of the camera “zooming” in on said evidence.²¹⁵

South Carolina, too, bans any close-ups taken without agreement, other than for exhibits.²¹⁶ Maine sets out seven criteria applicable to any deposition recording method, whether stenographic, electronic, or otherwise. Among other matters, all recording methods must “provide clear identification of the separate speakers.”²¹⁷ Similar to Alaska and Kentucky, the rule provides that in videotaped depositions, unless otherwise agreed, “the camera shall focus solely on the witness and any exhibits utilized by the witness . . .”²¹⁸ Like Kentucky, Alaska, South Carolina, and Maine, Massachusetts has express provisions requiring the camera operator to maintain a constant view of the deponent, except when asked to zoom in to display a relevant exhibit or visual aid.²¹⁹ Michigan specifically approves the use of more than one camera “in sequence or simultaneously.”²²⁰

Finally, there are a handful of additional matters that are worth noting. For example, in addition to expressly qualifying the admissibility of the tape on the absence of distorting technical errors, Kentucky permits objections that “the general technical quality of the tape is so poor that its being viewed by the jury would be unfairly prejudicial to the side so objecting.”²²¹ Louisiana makes unnecessary the reading or signing of a taped deposition.²²² In extensive provisions that go far beyond section 2025(u)(4) of the California Code of Civil Procedure, Massachusetts details the circumstances governing the oral depositions of treating physicians or expert witnesses by parties who intend to use such depositions in lieu of trial testimony.²²³ New Hampshire’s rules provide three simple admonitions to counsel at a videotaped deposition. First, they must take care “to have the witnesses speak slowly and distinctly.”²²⁴ Second, they must have papers “readily available for

214. KY. R. CIV. P. 30.02(4)(a).

215. *Id.* 30.02(b).

216. S.C. R. CIV. P. 30(h)(2)(D).

217. ME. R. CIV. P. 30(b)(4)(c).

218. *Id.* 30(b)(4)(F)

219. MA. R. CIV. P. 30A(d).

220. *Id.* 30A(C)(5).

221. KY. R. CIV. P. 30.02(f).

222. LA. CODE CIV. PROC. ANN. art. 1445 (West 2001).

223. MA. R. CIV. P. 30A(m).

224. N.H. SUPER. CT. R. 45.

reference without undue delay and unnecessary noise.”²²⁵ Third, both counsel and witnesses must “comport themselves at all times as if they were actually in the courtroom.”²²⁶

South Carolina requires the party who wishes to playback testimony at trial to provide the proper playback equipment.²²⁷ South Carolina also has the most extensive provisions regarding the allocation of the costs of recording. It states:

The cost of videotape, as a material, shall be borne by the party taking the videotape deposition. Where an edited version is required, the cost of videotape, as a material, shall be borne by the party who caused to be recorded testimony or other evidence subsequently determined to be objectionable and ordered stricken from the tape by the court. The cost of recording the deposition testimony on videotape shall be borne by the party taking videotape deposition. The cost of producing an edited version of the videotape recording for use at trial shall be borne by the party who caused to be recorded testimony or other evidence subsequently determined to be objectionable and ordered stricken from the tape by the court.²²⁸

For depositions recorded nonstenographically, Vermont allows an attorney to swear the deponent, provided the attorney is a notary.²²⁹

7. *Miscellaneous Deposition Provisions*

Finally, a handful of specific, unrelated provisions collectively deserve mention as possible sources of changes to California deposition law. Many states have provisions regarding appropriate deposition officers that differ markedly from California’s general provision. In California, a deposition must simply be supervised by an officer “who is authorized to administer an oath.”²³⁰ This is often a notary public.²³¹ Further, California disqualifies anyone “financially interested in the action” and “a relative or employee of any attorney of any of the parties[,] or of any of the parties.”²³²

In contrast, other states specifically enumerate certain individuals who can preside over a deposition. Two states address depositions of members of the armed forces of the United States. Idaho allows any military officer to preside over the

225. *Id.*

226. *Id.*

227. S.C. R. CIV. P. 30(h)(10).

228. *Id.* 30(h)(ii).

229. VT. R. CIV. P. 30(b)(4)(A).

230. CAL. CIV. PROC. CODE § 2025(k) (West 1998 & Supp. 2001). Additional provisions address the appropriate officers for depositions taken in other U.S. jurisdictions or nations. *Id.* §§ 2026(c), 2027(c).

