

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Civil Discovery: Statutory Clarification and Minor Substantive Improvements

February 2004

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend 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 in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 15, 2004.****

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

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

- (1) The one-deposition rule for a limited civil case (Code Civ. Proc. § 94) should be amended to make clear that a deposition of an organization is to be treated as a single deposition, even if more than one individual is deposed.
- (2) The section concerning an oral deposition taken in California (Code Civ. Proc. § 2025) should be amended to make clear that a party's right to make an audio or video recording of a deposition is not dependent on the method of recording used by the party who noticed the deposition.
- (3) Remaining references in the Civil Discovery Act to audiotape and videotape (Code Civ. Proc. §§ 2025, 2032) should be revised to reflect advances in technology, consistent with prior legislation.
- (4) The section concerning presuit discovery (Code Civ. Proc. § 2035) should be amended to permit such discovery in anticipation of a suit by a petitioner's successor in interest, subject to statutory safeguards.
- (5) The section concerning presuit discovery should also be amended to make clear that if a deposition to perpetuate testimony is taken in another jurisdiction, it must be taken under the law of that jurisdiction, or under California or federal law, to be admissible in California.

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

## CIVIL DISCOVERY: STATUTORY CLARIFICATION AND MINOR SUBSTANTIVE IMPROVEMENTS

1 The Law Revision Commission is engaged in a study of civil discovery.<sup>1</sup> As a  
2 preliminary step, the Commission proposed a nonsubstantive reorganization of the  
3 provisions governing civil discovery, to make them more user-friendly and  
4 facilitate sound development of the law.<sup>2</sup> The Commission has also begun to  
5 consider substantive matters, starting with minor issues relating to:

- 6 • The one-deposition rule in a limited civil case.
- 7 • Audio or video recording of a deposition.
- 8 • References to “audiotape” and “videotape” in the Civil Discovery Act.
- 9 • Presuit discovery.

10 As explained below, the Commission tentatively recommends reforms in each of  
11 these areas, to eliminate ambiguities, update terminology, and make other minor  
12 improvements.

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 comment on the following proposals and offer suggestions for other  
16 matters in need of reform.

### 17 **Application of the One-Deposition Rule to the Deposition of an Organization**

18 A limited civil case<sup>3</sup> is usually subject to special litigation rules known as  
19 economic litigation procedures,<sup>4</sup> which are designed to reduce the cost of litigation  
20 in a case for a relatively small amount.<sup>5</sup> Among the special procedures applicable  
21 to a limited civil case is the one-deposition rule, which permits a party to take only  
22 one oral or written deposition as to each adverse party.<sup>6</sup> The one-deposition rule is  
23 ambiguous as applied to a deposition of an organization.

24 A deposition notice directed to a corporation or other organization must  
25 “describe with reasonable particularity the matters on which examination is  
26 requested.”<sup>7</sup> The organization is obligated to designate and produce at the

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1. Prof. Gregory Weber of McGeorge School of Law prepared a background study for the Commission. See Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001).

2. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003).

3. For the rules governing whether an action or special proceeding is treated as a limited civil case, see Code Civ. Proc. § 85 & Comment. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

4. Section 91.

5. 1982 Cal. Stat. ch. 1581, § 5.

6. Section 94(b).

7. Section 2025(d).

1 deposition “those of its officers, directors, managing agents, employees, or agents  
2 who are most qualified to testify on its behalf.”<sup>8</sup> The statute setting forth the one-  
3 deposition rule does not specify how the rule applies if a deposition notice in a  
4 limited civil case specifies more than one topic on which an organization will be  
5 examined, but no one person in the organization has knowledge of every topic  
6 specified.

7 This has led to confusion over whether the organization must produce only one  
8 person, even though that person lacks knowledge of all the specified topics, or  
9 must produce several people, despite the one-deposition rule. Although the issue  
10 arises at the trial level, there is no published appellate decision resolving it,  
11 probably because a limited civil case ordinarily does not receive appellate review  
12 resulting in a published decision.

