Study J-503 April 30, 2003

Memorandum 2003-17

Discovery Improvements from Other Jurisdictions (Discussion of Issues)

The Commission began its study of civil discovery in May 2002 with a review of comments on Professor Gregory Weber's background study on *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001) (hereafter "Weber Study"). The Commission identified a number of subject areas for further investigation. Two of these topics, presuit discovery and automatic supplementation of discovery responses, were considered on a preliminary basis at the July 2002 meeting. This memorandum explores the topics further in light of subsequent commentary submitted by interested parties. The memorandum also addresses issues relating to the one-deposition rule in a limited civil case, the right to make an audio or video record of a deposition, and the use of "audiotape" and "videotape" terminology. The Commission is working towards preparation of a tentative recommendation.

The following comments are attached as an Exhibit:

Except as otherwise indicated, all statutory references in this memorandum are to the Code of Civil Procedure.

PRESUIT DISCOVERY

Section 2035 permits a person who expects to be a party to a California lawsuit to preserve testimony before a lawsuit is filed under specified circumstances. Last year, the Commission tentatively decided that Section 2035 should be amended along the following lines:

> 2035. (a) One who expects to be a party <u>or expects a successor in interest to be a party</u> 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 Section 2017, and subject to the restrictions

set forth in Section 2019, 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. One shall not employ the procedures of this section 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.

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

(c) One who desires to perpetuate testimony or preserve evidence for the purposes set forth in subdivision (a) 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.

(d) 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 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.

(4) The particular discovery methods described in subdivision (b) 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.

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.

(e) The petitioner shall cause service of a notice of the petition to be made on each natural person or organization named in the petition as an expected adverse party. This service shall be made in the same manner provided for the service of a summons. The

service of the notice shall be accompanied by a copy of the petition. The notice shall state that the petitioner will apply to the court at a time and place specified in the notice for the order requested in the petition. This service shall be effected at least 20 days prior to the date specified in the notice for the hearing on the petition.

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

(f) If the court determines that all or part of the discovery requested may prevent a failure or delay of justice, it shall make an order authorizing that discovery. 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. Any authorized depositions, inspections, and physical or mental examinations shall then be conducted in accordance with the provisions of this article relating to those methods of discovery in actions that have been filed.

(g) If a deposition to perpetuate testimony has been taken either under the provisions of this section, 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 subdivision (u) of Section 2025 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

Comment. Subdivisions (a) and (d) of Section 2035 are amended to permit a person to take presuit discovery in anticipation of a suit by the person's successor in interest, so long as the statutory requirements for such discovery are satisfied.

Subdivision (g) is revised 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.

The State Bar Committee on Administration of Justice ("CAJ") has submitted comments on the proposed revisions. Exhibit pp. 1, 3. CAJ's comments are discussed below.

Law Applicable to a Deposition to Perpetuate Testimony

Section 2035(g) states that a deposition to perpetuate testimony may be used in a subsequent action if the deposition was taken pursuant to Section 2035, "or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation." As Professor Weber explains, the provision "does not clarify whether the deposition must have been taken under the laws of the state in which it was taken, or just 'another state.'" Weber Study at 1071. The Commission decided to revise subdivision (g) to clarify this point and to make a similar clarification with regard to a deposition taken in a foreign nation. Minutes (July 11-12, 2002), pp. 20-22.

CAJ takes "no position" with regard to this proposed revision. Exhibit p. 1. The staff recommends that **the proposed revision of subdivision (g) be included in a tentative recommendation**.

Suit to be Filed by Petitioner's Heirs or Representatives

Section 2035(a) authorizes presuit discovery, under specified conditions, by someone who expects to be *a party* to an action. It does not appear to permit a person to engage in presuit discovery in anticipation of a suit by or against the person's successor in interest. Professor Weber notes that Oklahoma and Ohio allow presuit discovery to be made "even if it is not the petitioner but rather his or her heirs or representatives who will be parties to the action that cannot yet be brought." Weber Study at 1072. The Commission tentatively decided to propose a revision of subdivision (a) to permit presuit discovery by a person in anticipation of a suit involving the person's successor in interest.

CAJ Comments

CAJ opposes the proposed revision of subdivision (a):

> There is nothing that demonstrates that the existing language has actually created any problems, and the proposed revision might raise new issues and create new problems that do not exist under the current statutory language.

Exhibit p. 1.

CAJ points out that under the existing statute, a successor in interest who "expects to be a party" is already permitted to engage in presuit discovery to protect his or her own interests. *Id.* at 3. To the extent that the successor in interest is identifiable at the time the presuit discovery is sought, this statement

might be accurate. However, an unborn child or future assignee might eventually qualify as a successor in interest as well.

CAJ further contends that allowing a person to undertake presuit discovery on behalf of someone else would

> introduce an unnecessary and entirely new level of complexity, including questions about adequacy of representation, alignment of interests, and preclusion of subsequent discovery by the successor in interest.

Id. These concerns are stated quite broadly and are therefore difficult to address.

We note, however, that adequacy of representation and alignment of interests are issues that may arise even if a lawsuit has already been instituted. As for preclusion of subsequent discovery, CAJ does not cite any authority that discovery undertaken pursuant to Section 2035 would bar further discovery once a lawsuit has materialized. Under Section 2019, however, the court may preclude duplicative discovery upon motion for protective order. This procedure may be sufficient to prevent abuse by a successor in interest.

History of Section 2035

In light of CAJ's opposition, the staff conducted additional research tracing the history of Section 2035. