

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Civil Discovery: Miscellaneous Issues

September 2005

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 31, 2006.****

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission solicits comments on the procedural aspects of writ review of a pretrial ruling in a case that is coordinated or consolidated with other cases. Specifically, the Commission is interested in whether that procedure is satisfactory, what changes (if any) should be made in the procedure and why, and what procedural approaches are used in other jurisdictions. The Commission does not make a specific proposal on this topic at this time.

The Commission also proposes the following improvements in California's civil discovery statutes:

- Nonsubstantive revisions of the provisions governing service of a response to interrogatories (Code Civ. Proc. § 2030.260) and service of a response to an inspection demand (Code Civ. Proc. § 2031.260) to improve clarity.
- Clarification and refinement of the rules governing the procedure for deposing a witness in this state for purposes of a proceeding pending in another jurisdiction (Code Civ. Proc. § 2029.010).

The Commission solicits comments on these proposed reforms.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

## CIVIL DISCOVERY: MISCELLANEOUS ISSUES

1 The Law Revision Commission is engaged in a study of civil discovery and has  
2 issued several recommendations on that topic.<sup>1</sup> In this tentative recommendation,  
3 the Commission solicits comments on:

- 4 (1) The procedural aspects of writ review of a pretrial ruling in a case that is  
5 coordinated or consolidated with other cases.
- 6 (2) A proposal to amend the provisions governing service of a response to  
7 interrogatories and service of a response to an inspection demand to improve  
8 clarity without making any substantive change.
- 9 (3) A proposal to revise the law to provide clear guidance on the procedure that  
10 litigants, courts, and witnesses are to follow relating to a deposition in  
11 California for purposes of an out-of-state proceeding.

12 These matters are explained below.

13 The Commission's work on civil discovery is continuing and the Commission  
14 may propose further reforms in the future. The Commission encourages interested  
15 persons to identify other matters in need of reform.

### 16 **Writ Review of a Pretrial Ruling in a Case Coordinated or Consolidated with Other Cases**

17 Civil cases that share a common question of law or fact are sometimes  
18 coordinated<sup>2</sup> or consolidated<sup>3</sup> to facilitate pretrial preparation or trial.<sup>4</sup> On  
19 occasion, a court may issue a pretrial ruling in a case that is coordinated or  
20 consolidated with other cases, and a litigant may petition an appellate court for an

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

2. For provisions governing coordination, see Code Civ. Proc. §§ 404-404.9; Cal. R. Ct. 1500-1550, 1800-1830. (Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.) Under Section 404, a party may petition for coordination when complex civil cases sharing a common question of law or fact are pending in different courts. For factors relevant in ruling on a petition for coordination, see Section 404.1. For what constitutes a complex case, see Cal. R. Ct. 1800. For some recent examples of coordinated cases, see *Artiglio v. Corning, Inc.*, 18 Cal. 4th 604, 957 P.2d 1313, 76 Cal. Rptr. 2d 479 (1998) (coordination of product liability lawsuits against Dow Chemical and Dow Corning based on silicone breast implants); *Doe 1 v. Superior Court*, 132 Cal. App. 4th 1160, 34 Cal. Rptr. 3d 248 (2005) (coordination of nearly 500 lawsuits against Roman Catholic Bishop of Los Angeles for childhood sexual molestation by priest); *Morson v. Superior Court*, 90 Cal. App. 4th 775, 109 Cal. Rptr. 2d 343 (2001) (coordination of product liability lawsuits against manufacturer of products containing latex).

3. For provisions governing consolidation, see Section 1048; Cal. R. Ct. 367. Cases can be consolidated only if they are pending in the same court. See Section 1048. If a case is noncomplex, however, it can be transferred to another court for consolidation with a case sharing a common question of law or fact. See Section 403; Cal. R. Ct. 1500.

4. A third possibility is a class action. See Code Civ. Proc. § 382; Cal. R. Ct. 1850-1861.

1 extraordinary writ to overturn that ruling.<sup>5</sup> The Law Revision Commission is  
2 exploring the procedural aspects of that situation.