231. HOGAN & WEBER, *supra* note 41, at § 2.21.

232. CAL. CIV. PROC. CODE § 2025(k)(1) (West 1998 & Supp. 2001).

deposition of both a member of the military and the family of such members.²³³ Similarly, Iowa allows the taking of a deposition of members of the armed forces before their commissioned officer or any judge advocate general's officer.²³⁴ Kentucky and Missouri add city mayors to the list of approved deposition officers.²³⁵

In addition, several states have different approaches to the list of individuals presumptively disqualified from serving as deposition officers. Louisiana precludes the use of any court reporter with whom a party has a contract to provide reporting services.²³⁶ North Carolina echoes this provision, precluding the use, absent agreement, of any individual or firm that "is under a blanket contract for the court reporting services with an attorney of the parties, party to the action, or party having a financial interest in the action."²³⁷ In addition, it disqualifies anyone from serving as a deposition officer who is "under any contractual agreement that requires transmission of the original transcript [before it has been] certified."²³⁸ South Dakota also has a provision disqualifying persons working under certain standing contracts for court reporting services from serving as deposition officers.²³⁹ New Hampshire requires the deposition notice to include the name of the deposition officer.²⁴⁰ Puerto Rico, New York and Tennessee define disqualified "relatives" more specifically than California, by reference to "degrees of consanguinity."²⁴¹ Puerto Rico also excuses deposition officers from staying in attendance after the deponent has been sworn.²⁴²

Several states chart a different path regarding changes in the deposition transcript. For thirty days after the taking of a deposition, California allows the deponent to "change the form or substance of the answer to a question"²⁴³

233. IDAHO R. CIV. P. 28(c).

234. IOWA R. CIV. P. 153(d).

235. KY. R. CIV. P. 28.02; MO. ANN. STAT. § 492.090(2). Missouri also allows the taking of a deposition by anyone having a seal or the chief officer of a town. *Id.*

236. LA. CODE CIV. PROC. ANN. art. 1434A(2) (West 2001).

237. N.C. R. CIV. P. 28(c)(4). The rule further defines "a blanket contract" as "a contract to perform court reporting services over a fixed period of time or an indefinite period of time, rather than on a case-by-case basis, or any other contractual agreement which compels the, guarantees, regulates, or controls the use of particular court reporting services in future cases." *Id.*

238. *Id.*

239. S.D. Codified Laws § 15-16-28(c) (Michie 2000). It defines "employee of [an] attorney or counsel" to include "a person who has a contractual relationship with a person or entity interested in the outcome of the litigation, including anyone who may ultimately be responsible for payment to provide reporting or other court services, and a person who is employed part-time or full-time under contract or otherwise by a person who has a contractual relationship with a party to provide reporting or other court services." *Id.* It excludes "[c]ontracts for court reporting services for federal, state, or local governments and subdivisions" *Id.* It expressly does not prohibit "[n]egotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis" *Id.*

240. N.H. SUPER. CT. R. 39.

241. P.R. R. CIV. P. 25.3 (4th degree of consanguinity); N.Y. C.P.L.R. 3113 (McKinney 2001) (disqualified if would be disqualified to act as a juror because of consanguinity to a party); TENN. R. CIV. P. 28.03 (6th degree of consanguinity (civil)).

242. P.R. R. CIV. P. 25.1.

243. CAL. CIV. PROC. CODE § 2025(q)(1) (West 1998 & Supp. 2001).

Similar provisions apply in courts that follow the federal rules.²⁴⁴ In contrast, Illinois only allows corrections for “errors.”²⁴⁵ Even more stringently, New Hampshire, New Mexico and North Dakota prohibit any changes or alterations, but allow the deponent to set forth alleged errors in a separate document.²⁴⁶ New York refuses to permit claims of transcription errors unless a motion to suppress is made with reasonable promptness.²⁴⁷

Unlike California, Arkansas has eliminated the requirement that the deposition record be formally “sealed.” In Arkansas, a deposition need merely be “secured.”²⁴⁸ North Dakota allows a deposition officer to use a traceable commercial service to send a deposition transcript.²⁴⁹ Similarly, Ohio expressly authorizes transfer by express mail.²⁵⁰

Section 2025(u) of the California Code of Civil Procedure does contain extensive provisions regarding the use of deposition testimony at trial. Nevertheless, several provisions from other states are worth noting. Colorado encourages the parties to use summaries of testimony rather than reading verbatim from the transcript at trial.²⁵¹ Georgia requires the use of nonstenographic deposition recordings at trial, other than for cross-examination, if they exist.²⁵² Idaho clarifies that a party wishing to introduce a deposition transcript at trial or in support of a motion need not produce the original unless there is a genuine question about its authenticity.²⁵³ Ohio requires that any deposition that will be used at trial be filed at least one day before the start of trial.²⁵⁴ Kentucky provides an extensive list of persons whose deposition may be introduced at trial without a showing of their unavailability. The list includes state constitutional officers, postmasters, bank officers or clerks, doctors, lawyers, prison guards, and members of the armed forces.²⁵⁵ Finally, Michigan has an express “harmless error” provision regarding the admissibility of deposition provisions. Errors in the taking of depositions, even if not waived, will not restrict the usefulness at trial of the deposition unless the court finds that the deposition has been destroyed or that its use is unfair.²⁵⁶

Rhode Island and Texas have addressed attendance at depositions. Rhode Island prohibits anyone from being excluded from a deposition without a prior court order

244. *E.g.*, FED. R. CIV. P. 30(e). These courts require the deponent to state the reasons for any such changes.
Id.

