STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Civil Discovery: Statutory Clarification and Minor Substantive Improvements

June 2004

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

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June 10, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Law Revision Commission recommends the following improvements in 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 governing the procedure for conducting an oral deposition in California (Code Civ. Proc. § 2025.330) 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 to audiotape in the Civil Discovery Act (Code Civ. Proc. §§ 2032.510, 2032.530) should be revised to reflect advances in technology, consistent with prior legislation.

(4) Provisions governing presuit discovery (Code Civ. Proc. §§ 2035.010, 2035.030, 2035.050) 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 statute governing use of a presuit deposition (Code Civ. Proc. § 2035.060) should be amended to make clear that if such a deposition 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.

Respectfully submitted,

Frank Kaplan
Chairperson

CIVIL DISCOVERY: STATUTORY CLARIFICATION AND MINOR SUBSTANTIVE IMPROVEMENTS

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

- The one-deposition rule in a limited civil case.
- Audio or video recording of a deposition.
- References to “audiotape” in the Civil Discovery Act.
- Presuit discovery.

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

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

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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. 2004 Cal. Stat. ch. 182. The reorganization will become operative on July 1, 2005. *Id*. at § 64. Unless otherwise specified, all references are to the civil discovery provisions as reorganized and operative on July 1, 2005 (Code Civ. Proc. §§ 2016.010-2036.050), not to the civil discovery provisions that will be repealed on that date (Code Civ. Proc. §§ 2016-2036). Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

Application of the One-Deposition Rule to the Deposition of an Organization

A limited civil case[4] is usually subject to special litigation rules known as economic litigation procedures,[5] which are designed to reduce the cost of litigation in a case for a relatively small amount.[6] Among the special procedures applicable to a limited civil case is the one-deposition rule, which permits a party to take only one oral or written deposition as to each adverse party.[7] The one-deposition rule is ambiguous as applied to a deposition of an organization.

A deposition notice directed to a corporation or other organization must "describe with reasonable particularity the matters on which examination is requested."[8] The organization is obligated 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."[9] The statute setting forth the one-deposition rule does not specify how the rule applies if a deposition notice in a limited civil case specifies more than one topic on which an organization will be examined, but no one person in the organization has knowledge of every topic specified.

This has led to confusion over whether the organization must produce only one person, even though that person lacks knowledge of all the specified topics, or must produce several people, despite the one-deposition rule.[10] Although the issue

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4. For the rules governing whether an action or special proceeding is treated as a limited civil case, see Section 85 & Comment. In general, the maximum amount in controversy in a limited civil case is $25,000.

5. Section 91.

6. 1982 Cal. Stat. ch. 1581, § 5.

7. Section 94(b).

8. Section 2025.230.

9. *Id.*

10. Email from Chris Wilson to Stan Ulrich (Oct. 20, 2000) (Commission Staff Memorandum 2002-21, Exhibit p. 20); see also R. Weil & I. Brown, Jr.,

arises at the trial level, there is no published appellate decision resolving it, probably because a limited civil case ordinarily does not receive appellate review resulting in a published decision.

The ambiguity in the one-deposition rule should be eliminated by making clear that the organization must produce as many witnesses as necessary to testify knowledgeably to all of the topics specified in the deposition notice.[11] The organization is the deponent — not the officers, employees, and agents testifying on its behalf. The organization must necessarily speak through natural persons. Because of the large and decentralized nature of some organizations, the deponent's "knowledge" may be dispersed among several individuals.

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

The purpose of discovery rules is to "enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise."[12]

California Practice Guide: Civil Procedure Before Trial, Discovery ¶ 8:1809.1 (2004).

11. If the scope of the requested discovery is unduly burdensome, expensive, or intrusive, the organization can file a motion under Section 2017.020 seeking appropriate limitations.