3 Specifically, the Commission is interested in whether the existing procedure for  
4 handling this type of writ petition is satisfactory, not only from the standpoint of  
5 the parties to the writ proceeding but also from the perspective of other persons  
6 handling, involved in, or otherwise affected by the writ proceeding or the  
7 coordinated or consolidated cases. The Commission solicits comments that shed  
8 light on this point.

9 In particular, the Commission solicits comments that describe one or more  
10 experiences with writ review of a pretrial ruling in a case that was coordinated or  
11 consolidated with other cases. Was the procedure (as opposed to the substantive  
12 result of the writ proceeding) satisfactory, unsatisfactory, or otherwise? Why? If  
13 the procedure was unsatisfactory in some respect, how could the procedure be  
14 improved? Are there any approaches used in other jurisdictions that might serve as  
15 a model for reforming the California approach to this procedural point?

16 At this stage of its study, the Commission is merely gathering information on  
17 these matters and is not proposing any specific reform. If the Commission receives  
18 comments indicating that a statutory reform is warranted, the Commission will  
19 develop a legislative proposal and circulate it for comment before issuing a final  
20 recommendation to the Legislature and the Governor.

#### 21 **Service of a Response to Interrogatories or a Response to an Inspection Demand**

22 The provisions governing service of a response to interrogatories<sup>6</sup> and service of  
23 a response to an inspection demand<sup>7</sup> establish different rules for unlawful detainer  
24 cases than for other types of cases. As presently written, the rules for unlawful  
25 detainer cases are interspersed with the rules for other cases. To improve clarity,  
26 the Commission proposes to clearly separate the rules for unlawful detainer cases  
27 from the other rules. This would not be a substantive change.

#### 28 **Deposition of a Witness in California for Purposes of a Proceeding Pending in Another** 29 **Jurisdiction**

30 Code of Civil Procedure Section 2029.010<sup>8</sup> governs the procedure for deposing  
31 a witness in California for purposes of a proceeding pending in another  
32 jurisdiction:

33 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or  
34 commission is issued out of any court of record in any other state, territory, or  
35 district of the United States, or in a foreign nation, or whenever, on notice or

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5. See, e.g., *Doe I*, 132 Cal. App. 4th 1160.

6. Section 2030.260.

7. Section 2031.260.

8. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Section 2029 without change.  
Section 2029.010 Comment.

1 agreement, it is required to take the oral or written deposition of a natural person  
2 in California, the deponent may be compelled to appear and testify, and to  
3 produce documents and things, in the same manner, and by the same process as  
4 may be employed for the purpose of taking testimony in actions pending in  
5 California.

6 This provision authorizes a California court to use its subpoena power to compel a  
7 witness in the state to submit to a deposition for purposes of a proceeding pending  
8 elsewhere.<sup>9</sup> Because an out-of-state tribunal may be unable to compel testimony  
9 from a non-party witness located in California, the provision can be critical in  
10 ascertaining the truth and achieving justice in an out-of-state proceeding.<sup>10</sup> The  
11 assistance that the provision extends to other jurisdictions may in turn prompt such  
12 jurisdictions to reciprocate with respect to cases pending in California.<sup>11</sup>

13 The provision does not specify the details of the procedure for issuing a  
14 subpoena to take a deposition in California for purposes of an out-of-state  
15 proceeding. It is not clear from the statutory text what type of paper the deposing  
16 party must submit to the court, whether that party must pay a filing fee and, if so,  
17 what fee applies, whether a hearing before a judge is required, whether an attorney  
18 may issue a subpoena instead of the court, what type of court file the court must  
19 open (if any), and whether it is necessary to retain local counsel.<sup>12</sup> Because the

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

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

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

Other states have not adopted the UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 12.

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

The UIIPA was approved by NCCUSL in 1962 and was intended to supersede the UFDA. It has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821-13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). NCCUSL withdrew the UIIPA in 1977. See NCCUSL, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its 105th Year, Table IV, at 578

1 provision applies to a “natural person,” it is also questionable whether an  
2 organization located in California can be deposed for purposes of an out-of-state  
3 proceeding. Further, the statute does not make clear how to seek relief when a  
4 dispute arises in a deposition taken in California for purposes of an out-of-state  
5 proceeding. The proper enforcement procedure is particularly uncertain when a  
6 deposition is taken on notice or agreement without issuance of a California  
7 subpoena.