245. ILL. SUP. CT. R. 207(a).

246. N.H. SUPER CT. R. 41; N.M. DIST. CT. R. CIV. P. 30(e); N.D. R. CIV. P. 30(e).

247. N.Y. C.P.L.R. 3116.

248. ARK. R. CIV. P. 30(f)(1).

249. N.D. R. CIV. P. 30(f)(1).

250. OHIO R. CIV. P. 30(F)(1).

251. COLO. R. CIV. P. 32(a)(5).

252. GA. R. CIV. P. 30(g). *See also* KAN. STAT. ANN. § 60-232(c) (2000).

253. IDAHO R. CIV. P. 30(f)(4)(B).

254. OHIO R. CIV. P. 30(A).

255. KY. R. CIV. P. 32.01(c).

256. MICH. CT. R. 2.308(C)(5).

and requires forty-eight hours notice to all parties if persons, other than parties or party representatives, will be attending a deposition.²⁵⁷ Texas, too, requires notice if someone other than the witness, parties, spouses of parties, counsel, counsel's employees or the deposition officer plans to be present at the deposition.²⁵⁸

New York has given organizational deponents an option not available in California and other jurisdictions. In many jurisdictions, as in California, a party seeking to depose an organization has two options. First, it can describe the subject matter about which the deposing party wishes to examine the organization, and allow the organization to choose the appropriate person to be deposed on its behalf. Second, as for any individual, it can simply "name" an individual representative in the deposition notice or subpoena, and depose that individual accordingly.²⁵⁹ In contrast, under New York law, an organization that has been asked to produce a specific officer, director, member or employee for deposition can give ten days notice that it plans to produce someone else to be deposed on the matter.²⁶⁰

The substantial costs of taking depositions has prompted several jurisdictions to develop specific provisions addressing the payment, allocation and award of deposition expenses as costs. Louisiana requires the parties to state on the record which of them will be paying for the costs.²⁶¹ Iowa requires the deposing party to pay the costs of any depositions taken and prohibits the use of deposition testimony at trial until such costs have been paid.²⁶² In addition, Iowa only allows the court to tax as costs those portions of the depositions that were necessarily incurred for testimony admitted at trial.²⁶³ Michigan and North Dakota allow the court to apportion the transcription costs for nonstenographic depositions.²⁶⁴ Maine adds to the illustrative list of protective orders both a provision apportioning the costs of travel to a deposition as well as one that requires a witness under the control of a party to be brought into the state for deposition.²⁶⁵

Illinois has the most extensive provisions on deposition costs. Under the Illinois provision: (1) the party taking the deposition pays the fees for the witness, the officer, and the recorder; (2) the party at whose instance the deposition is transcribed pays the transcription costs; (3) if the scope of examination by any party exceeds the scope of the party at whose instance the deposition was taken, the court will apportion the excess to the additional party.²⁶⁶

257. R.I. SUPER. CT. R. CIV. P. 30(c).

258. TEX. R. CIV. P. 199.5(a)(3).

259. *E.g.*, CAL. CIV. PROC. CODE 2025(d)(6) (West 1998 & Supp. 2001); FED. R. CIV. P. 30(b)(6).

260. N.Y. C.P.L.R. 3106.

261. LA. CODE CIV. PROC. ANN. art. 1446(B)(4) (West 2001).

262. IOWA R. CIV. P. 157.

263. *Id.*

264. MICH. CT. R. 2.306(C)(3)(c) (if transcript used at trial); N.D. R. CIV. P. 30(c) (any transcript).

265. ME. R. CIV. P. 26(c)(10).

266. ILL. SUP. CT. R. 208(a).

Oklahoma places all of the burden of deposition costs, including the preparation of transcripts or copies of videotapes for adverse parties, on the noticing party. All of these costs, however, can ultimately be taxed.²⁶⁷

Finally, four states have provisions addressing attendance at written depositions. California, however, has no provisions addressing the physical attendance of parties or their attorneys at the site where the deposition officer will be propounding the written questions. Alabama and Iowa expressly allow any party to give notice that it intends to show up in person and cross-examine the deponent. Upon receipt of such notice, the examining party may choose to show up as well.²⁶⁸ In contrast, Kentucky expressly precludes any party or party's attorney from attending written depositions in person.²⁶⁹

B. Interrogatory Practice

Unlike the extensive provisions governing deposition practice, fewer potential innovations can be found in the survey of provisions governing interrogatories. Nevertheless, the important differences between California and other state and federal courts regarding the presumptive numbers of interrogatories that may be asked provide an opportunity for California to reexamine its limits. In addition, there are a handful of miscellaneous provisions worth noting.