13 The ambiguity in the one-deposition rule should be eliminated by making clear  
14 that the organization must produce as many witnesses as necessary to testify  
15 knowledgeably to all of the topics specified in the deposition notice.<sup>9</sup> The  
16 organization is the deponent, not the officers, employees, and agents testifying on  
17 its behalf. The organization must necessarily speak through natural persons.  
18 Because of the large and decentralized nature of some organizations, the  
19 deponent’s “knowledge” may be fragmented among several individuals.

20 If the deposition of an organization were limited to one individual,  
21 gamesmanship could occur. For example, an organization could designate as a  
22 witness the employee most qualified to testify on one of five topics identified in a  
23 deposition notice, even if another person is most qualified to testify on the  
24 remaining four topics. The deponent would have unilateral power to exclude  
25 relevant information from discovery.

26 The purpose of discovery rules is to “enhance the truth-seeking function of the  
27 litigation process and eliminate trial strategies that focus on gamesmanship and  
28 surprise.”<sup>10</sup> Revising the one-deposition rule as proposed would promote those  
29 goals.<sup>11</sup>

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8. *Id.*

9. If the scope of the requested discovery is unduly burdensome, expensive, or intrusive, the organization can file a motion under Section 2017 seeking appropriate limitations.

10. *Williams v. Volkswagenwerk Aktiengesellschaft*, 180 Cal. App. 3d 1244, 1254, 226 Cal. Rptr. 306 (1986).

11. The proposed reform would also be consistent with the language of the provision requiring the organization to designate who will testify. Section 2025(d) requires an organization to designate and produce at the deposition “those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf.” The use of the plural instead of the singular (“the officer, director, managing agent, employee, or agent who is most qualified to testify on its behalf”) suggests that the Legislature intended for the organization to designate as many witnesses as necessary to testify. But see Section 17 (plural includes singular).

Commentary also supports the view that an organization must produce as many witnesses as necessary to testify knowledgeably, even in a case subject to the one-deposition rule:

It is not clear how the “one deposition per adverse party” rule applies where the adverse party is a corporation or other entity. When the deposition notice is addressed to the entity, it must designate

1 **Equal Right to Record a Deposition By Audio or Video Technology**

2 With limited exceptions, Section 2025(l) requires deposition testimony to be  
3 stenographically recorded. In addition to recording the testimony stenographically,  
4 the party who notices the deposition (the “deposing party”) may also record the  
5 testimony by audio or video technology, if that party states an intention to do so in  
6 the deposition notice, or the other parties agree to the recording. The statute further  
7 states that “[a]ny other party, at that party’s expense, may make a *simultaneous*  
8 audio or video record of the deposition.”<sup>12</sup>

9 That language is ambiguous. It is unclear whether the party who did not notice  
10 the deposition (the “non-deposing party”) is entitled to make an audio or video  
11 record simultaneously with preparation of the stenographic record, or only  
12 simultaneously with preparation of an audio or video record by the deposing party.  
13 If the latter is true, the deposing party has full control over whether a deposition is  
14 recorded by audio or video technology. The Commission has been unable to find a  
15 published case resolving which interpretation of the sentence is correct.

16 To prevent unnecessary disputes over this issue, the Commission recommends  
17 that the word “simultaneous” be deleted from the sentence. That would make clear  
18 that the non-deposing party is entitled to make an audio or video record regardless  
19 of whether the deposing party does so.

20 There is solid justification for such an approach, and it appears consistent with  
21 the legislative history of the statute.<sup>13</sup> Recording a deposition by audio or video  
22 technology entails extra cost, but also confers evidentiary benefits that vary  
23 depending on the factual context and the perspective of a particular litigant. Each  
24 party should be able to make its own assessment of whether an audio or video  
25 record is necessary under the circumstances of a particular case, in addition to the  
26 stenographic record. Protections are in place to ensure that any audio or video  
27 record of a deposition is reliable and accurate.<sup>14</sup> There is no need to give the  
28 deposing party full control over whether such a record is made. Section 2025(l)  
29 should be amended to eliminate uncertainty regarding the authority of a non-  
30 deposing party to record a deposition by audio or video technology.

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the person or persons “most qualified” to testify on its behalf. ... Presumably, the party seeking discovery would be entitled to more than one deposition where the entity designates more than one person.