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

Revising the one-deposition rule as proposed would promote those goals.[13]

Equal Right to Record a Deposition By Audio or Video Technology

With limited exceptions, Section 2025.330 requires deposition testimony to be stenographically recorded. In addition to recording the testimony stenographically, the party who notices the deposition (the "deposing party") may also record the testimony by audio or video technology if that party states an intention to do so in the deposition notice, or all parties agree to the recording. The statute further states that "[a]ny other party, at that party's expense, may make a *simultaneous* audio or video record of the deposition."[14]

That language is ambiguous. It is unclear whether the party who did not notice the deposition (the "non-deposing party") is entitled to make an audio or video record simultaneously with preparation of the stenographic record, or only simultaneously with preparation of an audio or video record

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13. The proposed reform would also be consistent with the language of the provision requiring the organization to designate who will testify. Section 2025.230 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 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., *supra* note 10, at ¶ 8:1809.1 (emphasis in original).

14. Section 2025.330(c) (emphasis added).

by the deposing party. If the latter is true, the deposing party has full control over whether a deposition is recorded by audio or video technology. The Commission has been unable to find a published case resolving which interpretation of the sentence is correct.

To prevent unnecessary disputes over this issue, the Commission recommends that the word "simultaneous" be deleted from the sentence. This revision would make clear that the non-deposing party is entitled to make an audio or video record regardless of whether the deposing party does so.

There is solid justification for such an approach, and 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. Recording a deposition by audio or video technology entails extra cost, but also confers evidentiary benefits that vary depending on the factual context and the perspective of a particular litigant.[15] Each

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15. For example, a video record of a deposition often reveals when a witness is nervous and uncomfortable testifying about a subject, while a written transcript generally does not. This might be important in attacking the witness' credibility.

Similarly, impeachment by a video record may be more compelling than impeachment by a written record. As explained in a recent presentation on taking and using a videotaped deposition,

> If you carefully ask questions at trial that track questions asked at the deposition, and the witness strays from his deposition answers, you may, by pulling the trigger of a scanner gun, confront the witness with a larger than life video of himself testifying in just the opposite way. It is the rare witness who, having been properly impeached by video once or twice, will not settle down and keep his trial testimony within the bounds of his deposition testimony.

Greenwald, Caruso & Turrill, *Taking Effective Video-Taped Depositions and Using Them Effectively at Trial*, ABA Annual Meeting, ABA Section of Litigation (Aug. 7-10, 2003), at <http://www.abanet.org/litigation/articles/sf videodepo.pdf>. This technique may be especially useful in controlling a witness

party should be able to make its own assessment of whether an audio or video record is desirable under the circumstances of a particular case. Protections are in place to ensure that any audio or video record of a deposition is reliable and accurate.[16] Given these safeguards, there is no need to give the deposing party full control over whether such a record is made. Section 2025.330 should be amended to eliminate uncertainty regarding the authority of a non-deposing party to record a deposition by audio or video technology.

References to "Videotape" and "Audiotape"

In 2002, the Legislature replaced numerous references to "videotape" and "audiotape" in the Civil Discovery Act with terms that reflect advances in technology.[17] References to "videotape" were changed to "video technology," "video recording," or "video record." References to "audiotape" were similarly corrected.

A few references to "audiotape" remain in the Civil Discovery Act.[18] That appears to have been an oversight. The Law Revision Commission therefore recommends conforming the remaining references to "audiotape" in the Civil Discovery Act to the terminology changes made in 2002.

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who has a strong motivation to lie about critical facts, but it may be counterproductive if there are only slight discrepancies between the witness' deposition and trial testimony. *Id.*

16. Section 2025.340 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 2025.340(c). 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 2025.510.

17. 2002 Cal. Stat. ch. 1068.

18. See Code Civ. Proc. §§ 2032.510, 2032.530.

Presuit Discovery

Under specified circumstances, a person who expects to be a party to a lawsuit in a California state court may petition to conduct discovery before the lawsuit is filed. The provisions governing such presuit discovery (Sections 2035.010-2035.060) are ambiguous with respect to (1) whether a petitioner may take presuit discovery when the contemplated lawsuit would be filed by the petitioner's successor in interest instead of by the petitioner, and (2) whether a deposition to perpetuate testimony is admissible in California if it was taken under the laws of a jurisdiction other than California, the United States, or the jurisdiction in which it was held. The Commission recommends that these ambiguities be eliminated.