1. Presumptive Numerical Limits

California allows any party to send any other party an unlimited number of "form" interrogatories and thirty-five "specially prepared" interrogatories.²⁷⁰ A party wishing to send more than the thirty-five "specially prepared" interrogatories need only attach a "declaration for additional discovery."²⁷¹ In such a declaration, the party must simply state that the complexity or quantity of issues in the case, or the expenses of obtaining the information through alternative means, justifies the additional discovery.²⁷² The burden is on the recipient to challenge the sufficiency of the affidavit, although the burden remains on the propounding party to justify the number.²⁷³

At the time of its enactment, section 2030(c) of the California Code of Civil Procedure was on the leading edge of attempts to rein in abusive interrogatory practice. Nearly fifteen years later, however, the provision is easily the weakest of

267. OKLA. STAT. tit. 12, § 3230(J) (2000).

268. ALA. R. CIV. P. 31(a); IOWA R. CIV. P. 150(c).

269. KY. R. CIV. P. 31.02.

270. CAL. CIV. PROC. CODE § 2030(c)(1)-(2) (West 1998). In addition, a party may send supplemental interrogatories up to three more times which do not count against the 35 special interrogatory limit. *Id.* § 2030(c)(8).

271. *Id.*

272. *Id.*

273. *Id.* § 2030(c)(2)(C).

the efforts to end interrogatory abuse. It finds closest company with the likes of Georgia, Minnesota, Montana, Nebraska, New Hampshire and South Carolina. Each of these five states allow a total of fifty interrogatories.²⁷⁴ At the tougher extreme lie the federal courts and two companion states. Since 1993, the federal courts have limited interrogatories to twenty-five total. A party who wishes to exceed that number must obtain permission from either opposing counsel or the court.²⁷⁵ Eleven other states are only slightly more generous: Colorado, Florida, Illinois, Iowa, Maine, Massachusetts, Mississippi, Oklahoma, Rhode Island, Virginia and Wyoming allow a total of thirty interrogatories without a stipulation or court order.²⁷⁶ Florida and Colorado include official form interrogatories in their limits, although Colorado excludes subparts of official form interrogatories from being considered separate interrogatories for purposes of its limit.²⁷⁷ Florida, however, requires the use of official form interrogatories if they have been developed for the type of action involved.²⁷⁸ Kentucky has a similar limit of thirty, but excludes interrogatories seeking names and addresses of witnesses from its count.²⁷⁹ Next lies Louisiana, with a limit of thirty-five.²⁸⁰ One tick higher are Arizona, the District of Columbia, Idaho and Nevada, each of which permit forty interrogatories.²⁸¹ Arizona includes official form interrogatories in this limit, although, like Colorado, does not count individual subparts of such interrogatories as separate items.²⁸² Finally, two states place extremely tight restrictions in certain kinds of cases. In certain personal injury cases in Connecticut, only official form interrogatories are permitted absent stipulation or court order.²⁸³ Similarly, in New Jersey, for specified types of cases with official form interrogatories, only ten specially prepared interrogatories may be used.²⁸⁴ Both of these last two jurisdictions allow a simple demand for answers

274. MINN. R. CIV. P. 33.01(a); MONT. R. CIV. P. 33(a); NEB. R. DISCOVERY 33(a); N.H. SUPER. CT. R. 36; S.C. R. CIV. P. 33(b)(8) South Carolina also allows seven official form interrogatories without counting towards the fifty interrogatory limit. *Id.*

275. FED. R. CIV. P. 33(a).

276. COLO. R. CIV. P. 26(b)(2); FLA. R. CIV. P. 1.340(a); ILL. SUP. CT. R. 213(c); IOWA R. CIV. P. 126(a); ME. R. CIV. P. 33(a); MASS. R. CIV. P. 33(a); MISS. R. CIV. P. 33(a); OKLA. STAT. tit.12, § 3233(A) (2000); R.I. SUPER. CT. R. CIV. P. 33(b); VA. SUP. CT. R. 4:8(g); WYO. R. CIV. P. 33(a).

277. COLO. R. CIV. P. 26(b)(2); FLA. R. CIV. P. 1.340(a).

278. FLA. R. CIV. P. 1.340(a).

279. KY. R. CIV. P. 33.01(3).

280. LA. CODE CIV. PROC. ANN. art. 1457(B) (West 2000).

281. ARIZ. R. CIV. P. 33.1(a); D.C. R. Civ. Proc. 33(a); IDAHO R. CIV. P. 33(a)(3); NEV. R. CIV. P. 33(d).

282. ARIZ. R. CIV. P. 33.1(a).

283. CONN. R. SUPER. CT. CIV. 13-6(c) The specified classes of cases are: "all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property . . ." *Id.*

284. N.J. R. SUPER. CT. CIV. 4:17-1(b)(1). The specified classes of cases are: "all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim . . ." *Id.*

Cf. ARIZ. R. CIV. P. 26.2(b) (limiting parties, in medical malpractice actions, to ten "non-uniform" interrogatories).

to the form interrogatories in lieu of formal service of copies of the interrogatories themselves.²⁸⁵

2. *Other Potential Innovations*

Beyond the provisions addressing the presumptive numerical limits, the jurisdictional survey produced only a handful of additional areas for possible innovation. New Jersey requires a responding party who is not answering from personal knowledge to indicate where it got the information from.²⁸⁶ It also allows service of a single copy of answers on parties represented by the same attorney.²⁸⁷ New Jersey also expressly requires a responding party to answer all form interrogatories unless they call for privileged information.²⁸⁸ North Dakota excuses responding parties from answering “an interrogatory that is repetitive of any interrogatory it has already answered.”²⁸⁹ Illinois sets out a general requirement that propounders of interrogatories “restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.”²⁹⁰ It also allows a responding party to make its business records available in lieu of answering interrogatories without regard to the relative burdens on the parties of combing through the records.²⁹¹ Maryland’s Discovery Guidelines detail requirements for making objections.²⁹² In specified

285. CONN. R. SUPER. CT. CIV. 13-6(c) (sufficient to send “notice” referring to individual official form interrogatories by number); N.J. R. SUPER. CT. CIV. 4:17-1(b)(2).