R. Weil & I. Brown, Jr., California Practice Guide: Civil Procedure Before Trial, Discovery ¶ 8:1909.1 (2002).

12. Section 2025(l) (emphasis added).

13. The Commission is aware of nothing in the legislative history of the Civil Discovery Act suggesting that the Legislature intended to prohibit a non-deposing party from audio or video recording a deposition when the deposing party only records the testimony stenographically.

14. Section 2025(l)(2) sets forth in detail the procedures that must be followed if the deposition is recorded by audio or video technology by, or at the direction of a party. Special requirements apply where an expert witness’ testimony is video recorded for use at trial in lieu of live testimony. Section 2025(l)(2)(B). If the testimony is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of the testimony, not the audio or video record. Section 2025(p).

1 **References to “Videotape” and “Audiotape”**

2 In 2002, the Legislature enacted legislation that replaced references to  
3 “videotape” and “audiotape” in civil discovery provisions with terms that reflect  
4 advances in technology.<sup>15</sup> References to “videotape” were changed to “video  
5 technology,” “video recording,” or “video record.” References to “audiotape” were  
6 similarly corrected.

7 A few references to “videotape” and “audiotape” remain in the Civil Discovery  
8 Act.<sup>16</sup> Those omissions appear to have been oversights. The Law Revision  
9 Commission therefore recommends conforming the remaining references to  
10 “videotape” and “audiotape” in the Civil Discovery Act to the terminology  
11 changes made in 2002.

12 **Presuit Discovery**

13 Under specified circumstances, a person who expects to be a party to a lawsuit in  
14 a California state court may petition to conduct discovery before the lawsuit is  
15 filed. The statute governing such presuit discovery (Section 2035) is ambiguous  
16 with respect to (1) whether a petitioner may take presuit discovery when the  
17 contemplated lawsuit would be filed by the petitioner’s successor in interest  
18 instead of by the petitioner, and (2) whether a deposition to perpetuate testimony is  
19 admissible in California if it was taken under the laws of a jurisdiction other than  
20 California, the United States, or the jurisdiction in which it was held. The  
21 Commission recommends that these ambiguities be eliminated.

22 ***Suit to be Filed by Petitioner’s Successor in Interest***

23 Section 2035(a) authorizes presuit discovery, under specified conditions, by  
24 someone who expects to be a *party* to an action. It does not expressly permit a  
25 person to engage in presuit discovery in anticipation of a suit by or against the  
26 person’s successor in interest.

27 The statute does allow a successor in interest who expects to be a party to  
28 engage in presuit discovery if the statutory conditions are met. But this provision  
29 only functions to the extent that the successor in interest is identifiable at the time  
30 presuit discovery is sought. An unborn child or future assignee, for example, might  
31 eventually qualify as a successor in interest as well. As the statute is written, it  
32 does not seem to permit anyone to conduct presuit discovery on behalf of such a  
33 person. It is conceivable, however, that a court would find such authority implicit  
34 in the statute, even though it is not explicit.

35 The statute should be amended to eliminate the ambiguity and expressly  
36 authorize a petitioner to conduct presuit discovery in anticipation of a lawsuit by

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15. 2002 Cal. Stat. ch. 1068.

16. See Code Civ. Proc. §§ 2025(l)(2)(H)-(I), 2032(g)(1)-(2).

1 the petitioner's successor in interest.<sup>17</sup> Such discovery should be subject to all of  
2 the same safeguards as other presuit discovery.

3 The Legislature developed those safeguards to prevent presuit discovery from  
4 being exploited as a means of conducting a broad-ranging "fishing expedition" for  
5 information before a lawsuit is filed.<sup>18</sup> The key safeguard is Section 2035(a),  
6 which expressly prohibits use of the statute for purposes of ascertaining the  
7 possible existence of a cause of action or a defense to it, or of identifying those  
8 who might be made parties to a future action. The petitioner must also show a  
9 present inability to bring the action or cause it to be brought.<sup>19</sup> Notice and a  
10 contested hearing are required.<sup>20</sup> And, the court must find that the perpetuation of  
11 testimony "may prevent a failure or delay of justice."<sup>21</sup>

12 The last requirement is crucial, because it ensures that presuit discovery is not  
13 conducted unless a court is convinced that such discovery is in the interests of  
14 justice. If a petitioner makes such a showing with respect to presuit discovery on  
15 behalf of a successor in interest, it would be inappropriate to deny the requested  
16 discovery.