8 Because the statute fails to provide guidance on these points, California courts  
9 vary widely in how they handle such matters.<sup>13</sup> This inconsistent and unpredictable  
10 treatment is unfair. To ensure even-handedness and prevent confusion, the Law  
11 Revision Commission proposes to amend the provision to give additional guidance  
12 as detailed below. The recommended reforms to clarify the process will not only  
13 benefit litigants in out-of-state proceedings, but will also assist California court  
14 personnel, process servers, witnesses, and others affected by application of the  
15 provision.

16 ***Procedure for Seeking and Issuing a Subpoena to Depose a Witness in California for Purposes***  
17 ***of an Out-of-State Proceeding***

18 By its terms, Section 2029.010 does not apply unless (1) a court of another  
19 jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or  
20 commission, or (2) the deposition of a natural person in California is required by  
21 notice or agreement. Presumably, a litigant cannot obtain a subpoena under the  
22 statute without presenting evidence that one of these requirements is satisfied.  
23 Aside from this restriction, it is not clear what a litigant must do to obtain a  
24 subpoena.

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(1996). For this reason, and because it was not widely adopted, Section 3.02 of the UIIPA is of limited value as a model for nationwide uniformity.

Many states have provisions that do not track either the UFDA or UIIPA Section 3.02. There is great variety among these. See Ala. R. Civ. Proc. 28(c); Alaska R. Civ. Proc. 27(c); Ariz. R. Civ. Proc. 30(h); Ark. R. Civ. Proc. 28(c); Conn. Gen. Stat. § 52-155; Conn. R. Superior Ct. Civ. Proc. § 13-28; Del. Code Ann. tit. 10, § 4311; Haw. Rev. Stat. § 624-27; Idaho R. Civ. Proc. 28(e); Ill. Supreme Ct. R. 204(b); Iowa Code § 622.84; Kan. Stat. Ann. § 60-228(d); Ky. R. Civ. Proc. 28.03; Me. R. Civ. Proc. 30(h); Minn. R. Civ. Proc. 45.04; Miss. R. Civ. Proc. 45(a)(2); Mont. R. Civ. Proc. 28(d); N.J. R. Civ. Prac. 4:11-4; N.M. Stat. Ann. § 38-8-1; N.C. R. Civ. Proc. 28(d); Okla. Stat. Ann. tit. 12, § 2004.1.A.2; R.I. Gen. Laws § 9-18-11; Vt. Stat. Ann. tit. 12, § 1248; Wash. Superior Ct. Civ. R. 45(d)(4); W. Va. R. Civ. Proc. 28(d); Wisc. Stat. § 887.24; see also Bushnell, *How To Take an Out-of-State Deposition*, 14 Utah Bar J. 28, 28 (2001) (explaining that “each state has its own peculiar requirements”); Mullin, Jr., *supra* note 10, at 52 (noting “the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities”). There does not seem to be any uniformity in how other states handle the matters that require clarification here in California.

13. Email from Tony Klein to Barbara Gaal (July 6, 2005) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov))); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004) (Commission Staff Memorandum 2005-26, Exhibit pp. 4-6 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov))).

1 The requirements reportedly differ from court to court and sometimes even from  
2 clerk to clerk.<sup>14</sup> In some instances, a clerk will issue a subpoena on presentation of  
3 the original or a copy of one of the documents listed in the statute. Other times, a  
4 court may require greater formality, such as the filing of a formal petition or civil  
5 case cover sheet, or attendance at a hearing before a judge or other judicial  
6 officer.<sup>15</sup>

7 The Commission recommends that the procedure be clear, simple, and uniform  
8 from county to county. It does not seem necessary to subject litigants to the  
9 expense of a court hearing, or to consume the attention of a judicial officer, just  
10 for issuance of a subpoena. If a discovery dispute arises, then a judge or other  
11 judicial officer may need to be involved. To obtain a subpoena under the  
12 Commission's proposed amendment of Section 2029.010, however, it would be  
13 sufficient to file a properly completed application with the court clerk and the  
14 clerk would issue the subpoena. The proper court for filing the application would  
15 be the superior court of the county in which the deposition is to be taken.