286. N.J. R. SUPER. CT. CIV. 4:18-4.

287. *Id.*

288. *Id.* 4:17-1(b)(3).

289. N.D. R. CIV. P. 33(b)(7).

290. ILL. SUP. CT. R. 213(b).

291. *Id.* 213(d).

292. MD. R. DISCOVERY 5. The guideline states:

- (a) No part of an interrogatory should be left unanswered merely because an objection is interposed to another part of an interrogatory.
- (b) The practice of objecting to an interrogatory or a part thereof while simultaneously providing partial or incomplete answer to the objectionable part is presumptively improper.
- (c) Where a claim of privilege is asserted in objecting to any interrogatory or part thereof and information is not provided on the basis of such assertion: (1) The party asserting the privilege shall be in the objection to the interrogatory or part thereof and information is not provided on the basis of such assertion: (2) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information: (i) For oral communications: (a) the name of the person making the communication and the names of persons present while the communication was made, where not apparent the relationship of the persons present to the person making communication: (b) the date and place of the communication and (c) the general subject matter of the communication. (ii) For documents: (a) the type of documents; (b) general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, and any other recipient to each other. (3) The party

cases, New York bars simultaneous interrogatory and deposition discovery from the same party.²⁹³ Finally, Florida expressly clarifies that interrogatory answers do not bind coparties.²⁹⁴

C. Inspection Demands

The multi-jurisdictional survey developed only a handful of possible inspection demand innovations. Neither California nor the federal courts currently place any presumptive numerical limits on inspection demands. Three states, however, do place such limits. Arizona allows only ten demands.²⁹⁵ Colorado doubles the presumptive limit to twenty.²⁹⁶ Connecticut has no general limits, but, as it does for interrogatories, in specified classes of cases, it restricts inspection demands to official form demands.²⁹⁷

Three states have potentially useful provisions addressing the service of inspection demands upon nonparties. In such cases, California authorizes a “records-only” deposition subpoena.²⁹⁸ Under the Michigan procedure, a demand can be served without the need of a subpoena.²⁹⁹ In addition, Michigan, like New York,³⁰⁰ expressly provides for the court to order that the demanding party pay the costs of compliance with the demand by the responding party.³⁰¹ Under the Indiana procedure, a subpoena must be served on the nonparty.³⁰² But Indiana adds two wrinkles to the procedure. First, like Pennsylvania, it requires service of the intended nonparty demand on all *parties* fifteen days before service on the nonparty.³⁰³ Second, it requires the demand to state that the nonparty “is entitled to security

seeking disclosure of the information withheld may, for the purpose of determining whether to move to compel disclosure, notice the depositions of appropriate witnesses for the limited purpose of establishing other relevant information concerning the assertion of privilege including (i) the applicability of the privilege asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege. The party seeking disclosure may apply to the court for leave to file special interrogatories or redepose a particular witness if necessary.

293. N.Y. C.P.L.R. 3130 (Consol. 2001).

294. FLA. R. CIV. P. 1.340(d).

295. ARIZ. R. CIV. P. 34(a).

296. COLO. R. CIV. P. 26(b)(2).

297. CONN. R. SUPER. CT. (Civil) § 13-9. The specified cases include: “all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property.”

298. CAL. CIV. PROC. CODE § 2025(c) (West 1998 & Supp. 2001).

299. MICH. R. CIV. P. 2.310(D). The demand, however, must be served in the same manner as a subpoena would be served. *See* MICH. R. CIV. P. 2310(d)(2) (stating that the request must be served on the person to whom it is directed, and a copy must be served on the other parties).

300. N.Y. C.P.L.R. 3111 (Consol. 2001).

301. MICH. R. CIV. P. 2.310(D)(5).

302. IND. R. CIV. P. 34(c).

303. *Id.*; PA. R. CIV. P. 4009.21.

against damages or payment of damages resulting from such request.”³⁰⁴ If the nonparty moves to quash service of the demand, the court may condition relief “on the prepayment of damages . . . or require an adequate surety bond or other indemnity conditioned against such damages.”³⁰⁵

California and the federal courts allow a responding party to produce the demanded materials either as kept in the ordinary course of business or in separate categories that respond to the categories of the demand.³⁰⁶ Arkansas, however, only allows a responding party to produce documents “as kept in the ordinary course of business” if it is just as easy for the demanding party to find the responsive materials as it is for the responding party.³⁰⁷