Suit to be Filed by Petitioner's Successor in Interest

Section 2035.010 authorizes presuit discovery, under specified conditions, by someone who expects to be a *party* to an action. It does not expressly permit a person to engage in presuit discovery in anticipation of a suit by or against the person's successor in interest. For example, it is unclear whether the provision would permit a testator to perpetuate testimony relating to the testator's mental capacity to execute a will and to the circumstances surrounding its execution.

The statutory language does appear to be broad enough to allow presuit discovery under specified conditions by a person who expects to be a party by virtue of being a successor in interest. But this is helpful only to the extent that the successor in interest is identifiable at the time presuit discovery is sought. An unborn child or future assignee, for example, might eventually qualify as a successor in interest as well. As the statute is written, it does not seem to permit anyone to conduct presuit discovery on behalf of such a person. It is conceivable, however, that a court would find

such authority implicit in the statute, even though it is not explicit.

The statute should be amended to eliminate the ambiguity and expressly authorize a petitioner to conduct presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest.[19] Such discovery should be subject to all of the same safeguards as other presuit discovery.

The Legislature developed those safeguards to prevent presuit discovery from being exploited as a means of conducting a broad-ranging "fishing expedition" for information before a lawsuit is filed.[20] The key safeguard is Section 2035.010(b), which expressly prohibits use of the statute for purposes of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to a future action. The petitioner must also show a present inability to bring the action or cause it to be brought.[21] Notice and a contested hearing are required.[22] The court must also find that the perpetuation of testimony "may prevent a failure or delay of justice."[23]

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19. 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). The Comment to Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act explains that the provision would

> permit the petitioner to anticipate an action after his death or after he had assigned his interest in the subject matter. It would, for instance, permit a testator to perpetuate testimony relating to his mental capacity to execute a will and to the circumstances surrounding its execution. The same would be true with respect to the execution of any other kind of written instrument.

20. Block v. Superior Court, 219 Cal. App. 2d 469, 477 n.5, 33 Cal. Rptr. 205 (1963) (interpreting former Section 2017, which became Section 2035, the predecessor of Sections 2035.010-2035.060); see also Hunt-Wesson Foods, Inc. v. County of Stanislaus, 273 Cal. App. 2d 92, 94, 77 Cal. Rptr. 832 (1969).

21. Section 2035.030(b)(2).

22. Section 2035.040.

23. Section 2035.050(a).

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

The Commission recommends that these safeguards be added:

(1) The petition must include a copy of any written instrument, the validity or construction of which may be called into question or is connected with the subject matter of the proposed discovery.[24]

(2) If a petitioner seeks presuit discovery in anticipation of a lawsuit by a successor in interest, the petition must show that the successor in interest is presently unable to bring an action or cause it to be brought.[25]

(3) When a petitioner seeks presuit discovery in the expectation that a successor in interest will be a party to an action, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner.

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24. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act. The Comment to that provision explains:

> [S]ubdivision (b) would require the petitioner to attach a copy of the instrument to the petition. In the case of a will it is perfectly obvious that unless the contents of the will were revealed the heirs and beneficiaries would have no way of knowing the nature of their interest and would be completely in the dark as to whether they should be proponents or contestants. To give them notice so that they might have the right to cross-examine the witnesses whose depositions are to be taken would be an empty gesture indeed if they were not given an opportunity to know in what manner their interests were affected by the will.

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

Amending the statute in this manner to cover an anticipated suit by a successor in interest would not be a significant extension of the statute, would be helpful to some petitioners and their successors in interest, and would provide guidance on the point. The existing requirements, in conjunction with the proposed new safeguards, should inhibit any attempt to use the statute for purely investigative purposes.

Law Applicable to a Deposition to Perpetuate Testimony

Section 2035.060 states that a deposition to perpetuate testimony may be used in a subsequent action in California state court if the deposition was taken pursuant to the chapter governing presuit discovery (Sections 2035.010-2035.060), "or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation." The provision does not make clear whether an out-of-state deposition must have been taken under the laws of the state in which it was taken, or just "another state."[26] This omission leaves open the possibility that a deposition taken in a second state under a third state's laws regarding presuit discovery could be admissible in California. The provision is similarly ambiguous with regard to the admissibility of a deposition to perpetuate testimony that was taken in another country.