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

26 To further streamline the process, the proposed law would also direct the  
27 Judicial Council to prepare subpoena forms that include clear instructions for use  
28 in issuance of a subpoena under Section 2029.010. The Judicial Council would  
29 have the option of either creating new forms or modifying existing forms to meet

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14. See sources cited in note 13 *supra*.

15. Like Section 2029.010, many of the comparable statutes of other states are silent regarding the proper procedural approach. The statutes that do address such details vary in the degree of formality they require. In some states, a judge must issue the subpoena, not the court clerk. See, e.g., Mich. R. Civ. Proc. 2.305(E); Ala. R. Civ. Proc. 28(c); Ky. R. Civ. Proc. 28.03; N.C. R. Civ. Proc. 28(d); Wash. Superior Ct. Civ. R. 45(d)(4). Other states use a less complicated approach. See, e.g., Ariz. R. Civ. Proc. 30(h); Mont. R. Civ. Proc. 28(d); Miss. R. Civ. Proc. 45(a)(2); N.D. R. Civ. Proc. 45(a)(3); Utah R. Civ. Proc. 26(h).

16. A true and correct copy of the required document should be sufficient. It would not be appropriate for the application form to require the original or a certified copy, because the original might not be accessible to the litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

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

1 this requirement. Again, use of these forms would be mandatory once they become  
2 available.<sup>18</sup>

3 ***Filing Fee for Issuing a Subpoena to Depose a Witness in California for Purposes of an Out-***  
4 ***of-State Proceeding***

5 There is great disparity in the fees California courts charge for issuance of a  
6 subpoena to take a deposition in the state for purposes of an out-of-state  
7 proceeding. Some courts charge a first appearance fee and at least one court  
8 charges multiple first appearance fees if a litigant seeks more than one subpoena.  
9 Other courts require more modest fees.<sup>19</sup>

10 The Uniform Civil Fees and Standard Fee Schedule Act of 2005<sup>20</sup> does not  
11 expressly address what fee to charge in this situation. The Commission proposes  
12 to amend the law to specify a relatively modest fee of \$20 per subpoena,<sup>21</sup>  
13 comparable to the fee for issuing a commission to take an out-of-state deposition.<sup>22</sup>

14 ***Retention of Local Counsel When Obtaining a Subpoena to Depose a Witness in California for***  
15 ***Purposes of an Out-of-State Proceeding***

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

19 By statute, a person may not practice law in California unless the person is an  
20 active member of the State Bar.<sup>23</sup> A recently adopted rule of court makes clear,  
21 however, that under specified conditions it is permissible for an attorney duly  
22 licensed to practice in another state to perform litigation tasks in California on a  
23 temporary basis for purposes of a proceeding pending in another jurisdiction.<sup>24</sup>

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18. In many respects, the existing subpoena forms are already suitable for use when a person seeks to depose a California witness for purposes of an out-of-state proceeding. But portions of those forms are not. For instance, it is unclear what caption and case number to include, and some of the statutory references in some of the forms are plainly inapplicable to a deposition for purposes of an out-of-state proceeding (e.g., the form Deposition Subpoena for Personal Appearance includes a box for indicating that “This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).”) Although the necessary adjustments may be minor, it would be beneficial to have the Judicial Council review the subpoena forms with Section 2029.010 in mind.

19. Email from Tony Klein to Barbara Gaal (July 6, 2005) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov))).

20. 2005 Cal. Stat. ch. 75.