17 The Commission recommends that these safeguards be added to Section 2035:

- 18 (1) The petition must include a copy of any written instrument, the validity or  
19 construction of which may be called in question or is connected with the  
20 subject matter of the proposed discovery.<sup>22</sup>
- 21 (2) The petition must show that the successor in interest is presently unable to  
22 bring an action or cause it to be brought.<sup>23</sup>

23 Amending the statute in this manner to cover an anticipated suit by a successor  
24 in interest would not be a significant extension of the statute, would be helpful to  
25 some petitioners and their successors in interest, and would provide guidance on  
26 the point. The existing safeguards, in conjunction with the proposed requirements  
27 that the petitioner demonstrate the successor's present inability to bring or defend  
28 an action and attach any relevant writing, should inhibit any attempt to use the  
29 statute for purely investigative purposes.

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17. For examples of provisions that authorize presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest, see Ohio R. Civ. Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; Or. R. Civ. Proc. 37; 1959 Unif. Perpetuation of Testimony Act, § 1(a) & Comment.

18. *Block v. Superior Court*, 219 Cal. App. 2d 469, 477 n.5, 33 Cal. Rptr. 205 (1963) (interpreting former Section 2017, the predecessor of Section 2035); see also *Hunt-Wesson Foods, Inc. v. County of Stanislaus*, 273 Cal. App. 2d 92, 94, 77 Cal. Rptr. 832 (1969).

19. Section 2035(d)(2).

20. Section 2035(e).

21. Section 2035(f).

22. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act.

23. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act.

1 ***Law Applicable to a Deposition to Perpetuate Testimony***

2 Section 2035(g) states that a deposition to perpetuate testimony may be used in a  
3 subsequent action in California state court if the deposition was taken pursuant to  
4 Section 2035, “or under comparable provisions of the laws of another state, or the  
5 federal courts, or a foreign nation.” The provision does not make clear whether an  
6 out-of-state deposition must have been taken under the laws of the state in which it  
7 was taken, or just “another state.”<sup>24</sup> This omission leaves open the possibility that  
8 a deposition taken in a second state under a third state’s laws regarding presuit  
9 discovery could be admissible in California. The provision is similarly ambiguous  
10 with regard to the admissibility of a deposition to perpetuate testimony that was  
11 taken in another country.

12 The Commission recommends that the statutory language be clarified to prevent  
13 disputes regarding the admissibility of a deposition taken in another jurisdiction.  
14 Specifically, Section 2035(g) should be amended to make clear that a deposition to  
15 perpetuate testimony may be used in California only if it was taken under  
16 California law, federal law, or a comparable provision of the jurisdiction in which  
17 it was taken.

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24. Weber, *supra* note 1, at 1071.

## PROPOSED LEGISLATION

1 **Code Civ. Proc. § 94 (amended). Discovery**

2 SECTION 1. Section 94 of the Code of Civil Procedure is amended to read:

3 94. Discovery is permitted only to the extent provided by this section and  
4 Section 95. This discovery shall comply with the notice and format requirements  
5 of the particular method of discovery, as provided in Article 3 (commencing with  
6 Section 2016) of Chapter 3 of Title 4 Title 3 of Part 4. As to each adverse party, a  
7 party may use the following forms of discovery:

8 (a) Any combination of 35 of the following:

9 (1) Interrogatories (with no subparts) under Section 2030.

10 (2) Demands to produce documents or things under Section 2031.

11 (3) Requests for admission (with no subparts) under Section 2033.

12 (b) One oral or written deposition under Sections 2025 to 2028, inclusive. For  
13 purposes of this subdivision, a deposition of an organization shall be treated as a  
14 single deposition even though more than one person may be designated or required  
15 to testify pursuant to subdivision (d) of Section 2025.