The Commission recommends that the statutory language be clarified to prevent disputes regarding the admissibility of a deposition taken in another jurisdiction. Specifically, Section 2035.060 should be amended to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under California law, federal law, or a comparable provision of the jurisdiction in which it was taken.

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

PROPOSED LEGISLATION

Code Civ. Proc. § 94 (amended). Discovery in economic litigation case

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

94. Discovery is permitted only to the extent provided by this section and Section 95. This discovery shall comply with the notice and format requirements of the particular method of discovery, as provided in Title 4 (commencing with Section 2016.010) of Part 4. As to each adverse party, a party may use the following forms of discovery:

(a) Any combination of 35 of the following:

(1) Interrogatories (with no subparts) under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4.

(2) Demands to produce documents or things under Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4.

(3) Requests for admission (with no subparts) under Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4.

(b) One oral or written deposition under Chapter 9 (commencing with Section 2025.010), Chapter 10 (commencing with Section 2026.010), ~~and~~ *or* Chapter 11 (commencing with Section 2028.010) of Title 4 of Part 4. *For purposes of this subdivision, a deposition of an organization shall be treated as a single deposition even though more than one person may be designated or required to testify pursuant to Section 2025.230.*

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

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

(d) Physical and mental examinations under Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4.

(e) The identity of expert witnesses under Chapter 18 (commencing with Section 2034.010) of Title 4 of Part 4.

Comment. Subdivision (b) of Section 94 is amended to make clear the proper treatment of a deposition of an organization. Subdivision (b) is also amended to make a stylistic revision.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 94 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 6, 64.

Code Civ. Proc. § 2025.330 (amended). Conduct of deposition

SEC. 2. Section 2025.330 of the Code of Civil Procedure is amended to read:

2025.330. (a) The deposition officer shall put the deponent under oath.

(b) Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically.

(c) The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods. Any other party, at that party's expense, may make ~~a simultaneous~~ *an* audio or video record of the deposition, provided that the other party promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, serves a written notice of this intention to make an audio or video record of the deposition testimony on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition

notice was served under Section 2025.240, and on any deponent whose attendance is being compelled by a deposition subpoena under Chapter 6 (commencing with Section 2020.010). If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011.

(d) Examination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code.

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

Comment. Subdivision (c) of Section 2025.330 is amended to make clear that the right of a non-deposing party to make an audio or video record of deposition testimony is not dependent on the method of recording used by the party noticing the deposition.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2025.330 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2032.510 (amended). Observation of examination by attorney or representative

SEC. 3. Section 2032.510 of the Code of Civil Procedure is amended to read:

2032.510. (a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by ~~audiotape~~ *audio technology* any words spoken to or by the examinee during any phase of the examination.

(b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.

(c) If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative.

(d) If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order.

(e) If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order.

(f) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Comment. Subdivision (a) of Section 2032.510 is amended to reflect advances in technology and for consistency of terminology throughout the Civil Discovery Act. See 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in the Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as the context required).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2032.510 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2032.530 (amended). Recording of mental examination

SEC. 4. Section 2032.530 of the Code of Civil Procedure is amended to read:

2032.530. (a) The examiner and examinee shall have the right to record a mental examination ~~on audiotape~~ *by audio technology*.

(b) Nothing in this title shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.

Comment. Subdivision (a) of Section 2032.530 is amended to reflect advances in technology and for consistency of terminology throughout the Civil Discovery Act. See 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in the Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as the context required).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2032.530 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.010 (amended). Perpetuation of testimony or preservation of evidence before filing action

SEC. 5. Section 2035.010 of the Code of Civil Procedure is amended to read:

2035.010. (a) One who expects to be a party *or expects a successor in interest to be a party* to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), for the purpose of perpetuating that ~~party's~~ *person's* own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed.