21. See proposed Gov’t Code § 70626(b)(6) *infra*.

22. Gov’t Code § 70626(b)(5).

23. Bus. & Prof. Code § 6125.

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



1 The drafters of this rule specifically considered the situation in which an out-of-  
2 state attorney deposes a witness in California for purposes of an out-of-state  
3 proceeding.<sup>25</sup> Thus, if a party is represented by an out-of-state attorney in an out-  
4 of-state proceeding under the conditions specified in the rule, the party does not  
5 have to retain local counsel to be able to depose a witness in California. Further, if  
6 a party is self-represented in an out-of-state proceeding, the party does not have to  
7 retain local counsel to be able to depose a witness in California.<sup>26</sup>

8 Because these matters are already governed by other law, there is no need to  
9 address them in Section 2029.010. To assist persons in using the statute, however,  
10 the Commission’s proposed Comment would refer to the relevant authorities.<sup>27</sup>

11 ***Issuance of a Subpoena Under Section 2029.010 By Counsel***

12 For purposes of an action pending in California, an attorney of record may issue  
13 a subpoena instead of having to obtain a subpoena from the court.<sup>28</sup> Section  
14 2029.010 does not specify, however, whether an attorney may issue a subpoena to  
15 depose a witness in California for purposes of a proceeding pending in another  
16 jurisdiction.

17 The Commission proposes to amend the statute to make clear that an active  
18 member of the California Bar retained to represent a party in an out-of-state  
19 proceeding may issue a deposition subpoena or subpoena duces tecum pursuant to  
20 the statute for purposes of that proceeding. The proposed law would not extend  
21 that privilege to an out-of-state attorney. It seems reasonable to require the  
22 involvement of either a California court or a California attorney to issue process  
23 under the authority of the State of California.<sup>29</sup>

24 ***Discovery Dispute***

25 If a dispute arises regarding discovery conducted in California for purposes of a  
26 proceeding pending elsewhere, it may be necessary for the deponent or a party to

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

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

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

27. See proposed Section 2029.010 Comment *infra*.

28. Section 1985(c).

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

1 the proceeding to seek relief in a California court. Section 2029.010 does not  
2 provide guidance on the proper procedure to follow in such circumstances.

3 The proposed law would eliminate that ambiguity. It would require the person  
4 desiring relief to file a petition in the superior court of the county in which the  
5 deposition is being taken. The petitioner would have to pay a first appearance fee,  
6 as would each person who responds to the petition.<sup>30</sup> The amount of these first  
7 appearance fees would be the same as the amount specified in the Government  
8 Code for a proceeding pending in California that is comparable to the out-of-state  
9 proceeding in which the deposition is being taken.<sup>31</sup>

#### 10 *Deposition on Notice or Agreement*

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

18 Often, if a dispute arises regarding a deposition taken in California pursuant to  
19 notice or agreement for purposes of an out-of-state proceeding, the disputants will  
20 be able to seek relief in the out-of-state forum.<sup>32</sup> That frequently will be the most  
21 satisfactory approach, because the out-of-state tribunal is likely to be familiar with  
22 the proceeding, its history, and some if not all of the disputants.

23 In some instances, however, it may be preferable for a deponent or party to the  
24 out-of-state proceeding to seek relief in a California court when a dispute arises  
25 over a deposition taken in California. In particular, the proximity of a California  
26 court to the place of deposition may be a significant factor.<sup>33</sup>

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30. If another dispute later arises relating to a deposition being taken in the same county for purposes of the same out-of-state proceeding, a party or deponent who has already paid a first appearance fee would not have to pay another first appearance fee under Section 2029.010.

31. For example, if the out-of-state proceeding is a probate matter concerning the internal affairs of a trust, the first appearance fees for the petitioner and each responding party generally would be \$320 apiece, which is the “uniform filing fee for each petition concerning the internal affairs of a trust under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9 of the Probate Code.” Gov’t Code § 70652(a), (b).

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

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

It is a burden on the California court system to have to resolve a dispute relating to a deposition in California for purposes of an out-of-state proceeding. But Section 2029.010 reflects a policy decision that

1 When this occurs, it should be possible for the deponent or party to resort to the  
2 California court regardless of whether the deposition is being taken pursuant to a  
3 California subpoena. The opposite approach — requiring a California subpoena to  
4 enforce discovery rights and obligations relating to a deposition taken on notice or  
5 agreement in the state for purposes of an out-of-state proceeding — would entail  
6 needless paperwork, expense, and expenditure of judicial and litigant resources in  
7 the many instances in which no discovery dispute occurs. The Commission  
8 proposes to amend Section 2029.010 to make clear that if a party to a proceeding  
9 pending in another jurisdiction deposes a witness in this state by properly issued  
10 notice or by agreement, the deponent or any party may seek relief in a California  
11 court regardless of whether the deposing party obtained a subpoena or subpoena  
12 duces tecum under the statute.