16 (c) Any party may serve on any person a deposition subpoena duces tecum  
17 requiring the person served to mail copies of documents, books or records to the  
18 party's counsel at a specified address, along with an affidavit complying with  
19 Section 1561 of the Evidence Code.

20 The party who issued the deposition subpoena shall mail a copy of the response  
21 to any other party who tenders the reasonable cost of copying it.

22 (d) Physical and mental examinations under Section 2032.

23 (e) The identity of expert witnesses under Section 2034.

24 **Comment.** Subdivision (a) of Section 94 is amended to correct a cross-reference.

25 Subdivision (b) is amended to make clear the proper treatment of a deposition of an  
26 organization.

27 **Code Civ. Proc. § 2025 (amended). Oral deposition inside California**

28 SEC. 2. Section 2025 of the Code of Civil Procedure is amended to read:

29 2025....

30 ....

31 (h)(1) The service of a deposition notice under subdivision (c) is effective to  
32 require any deponent who is a party to the action or an officer, director, managing  
33 agent, or employee of a party to attend and to testify, as well as to produce any  
34 document or tangible thing for inspection and copying.

35 (2) The attendance and testimony of any other deponent, as well as the  
36 production by the deponent of any document or tangible thing for inspection and  
37 copying, requires the service on the deponent of a deposition subpoena under  
38 Section 2020.

1 (3) A person may take, and any person other than the deponent may attend, a  
2 deposition by telephone or other remote electronic means. The court may  
3 expressly provide that a nonparty deponent may appear at his or her deposition by  
4 telephone if it finds there is good cause and no prejudice to any party. A party  
5 deponent shall appear at his or her deposition in person and be in the presence of  
6 the deposition officer. The procedures to implement this section shall be  
7 established by court order in the specific action or proceeding or by the California  
8 Rules of Court.

9 ....

10 (l)(1) The deposition officer shall put the deponent under oath. Unless the parties  
11 agree or the court orders otherwise, the testimony, as well as any stated objections,  
12 shall be taken stenographically. The party noticing the deposition may also record  
13 the testimony by audio or video technology if the notice of deposition stated an  
14 intention also to record the testimony by either of those methods, or if all the  
15 parties agree that the testimony may also be recorded by either of those methods.  
16 Any other party, at that party's expense, may make a ~~simultaneous~~ an audio or  
17 video record of the deposition, provided that other party promptly, and in no event  
18 less than three calendar days before the date for which the deposition is scheduled,  
19 serves a written notice of this intention to make an audio or video record of the  
20 deposition testimony on the party or attorney who noticed the deposition, on all  
21 other parties or attorneys on whom the deposition notice was served under  
22 subdivision (c), and on any deponent whose attendance is being compelled by a  
23 deposition subpoena under Section 2020. If this notice is given three calendar days  
24 before the deposition date, it shall be made by personal service under Section  
25 1011. Examination and cross-examination of the deponent shall proceed as  
26 permitted at trial under the provisions of the Evidence Code.

27 (2) If the deposition is being recorded by means of audio or video technology by,  
28 or at the direction of, any party, the following procedure shall be observed:

29 (A) The area used for recording the deponent's oral testimony shall be suitably  
30 large, adequately lighted, and reasonably quiet.

31 (B) The operator of the recording equipment shall be competent to set up,  
32 operate, and monitor the equipment in the manner prescribed in this subdivision.  
33 The operator may be an employee of the attorney taking the deposition unless the  
34 operator is also the deposition officer. However, if a video recording of deposition  
35 testimony is to be used under paragraph (4) of subdivision (u), the operator of the  
36 recording equipment shall be a person who is authorized to administer an oath, and  
37 shall not be financially interested in the action or be a relative or employee of any  
38 attorney of any of the parties, unless all parties attending the deposition agree on  
39 the record to waive these qualifications and restrictions. Services and products  
40 offered or provided by the deposition officer or the entity providing the services of  
41 the deposition officer to any party or to any party's attorney or third party who is  
42 financing all or part of the action shall be offered or provided to all parties or their  
43 attorneys attending the deposition. No service or product may be offered or