Indiana makes an express exception to the best evidence rule for documents that are not produced in response to inspection demands.³⁰⁸ Under this exception, a party who has a document in its possession, custody or control, but failed to produce it in response to a proper inspection demand, may not raise the “best evidence rule” at trial.³⁰⁹

Texas, Nevada and Illinois address the costs of producing documents. Texas codifies the traditional but rarely-codified rule that the responding party pays for the costs of finding the materials demanded, while the demanding party pays for the costs of inspecting, copying or testing the materials produced.³¹⁰ Nevada expressly requires the party who wants copying to pay for it. It authorizes the court, however, to require the responding party to actually do the copying.³¹¹ Similarly, for “records only” subpoenas, Illinois clarifies that the requesting party, not the “deponent,” pays for any copying charges.³¹²

New Jersey has an interesting provision addressing documents referenced in pleadings. If such documents are neither annexed to the pleading nor quoted verbatim within the pleading, the opposing party has the right to demand a copy of the documents. The pleader must turn over a copy of the referenced materials within five days of the demand.³¹³

Pennsylvania offers parties faced with ambiguous requests two options. They can either produce what they believe the request is seeking, or they can identify the

304. IND. R. CIV. P. 34(c).

305. *Id.*

306. FED. R. CIV. P. 33(b); CAL. CIV. PROC. CODE § 2031(f) (West 1998 & Supp. 2001).

307. ARK. R. CIV. P. 34(b)(3)(B).

308. IND. R. CIV. P. 34(d).

309. *Id.*

310. TEX. R. CIV. P. 196.6. *Cf.* CAL. CIV. PROC. CODE § 2031(g)(1) (West 1998 & Supp. 2001) (demanding party pays for costs of translating databases into a useable format); OKLA. STAT., tit.12, § 3237(c) (requesting party pays the reasonable expense of making property available for inspection; court may tax costs later).

311. NEV. R. CIV. P. 34(d).

312. ILL. SUP. CT. R. 204(a).

313. N.J. CT. R. 4:18-2.

documents that they are not producing and present the reasons why they are not producing them.³¹⁴

Tennessee requires that a party seeking to do destructive testing on an item must move for a court order before conducting those tests.³¹⁵

Finally, Texas makes responses to inspection demands self-authenticating, unless a genuine question exists as to a document's authenticity.³¹⁶ Texas also requires the requesting party to specify the form in which it wants electronic materials produced.³¹⁷

D. Medical Examinations

Pertaining to medical examinations, only four potential innovations were found. The first addresses examinations by stipulation. Section 2032(c) of the California Code of Civil Procedure sets out the procedure for taking a routine physical examination of a plaintiff in a personal injury case. Section 2032(d) addresses all other medical examinations. Section 2032(e) then authorizes parties to make their own agreement regarding medical examinations "in lieu of the procedures and restrictions specified [in the other two sections]"³¹⁸ The line between these three categories of examinations, however, is unclear when an agreement covers only some portions of an examination. In contrast, the federal rules specify that the basic examination provisions control "except to the extent that agreement provides otherwise."³¹⁹ Arizona addresses the circumstances where the parties agree that an examination is necessary but cannot agree on the identity of the examining physician or psychologist. In such cases, the examination may be conducted, after notice, by the physician specified by the party seeking the examination without the prior need for a judicial order.³²⁰ The party unhappy with the selected physician may go to court to obtain an order changing the identity of the examiner.³²¹

The second innovation addresses *ex parte* contacts with physicians. The California discovery statutes are silent regarding *ex parte* contacts between a party and another party's physician. Arkansas and Pennsylvania, however, expressly

314. PA. R. CIV. P. 4009.12(d).

315. TENN. R. CIV. P. 34.01.

316. TEX. R. CIV. P. 193.7.

317. *Id.* 196.4.

318. CAL. CIV. PROC. CODE § 2032(e) (West 1998).

319. FED. R. CIV. P. 35(b)(3).

320. ARIZ. R. CIV. P. 35(c)(1).

321. *Id.* 35(c)(2).

prohibit any such ex parte contacts absent the party's consent.³²² Arkansas' rules state:

Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.³²³

The third medical exam innovation comes from South Carolina. It instructs the court that in setting the conditions for any court-ordered exam, it should give special consideration to the examinee's needs and the examinee's physician's needs, but only reasonable consideration to the examining physician's needs.³²⁴

Finally, Texas clarifies that the party whose condition is in controversy may not comment at trial on the adverse party's failure to request a discovery examination.³²⁵

E. Admission Requests

Two potential admission request innovations were found. The first involves presumptive numerical limits. As with specially prepared interrogatories, absent agreement or an order to the contrary, California currently limits admission requests to thirty-five. Requests for admission of the genuineness of documents do not count towards this limit.³²⁶ Again, like interrogatory practice, to exceed the limit, an attorney in a California action need only attach a "declaration for additional discovery."³²⁷ Most other jurisdictions, including the federal courts, do not place any presumptive limits on admission requests.³²⁸ Compared to seven other states who do impose such limits, however, California's limitations are the second weakest. Colorado and South Carolina are the toughest, limiting admission requests to twenty.³²⁹ Arizona, with twenty-five, and Iowa, Oklahoma and Oregon, with thirty, follow.³³⁰ Only Nevada has a more generous presumptive limit, allowing forty

322. ARK. R. CIV. P. 35(c)(2); PA. R. CIV. P. 4003.6.

323. ARK. R. CIV. P. 35(c)(2).

324. S.C. R. CIV. P. 35(a).

325. TEX. R. CIV. P. 204.3.

326. CAL. CIV. PROC. CODE § 2033(c)(1) (West 1998).

327. *Id.* § 2033(c)(2)(3) (West 1998).