### 13 *Creation of a Court File*

14 Another issue is what type of file a California court should use for materials  
15 filed or issued pursuant to Section 2029.010 — applications, subpoenas, petitions,  
16 responses to petitions, and the like. Again, the statute is silent on this point. In  
17 particular, it is unclear what caption the court should use (the out-of-state caption  
18 or a new California caption) and whether the court should create a separate file for  
19 each subpoena sought or each out-of-state case, as opposed to filing all such  
20 materials together.

21 The Commission recommends that the statute direct the Judicial Council to  
22 promulgate a court rule governing these matters, which would impose the same  
23 requirements in each county. This would promote uniformity but afford greater  
24 flexibility than regulating these matters by statute.

### 25 *Type of Deposition*

26 By its terms, Section 2029.010 is limited to “the oral or written deposition of a  
27 natural person in California ....” This limitation was deliberately imposed in the  
28 Civil Discovery Act of 1986.<sup>34</sup> The drafters’ apparent concern was that some  
29 jurisdictions might not permit a deposition of an organization (as opposed to a

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other factors outweigh that burden. In particular, the following considerations may justify the policy decision underlying the statute:

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

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

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

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

1 natural person) and litigants might try to subvert such a restriction by seeking to  
2 depose an organization in California instead of the forum state.<sup>35</sup>

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

6 As a matter of policy, deposing an organization located in California may be just  
7 as important to the pursuit of truth as deposing an individual who resides in the  
8 state. Consistent with the spirit of comity inherent in Section 2029.010, the  
9 Commission recommends revising the statute to apply to the oral or written  
10 deposition of any person in California.

11 The Commission further recommends revising the statute to make clear that it  
12 applies to a deposition in which no testimony is required, only the production of  
13 documents and things.<sup>36</sup> It is already clear that the statute encompasses a  
14 deposition in which both testimony and the production of tangible evidence is  
15 required. The provision should be revised to eliminate any doubt that it also  
16 applies to a deposition that just seeks the production of tangible evidence.

17 These revisions, together with the other clarifications of Section 2029.010  
18 proposed by the Commission, would help to achieve justice, prevent confusion,  
19 and make the statute more workable for all concerned.

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35. See *id.*

36. See Sections 2020.010(a)(3), 2020.410-2020.440.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 2029.010 (amended). Deposition in California for purposes of proceeding**  
2 **pending outside California**

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

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

14 (b) Except as provided in subdivision (d), to obtain a subpoena or subpoena  
15 duces tecum under this section, the party seeking a deposition shall file an  
16 application with the superior court of the county in which the deposition is to be  
17 taken.

18 (c) On receiving a properly completed application under this section, and  
19 payment of the filing fee specified in Section 70626 of the Government Code, the  
20 clerk of court shall issue the requested subpoena or subpoena duces tecum.

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

25 (e) If a dispute arises relating to a deposition that a party is taking in this state  
26 for purposes of a proceeding pending in another jurisdiction, the deponent or a  
27 party to the proceeding may file a petition for a protective order or to compel  
28 discovery or obtain other appropriate relief in the superior court of the county in  
29 which the deposition is being taken. On filing the petition, the petitioner shall pay  
30 a first appearance fee. On responding to the petition, each person who responds  
31 shall pay a first appearance fee. The amount of these first appearance fees shall be  
32 as specified in Chapter 5.8 (commencing with Section 70600) of Title 8 of the  
33 Government Code for a proceeding in this state that would be comparable in  
34 nature to the out-of-state proceeding in which the deposition is being taken. If  
35 another dispute later arises relating to a deposition being taken in the same county  
36 for purposes of the same out-of-state proceeding, a party or deponent who has  
37 already paid a first appearance fee does not have to pay another first appearance  
38 fee under this section.