1 provided by the deposition officer or by the entity providing the services of the  
2 deposition officer to any party or any party's attorney or third party who is  
3 financing all or part of the action unless the service or product is offered or  
4 provided to all parties or their attorneys attending the deposition. All services and  
5 products offered or provided shall be made available at the same time to all parties  
6 or their attorneys. The deposition officer or the entity providing the services of the  
7 deposition officer shall not provide to any party or any other person or entity any  
8 service or product consisting of the deposition officer's notations or comments  
9 regarding the demeanor of any witness, attorney, or party present at the deposition.  
10 The deposition officer or the entity providing the services of the deposition officer  
11 shall not collect any personal identifying information about the witness as a  
12 service or product to be provided to any party or third party who is financing all or  
13 part of the action. Upon the request of any party or any party's attorney attending a  
14 deposition, any party or any party's attorney attending the deposition shall enter in  
15 the record of the deposition all services and products made available to that party  
16 or party's attorney or third party who is financing all or part of the action by the  
17 deposition officer or by the entity providing the services of the deposition officer.  
18 A party in the action who is not represented by an attorney shall be informed by  
19 the noticing party that the unrepresented party may request this statement.

20 (C) The operator shall not distort the appearance or the demeanor of participants  
21 in the deposition by the use of camera or sound recording techniques.

22 (D) The deposition shall begin with an oral or written statement on camera or on  
23 the audio recording that includes the operator's name and business address, the  
24 name and business address of the operator's employer, the date, time, and place of  
25 the deposition, the caption of the case, the name of the deponent, a specification of  
26 the party on whose behalf the deposition is being taken, and any stipulations by the  
27 parties.

28 (E) Counsel for the parties shall identify themselves on camera or on the audio  
29 recording.

30 (F) The oath shall be administered to the deponent on camera or on the audio  
31 recording.

32 (G) If the length of a deposition requires the use of more than one unit of tape or  
33 electronic storage, the end of each unit and the beginning of each succeeding unit  
34 shall be announced on camera or on the audio recording.

35 (H) At the conclusion of a deposition, a statement shall be made on camera or on  
36 the audio recording that the deposition is ended and shall set forth any stipulations  
37 made by counsel concerning the custody of the ~~audiotape or videotape~~ audio or  
38 video recording and the exhibits, or concerning other pertinent matters.

39 (I) A party intending to offer an audio or video recording of a deposition in  
40 evidence under subdivision (u) shall notify the court and all parties in writing of  
41 that intent and of the parts of the deposition to be offered within sufficient time for  
42 objections to be made and ruled on by the judge to whom the case is assigned for  
43 trial or hearing, and for any editing of the recording. Objections to all or part of the

1 deposition shall be made in writing. The court may permit further designations of  
2 testimony and objections as justice may require. With respect to those portions of  
3 an audio or video record of deposition testimony that are not designated by any  
4 party or that are ruled to be objectionable, the court may order that the party  
5 offering the recording of the deposition at the trial or hearing suppress those  
6 portions, or that an edited version of the deposition recording be prepared for use  
7 at the trial or hearing. The original audio or video record of the deposition shall be  
8 preserved unaltered. If no stenographic record of the deposition testimony has  
9 previously been made, the party offering a ~~videotape or an audiotape~~ an audio or  
10 video recording of that testimony under subdivision (u) shall accompany that offer  
11 with a stenographic transcript prepared from that recording.

12 (3) In lieu of participating in the oral examination, parties may transmit written  
13 questions in a sealed envelope to the party taking the deposition for delivery to the  
14 deposition officer, who shall unseal the envelope and propound them to the  
15 deponent after the oral examination has been completed.

16 **Comment.** Subdivision (h)(3) of Section 2025 is amended to make a technical correction.

17 Subdivision (l)(1) is amended to make clear that the right of a non-deposing party to make an  
18 audio or video record of deposition testimony is not dependent on the method of recording used  
19 by the party noticing the deposition, except as otherwise provided by court order or party  
20 stipulation.