328. *See, e.g.*, FED. R. CIV. P. 36.

329. COLO. R. CIV. P. 26(b)(2); S.C. R. CIV. P. 36(c) (stating requests involving authenticity of documents do not count toward this limit).

330. ARIZ. R. CIV. P. 26(b); IOWA R. CIV. P. 127; OKLA. STAT., tit.12, § 3236; OR. R. 45.

admission requests exclusive of those addressed to the genuineness of documents.³³¹ None of the other four states, however, allow an attorney to exceed the limit simply by attaching a declaration for additional discovery. All require a motion to the court.³³²

The second potential admission request innovation comes from Illinois and Michigan. In both states, a party can send copies of public records to an adversary for review. Under such circumstances, the genuineness of the copies is deemed admitted unless the adversary makes a formal objection.³³³

F. Expert Witness Information

The survey uncovered about a half-dozen potential innovations in discovery of expert witnesses' identity, background, prior reports, and expected testimony. California currently uses the "exchange of expert witness lists" procedure to address these matters.³³⁴ This exchange occurs only if demanded by some party to the case, but if any party demands it, then all parties must comply. Following the exchange, the experts may be deposed.³³⁵ For the most part, Nevada has adopted the "exchange" process as well.³³⁶

Other courts, however, have taken a different path. Since 1993, the federal courts have required automatic disclosure of testifying expert witness information.³³⁷ Automatic disclosure has been followed not only by the state courts who have generally adopted the federal disclosure requirements, but by a couple of others as well.³³⁸ For its part, Colorado has modified the federal disclosure requirement by sequencing expert disclosure; rather than the simultaneous disclosure contemplated by the federal courts, Colorado has the plaintiff disclose first, the defendant second, and rebuttal experts third.³³⁹

In addition to the disclosure provisions, several states have enacted some other general provisions that may be worth examining. Discovery of experts has traditionally been wrapped up in the law governing an attorney's work product. The work product doctrine attempts to give attorneys the freedom to examine both the positive and the negative aspects of their cases. Since, in many cases, consultation also with experts is essential to this examination, a party who had to first pay for and

331. NEV. R. CIV. P. 36(c).

332. COLO. R. CIV. P. 26(b)(2); ARIZ. R. CIV. P. 26(b); IOWA R. CIV. P. 127; NEV. R. CIV. P. 36(c).

333. ILL. SUP. CT. R. 216(d); MICH. CT. R. 2.312(E).

334. CAL. CIV. PROC. CODE § 2034(a)(1) (West 1998).

335. *Id.* § 2034(i).

336. NEV. R. CIV. P. 26(b)(5). *See also* N.Y. C.P.L.R. 3101 (offer to disclose names of medical experts in medical malpractice cases).

337. FED. R. CIV. P. 26(a)(2)(c). The date of the disclosure is either set by the parties, by the court, or occurs no later than ninety days prior to trial. *Id.*

338. *See, e.g.*, CONN. R. SUPER. CT. (Civil) § 13-4, KAN. STAT. ANN. § 60-226(b) (2001) (requiring automatic disclosure of discovery).

339. COLO. CT. R. CIV. P. 26(a)(2)(C).

then turn over, through discovery, the results of such expensive consultations would have much less incentive to do so. Once the decision has been made to present an expert's testimony at trial, however, fairness to the adversary tips the balance in favor of at least some exchange of information about the expert and his or her expected testimony. Accordingly, most jurisdictions have distinguished between experts who have been retained (or who are employed by a party as an in-house expert) but who are not planned to be called at trial and those who have been retained (or employed) and are expected to be called.

This basic dichotomy, however, oversimplifies the possible classifications of experts. For example, many jurisdictions, including California, have implicitly recognized that some experts, notably treating physicians, may testify as experts even though they have not been retained or employed by any party to provide such testimony.³⁴⁰ Several states are more direct in their recognition of this distinction among classes of testifying experts. For example, Colorado and Missouri expressly recognize that experts may not necessarily be either employed or retained by the party intending to call them at trial; both specify discovery obligations for such experts.³⁴¹ Illinois reaches a similar result simply by requiring that the identity, background and opinions of all "opinion" witnesses, whether retained or not, must be disclosed in answers to interrogatories.³⁴² Iowa expressly excludes percipient witness experts from any limitations on discovery of experts.³⁴³ And South Carolina expressly acknowledges that parties have no duty to produce information developed from an informally consulted expert.³⁴⁴

Although the use of experts in a case often adds greatly to litigation expenses, especially when the testimony of dueling experts turns a case into a battle of the experts, courts have shown no real interest in "arms control." Thus, virtually no presumptive numerical limits apply to the use of experts. The two exceptions to date

340. *E.g.*, CAL. CIV. PROC. CODE §§ 2034(a)(1) & (2) (West 1998). *See generally* HOGAN & WEBER, *supra* note 41, at § 10.1; *see also* notes 18-24 and accompanying text.