1 (f) If a party to a proceeding pending in another jurisdiction seeks to depose a  
2 witness in this state by properly issued notice or by agreement, it is not necessary  
3 for that party to obtain a subpoena or subpoena duces tecum under this section to  
4 be able to seek relief under subdivision (e). The deponent or any other party may  
5 also seek relief under subdivision (e) in those circumstances regardless of whether  
6 the deponent was subpoenaed under this section.

7 (g) On or before January 1, 2008, the Judicial Council shall do all of the  
8 following:

9 (1) Prepare an application form to be used for purposes of subdivision (b). The  
10 application form shall require the applicant to attach a true and correct copy of the  
11 mandate, writ, letters rogatory, letter of request, commission, or other document  
12 authorizing the deposition. As soon as the application form becomes available,  
13 every applicant shall use the form.

14 (2) Prepare one or more new subpoena forms that include clear instructions for  
15 use in issuance of a subpoena under subdivision (c) or (d). Alternatively, the  
16 Judicial Council may modify one or more existing subpoena forms to include clear  
17 instructions for use in issuance of a subpoena under subdivision (c) or (d). As soon  
18 as one or more new or modified Judicial Council forms become available, use of  
19 those forms is mandatory.

20 (3) Adopt a rule specifying the type of court file and case caption a court is to  
21 use for purposes of (i) issuing a subpoena under this section or (ii) enforcing  
22 discovery rights and obligations under this section.

23 **Comment.** The first sentence of Section 2029.010 (new subdivision (a)) is amended to apply to  
24 an organization located in California, not just an individual found in the state. The sentence is  
25 also amended to make clear that Section 2029.010 encompasses a deposition for the production of  
26 documents and things, regardless of whether the deponent is required to testify.

27 Subdivisions (b)-(d) are added to clarify the procedure for obtaining a California subpoena or  
28 subpoena duces tecum to depose a witness in this state for purposes of a proceeding pending in  
29 another jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the  
30 procedure is designed to be simple and expeditious.

31 Subdivision (d) does not specify whether a party to an out-of-state proceeding must retain local  
32 counsel to obtain a subpoena or subpoena duces tecum under this section. For guidance on that  
33 point, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; see also Report of the California  
34 Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and  
35 Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on  
36 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a  
37 party to an out-of-state proceeding may take a deposition in California without retaining local  
38 counsel if the party is self-represented or represented by an attorney duly admitted to practice in  
39 another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70  
40 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own  
41 interests regardless of State Bar membership...”); Cal. R. Ct. 966; Final Report and  
42 Recommendations, *supra*, at 24.

43 Subdivision (e) is added to clarify the procedure for using a California court to resolve a  
44 dispute relating to discovery conducted in this state for purposes of a proceeding pending in  
45 another jurisdiction.

46 Subdivision (f) is added to clarify how this section applies when a party to a proceeding  
47 pending in another jurisdiction seeks to depose a witness in this state by properly issued notice or  
48 by agreement.

1 Under subdivision (g), the Judicial Council is to prepare forms to facilitate compliance with  
2 this section. To promote court uniformity and prevent confusion, the provision also requires the  
3 Judicial Council to adopt a rule governing the creation and labeling of court files that are used for  
4 purposes of this section.

5 **Note.** Subdivision (g) would set a deadline of January 1, 2008, for the Judicial Council to  
6 prepare the required forms and adopt the required rule. This deadline is premised on enactment of  
7 the proposed amendment in 2006, with an effective date of January 1, 2007. That would give the  
8 Judicial Council one year to prepare the forms and adopt the rule. The deadline would have to be  
9 adjusted if the proposed amendment was not introduced in the Legislature until 2007 or later.

10 **Code Civ. Proc. § 2030.260 (amended). Service of response to interrogatories**

11 SEC. \_\_\_\_\_. Section 2030.260 of the Code of Civil Procedure is amended to  
12 read:

13 2030.260. (a) Within 30 days after service of interrogatories, ~~or in unlawful~~  
14 ~~detainer actions within five days after service of interrogatories~~ the party to whom  
15 the interrogatories are propounded shall serve the original of the response to them  
16 on the propounding party, unless on motion of the propounding party the court has  
17 shortened the time for response, or unless on motion of the responding party the  
18 court has extended the time for response. ~~In unlawful detainer actions,~~

19 (b) Notwithstanding subdivision (a), in an unlawful detainer action the party to  
20 whom the interrogatories are propounded shall have five days from the date of  
21 service to respond, unless on motion of the propounding party the court has  
22 shortened the time for response.