21 Subdivision (l)(2) is amended for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

22 ☞ **Note.** To conserve resources and focus attention on the proposed reforms, only subdivisions  
23 (h) and (l) of Section 2025 are reproduced here. Subdivisions (a)-(g), (i)-(k), and (m)-(v) have  
24 been omitted.

25 **Code Civ. Proc. § 2032 (amended). Physical and mental examinations**

26 SEC. 3. Section 2032 of the Code of Civil Procedure is amended to read:  
27 2032....

28 ....

29 (g)(1) The attorney for the examinee or for a party producing the examinee, or  
30 that attorney's representative, shall be permitted to attend and observe any  
31 physical examination conducted for discovery purposes, and to record  
32 stenographically or by ~~audiotape~~ audio technology any words spoken to or by the  
33 examinee during any phase of the examination. This observer may monitor the  
34 examination, but shall not participate in or disrupt it. If an attorney's representative  
35 is to serve as the observer, the representative shall be authorized to so act by a  
36 writing subscribed by the attorney which identifies the representative.

37 If in the judgment of the observer the examiner becomes abusive to the  
38 examinee or undertakes to engage in unauthorized diagnostic tests and procedures,  
39 the observer may suspend it to enable the party being examined or producing the  
40 examinee to make a motion for a protective order. If the observer begins to  
41 participate in or disrupt the examination, the person conducting the physical  
42 examination may suspend the examination to enable the party at whose instance it  
43 is being conducted to move for a protective order.

1 The court shall impose a monetary sanction under Section 2023 against any  
2 party, person, or attorney who unsuccessfully makes or opposes a motion for a  
3 protective order, unless it finds that the one subject to the sanction acted with  
4 substantial justification or that other circumstances make the imposition of the  
5 sanction unjust.

6 If the examinee submits or authorizes access to X-rays of any area of his or her  
7 body for inspection by the examining physician, no additional X-rays of that area  
8 may be taken by the examining physician except with consent of the examinee or  
9 on order of the court for good cause shown.

10 (2) The examiner and examinee shall have the right to record a mental  
11 examination ~~on audio tape~~ by audio technology. However, nothing in this article  
12 shall be construed to alter, amend, or affect existing case law with respect to the  
13 presence of the attorney for the examinee or other persons during the examination  
14 by agreement or court order.

15 **Comment.** Subdivision (g) of Section 2032 is amended for consistency of terminology. See  
16 2002 Cal. Stat. ch. 1068.

17 ☞ **Note.** To conserve resources and focus attention on the proposed reforms, only subdivision (b)  
18 of Section 2032 is reproduced here. Subdivisions (a)-(f) and (h)-(k) have been omitted.

19 **Code Civ. Proc. § 2035 (amended). Presuit discovery**

20 SEC. 4. Section 2035 of the Code of Civil Procedure is amended to read:

21 2035. (a) One who expects to be a party or expects a successor in interest to be a  
22 party to any action that may be cognizable in any court of the State of California,  
23 whether as a plaintiff, or as a defendant, or in any other capacity, may obtain  
24 discovery within the scope delimited by Section 2017, and subject to the  
25 restrictions set forth in Section 2019, for the purpose of perpetuating that party's  
26 person's own testimony or that of another natural person or organization, or of  
27 preserving evidence for use in the event an action is subsequently filed. One shall  
28 not employ the procedures of this section for the purpose either of ascertaining the  
29 possible existence of a cause of action or a defense to it, or of identifying those  
30 who might be made parties to an action not yet filed.

31 (b) The methods available for discovery conducted for the purposes set forth in  
32 subdivision (a) are (1) oral and written depositions, (2) inspections of documents,  
33 things, and places, and (3) physical and mental examinations.

34 (c) One who desires to perpetuate testimony or preserve evidence for the  
35 purposes set forth in subdivision (a) shall file a verified petition in the superior  
36 court of the county of the residence of at least one expected adverse party, or, if no  
37 expected adverse party is a resident of the State of California, in the superior court  
38 of a county where the action or proceeding may be filed.

39 (d) The petition shall be titled in the name of the one who desires the  
40 perpetuation of testimony or the preservation of evidence. The petition shall set  
41 forth all of the following:

1 (1) The expectation that the petitioner or the petitioner's successor in interest  
2 will be a party to an action cognizable in a court of the State of California.