341. COLO. R. CIV. P. 26(a)(2)(B); MISSOURI R. CIV. P. 56.01(b)(5). Under the Colorado provision, the two classes are: (1) "a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony;" and (2) any other "witness who may be called to provide expert testimony." *Id.* The disclosure duties are most extensive for the first class of experts.

The Missouri provision also distinguishes between retained or employed and non-retained or employed testifying expert witnesses. It states:

A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial who may provide expert witness opinion testimony by providing the expert's name, address, and field of expertise. For the purpose of this Rule 56.01(b)(5), an expert witness is a witness qualified as an expert by knowledge, experience, training, or education giving testimony relative to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence. Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses. *Id.*

342. ILL. SUP. CT. R. 213(g).

343. IOWA R. CIV. P. 125(A)(1)(c).

344. S.C. R. CIV. P. 26(b)(4)(b).

are Alaska and Arizona. Alaska limits experts to three per side.³⁴⁵ Arizona has a presumptive limit of one independent expert per side.³⁴⁶

During the exchange of expert witness information, California requires the attorney for a party to sign a declaration describing the background and expected testimony of retained experts.³⁴⁷ Although its overall practices are different—using interrogatories rather than exchanged declarations—Iowa requires the retained, testifying expert to personally sign the document containing the information.³⁴⁸ Utah, however, excuses the testifying expert from having to author the report regarding his or her expected testimony.³⁴⁹ New Jersey takes a slightly different tack. It requires the attorney for any party who sends copies of expert reports in response to a discovery request to certify that there are no other relevant reports by that expert available.³⁵⁰

A testifying expert's fees are usually a subject of interest to other parties. California requires the parties to an exchange to include in the attorney's declaration "a statement of the expert's hourly and daily fee for providing deposition testimony" and for consulting with the retaining attorney.³⁵¹ Additional information about the expert's prior testimony and relevant fees can be developed if, as usually occurs, the expert is deposed after the information exchange. Florida, however, allows extensive discovery by interrogatories of a testifying expert's prior testimony and financial arrangements with retaining counsel.³⁵² If an expert is deposed, Texas requires the

345. ALASKA R. CIV. P. 26(a)(2)(D).

346. ARIZ. R. CIV. P. 26(b)(4)(D). If the parties on a side cannot agree, then either the court designates the expert, or, if good cause is shown, may allow more than one expert. *Id.*

347. CAL. CIV. PROC. CODE § 2034(f)(2) (West 1998).

348. IOWA R. CIV. P. 122(c)(1); OR. R. 4003.5.

349. UTAH R. CIV. P. 26(a)(3).

350. N.J. CT. R. 4:18-4.

351. CAL. CIV. PROC. CODE § 2034(f)(2)(E) (West 1998).

352. FLA. R. CIV. P. 1.280(b)(4)(A)(iii)(1)-(3). The rule provides:

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

deposing party to pay fees for the expert's time spent preparing for and giving the deposition, as well as reviewing and correcting the transcript.³⁵³

Two other provisions are worth noting. Iowa and Pennsylvania address the substance of an expert's trial testimony. They preclude trial testimony that is different from the expert's deposition testimony, but permit the expert to testify about matters that were not inquired into during discovery.³⁵⁴ Finally, absent the opposing party's consent, Hawaii expressly precludes *ex parte* contacts with an opposing party's retained expert.³⁵⁵

III. CONCLUSION

In conclusion, should the California Law Revision Commission decide to take up discovery reform as one of its topics, it will find plenty of possible innovations to consider. This report has made no attempt to make specific recommendations regarding specific innovations. It also has not fully evaluated the possible innovations to determine how much, if at all, they might further the goals of discovery reform. It is simply a starting point for a much more detailed conversation.

Should the Commission decide to initiate that conversation, the author recommends that it bring into the dialog as many of the different voices on discovery reform as possible. Many of the possibilities catalogued here, of course, will be quite controversial among the many parties interested in the civil litigation process. A collaborative approach to discovery reform, facilitated by the Commission, among the various stakeholders offers the greatest potential for long-term acceptance by both the general public and the legal community.³⁵⁶

353. TEX. R. CIV. P. 195.7.

354. IOWA R. CIV. P. 125(d); PA. R. CIV. P. 4003.5.

355. HAW. R. CIV. P. 26(b)(4)(A)(iii); PA. R. CIV. P. 4003.6 (health care experts).

356. The author, an Associate of the California Center for Public Dispute Resolution, a joint project of California State University-Sacramento and the University of the Pacific, McGeorge School of Law, would be happy to discuss with the Commission the feasibility and possible design of such a collaborative.