23 ~~(b)~~ (c) The party to whom the interrogatories are propounded shall also serve a  
24 copy of the response on all other parties who have appeared in the action. On  
25 motion, with or without notice, the court may relieve the party from this  
26 requirement on its determination that service on all other parties would be unduly  
27 expensive or burdensome.

28 **Comment.** Section 2030.260 is amended to improve clarity. This is not a substantive change.

29 **Code Civ. Proc. § 2031.260 (amended). Service of response to inspection demand**

30 SEC. \_\_\_\_\_. Section 2031.260 of the Code of Civil Procedure is amended to  
31 read:

32 2031.260. (a) Within 30 days after service of an inspection demand, ~~or in~~  
33 ~~unlawful detainer actions within five days of an inspection demand,~~ the party to  
34 whom the demand is directed shall serve the original of the response to it on the  
35 party making the demand, and a copy of the response on all other parties who have  
36 appeared in the action, unless on motion of the party making the demand, the court  
37 has shortened the time for response, or unless on motion of the party to whom the  
38 demand has been directed, the court has extended the time for response. ~~In~~  
39 ~~unlawful detainer actions,~~

40 (b) Notwithstanding subdivision (a), in an unlawful detainer action the party to  
41 whom an inspection demand is directed shall have at least five days from the ~~dates~~

1 date of service of the demand to respond, unless on motion of the party making the  
2 demand, the court has shortened the time for the response.

3 **Comment.** Section 2031.260 is amended to improve clarity. This is not a substantive change.

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

5 SEC. \_\_\_\_\_. Section 70626 of the Government Code is amended to read:

6 70626. (a) The fee for each of the following services is fifteen dollars (\$15).  
7 Amounts collected shall be distributed to the Trial Court Trust Fund under Section  
8 68085.1.

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

12 (2) Issuing an abstract of judgment.

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

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

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

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

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

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

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

25 (1) Issuing an order of sale.

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

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

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

33 (5) Issuing a commission to take a deposition in another state or place under  
34 Section 2026.010 of the Code of Civil Procedure.

35 (6) Issuing a subpoena under Section 2029.010 of the Code of Civil Procedure to  
36 take a deposition in this state for purposes of a proceeding pending in another  
37 jurisdiction.

38 ~~(6)~~ (7) Filing and entering an award under the Workers' Compensation Law  
39 (Division 4 (commencing with Section 3200) of the Labor Code).

40 ~~(7)~~ (8) Filing an affidavit of publication of notice of dissolution of partnership.

41 ~~(8)~~ (9) Filing an appeal of a determination whether a dog is potentially  
42 dangerous or vicious under Section 31622 of the Food and Agricultural Code.



1     ~~(9)~~ (10) Filing an affidavit under Section 13200 of the Probate Code, together  
2 with the issuance of one certified copy of the affidavit under Section 13202 of the  
3 Probate Code.

4     ~~(10)~~ (11) Filing and indexing all papers for which a charge is not elsewhere  
5 provided, other than papers filed in actions or special proceedings, official bonds,  
6 or certificates of appointment.

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

11     **Note.** Government Code Section 70626 was enacted as part of the Uniform Civil Fees and  
12 Standard Fee Schedule Act of 2005 (2005 Cal. Stat. ch. 75). As enacted in that bill, Government  
13 Code Section 70626(b)(5) referred to Code of Civil Procedure Section 2026, which was repealed  
14 as part of the 2004 nonsubstantive reorganization of the Civil Discovery Act. A later chaptered  
15 bill corrects this obsolete cross-reference in Section 70626. See AB 1742 (Committee on  
16 Judiciary), 2005 Cal. Stat. ch. 706, § 31. The corrected version of Section 70626 is used here,  
17 because it supplants the earlier chaptered version. See Gov't Code § 9605.

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