3 (2) The present inability of the petitioner and the petitioner's successor in  
4 interest either to bring that action or to cause it to be brought.

5 (3) The subject matter of the expected action and the petitioner's involvement. A  
6 copy of any written instrument the validity or construction of which may be called  
7 in question, or which is connected with the subject matter of the proposed  
8 discovery, shall be attached to the petition.

9 (4) The particular discovery methods described in subdivision (b) that the  
10 petitioner desires to employ.

11 (5) The facts that the petitioner desires to establish by the proposed discovery.

12 (6) The reasons for desiring to perpetuate or preserve these facts before an action  
13 has been filed.

14 (7) The name or a description of those whom the petitioner expects to be adverse  
15 parties so far as known.

16 (8) The name and address of those from whom the discovery is to be sought.

17 (9) The substance of the information expected to be elicited from each of those  
18 from whom discovery is being sought.

19 The petition shall request the court to enter an order authorizing the petitioner to  
20 engage in discovery by the described methods for the purpose of perpetuating the  
21 described testimony or preserving the described evidence.

22 (e) The petitioner shall cause service of a notice of the petition to be made on  
23 each natural person or organization named in the petition as an expected adverse  
24 party. This service shall be made in the same manner provided for the service of a  
25 summons. The service of the notice shall be accompanied by a copy of the  
26 petition. The notice shall state that the petitioner will apply to the court at a time  
27 and place specified in the notice for the order requested in the petition. This  
28 service shall be effected at least 20 days prior to the date specified in the notice for  
29 the hearing on the petition.

30 If after the exercise of due diligence, the petitioner is unable to cause service to  
31 be made on any expected adverse party named in the petition, the court in which  
32 the petition is filed shall make an order for service by publication. If any expected  
33 adverse party served by publication does not appear at the hearing, the court shall  
34 appoint an attorney to represent that party for all purposes, including the cross-  
35 examination of any person whose testimony is taken by deposition. The court shall  
36 order that the petitioner pay the reasonable fees and expenses of any attorney so  
37 appointed.

38 (f) If the court determines that all or part of the discovery requested may prevent  
39 a failure or delay of justice, it shall make an order authorizing that discovery. The  
40 order shall identify any witness whose deposition may be taken, and any  
41 documents, things, or places that may be inspected, and any person whose physical  
42 or mental condition may be examined. Any authorized depositions, inspections,  
43 and physical or mental examinations shall then be conducted in accordance with

1 the provisions of this article relating to those methods of discovery in actions that  
2 have been filed.

3 (g) If a deposition to perpetuate testimony has been taken either under the  
4 provisions of this section, or under comparable provisions of the laws of another  
5 state the state in which it was taken, or the federal courts, or a foreign nation in  
6 which it was taken, that deposition may be used, in any action involving the same  
7 subject matter that is brought in a court of the State of California, in accordance  
8 with subdivision (u) of Section 2025 against any party, or the successor in interest  
9 of any party, named in the petition as an expected adverse party.

10 **Comment.** Subdivisions (a) and (d) of Section 2035 are amended to permit a person to take  
11 presuit discovery in anticipation of a suit by the person's successor in interest, so long as the  
12 statutory requirements for such discovery are satisfied. For similar provisions, see Ohio R. Civ.  
13 Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; Or. R. Civ. Proc. 37; 1959 Unif. Perpetuation of  
14 Testimony Act, § 1(a) & Comment.

15 Two new safeguards are included to ensure that presuit discovery is conducted only when it is  
16 warranted. Under subdivision (d)(2), presuit discovery is permissible only if both the petitioner  
17 and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from  
18 Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act. Under subdivision (d)(3), a  
19 petition for presuit discovery must include a copy of any written instrument connected with the  
20 subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform  
21 Perpetuation of Testimony Act.

22 Subdivision (g) is revised to make clear that a deposition to perpetuate testimony may be used  
23 in California only if it was taken under this section or under a comparable provision of the federal  
24 courts or of the jurisdiction in which it was taken.