(b) One shall not employ the procedures of this chapter for the purpose either of ascertaining the possible existence of a

cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.

Comment. Section 2035.010 is amended to permit a person to take presuit discovery on behalf of a successor in interest (i.e., in anticipation of a suit by the person's successor in interest), so long as the statutory requirements for such discovery are satisfied. For similar provisions, 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.

In connection with this reform, several new safeguards have been added to ensure that presuit discovery is conducted only when it is warranted. Under Section 2035.030(b)(2), when a petitioner seeks presuit discovery on behalf of a successor in interest, presuit discovery is permissible only if both the petitioner and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act. Under Section 2035.030(b)(3), a petition for presuit discovery must include a copy of any written instrument connected with the subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act. Under Section 2035.050(a), when a petitioner seeks presuit discovery on behalf of a successor in interest, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner. This factor is significant but not necessarily determinative.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.010 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.030 (amended). Petition

SEC. 6. Section 2035.030 of the Code of Civil Procedure is amended to read:

2035.030. (a) One who desires to perpetuate testimony or preserve evidence for the purposes set forth in Section 2035.010 shall file a verified petition in the superior court of the county of the residence of at least one expected adverse party, or, if no expected adverse party is a resident of the State of California, in the superior court of a county where the action or proceeding may be filed.

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

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

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

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

(4) The particular discovery methods described in Section 2035.020 that the petitioner desires to employ.

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

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

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

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

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

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

Comment. Subdivision (b)(1) of Section 2035.030 is amended to reflect the rule that a person may take presuit discovery on behalf of a successor in interest (i.e., in anticipation of a suit by the person's successor in interest), so long as the statutory requirements for such

discovery are satisfied. See Section 2035.010 (perpetuation of testimony or preservation of evidence before filing action).

Subdivision (b)(2) is amended to ensure that if a person seeks presuit discovery on behalf of a successor in interest, a court may authorize such discovery only if both the petitioner and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act.

Subdivision (b)(3) is amended to add the requirement that a petition for presuit discovery include a copy of any written instrument connected with the subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act.

For an additional safeguard relating to presuit discovery on behalf of a successor in interest, see Section 2035.050(a) (in deciding whether to permit petitioner to take presuit discovery on behalf of successor in interest, court must consider whether requested discovery could instead be conducted by successor in interest).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.030 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.050 (amended). Court order

SEC. 7. Section 2035.050 of the Code of Civil Procedure is amended to read:

2035.050. (a) If the court determines that all or part of the discovery requested under this chapter may prevent a failure or delay of justice, it shall make an order authorizing that discovery. *In determining whether to authorize discovery by a petitioner who expects a successor in interest to be a party to an action, the court shall consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the petitioner's successor in interest, instead of by the petitioner.*

(b) The order shall identify any witness whose deposition may be taken, and any documents, things, or places that may be inspected, and any person whose physical or mental condition may be examined.

(c) Any authorized depositions, inspections, and physical or mental examinations shall then be conducted in accordance

with the provisions of this title relating to those methods of discovery in actions that have been filed.

Comment. Subdivision (a) of Section 2035.050 is amended to make clear that when a petitioner seeks presuit discovery on behalf of a successor in interest (i.e., in the expectation that a successor in interest will be a party to an action), the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner. This factor is significant but not necessarily determinative.

For the provision authorizing presuit discovery on behalf of a successor in interest, see Section 2035.010 (perpetuation of testimony or preservation of evidence before filing action). For other safeguards applicable to such discovery, see Section 2035.030 (petition) & Comment.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.050 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.060 (amended). Use of presuit deposition to perpetuate testimony

SEC. 8. Section 2035.060 of the Code of Civil Procedure is amended to read:

2035.060. If a deposition to perpetuate testimony has been taken either under the provisions of this chapter, or under comparable provisions of the laws of ~~another state~~ *the state in which it was taken*, or the federal courts, or a foreign nation *in which it was taken*, that deposition may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with Section 2025.620 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

Comment. Section 2035.060 is amended to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under this section or under a comparable provision of the federal courts or of the jurisdiction in which it was taken.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.060 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.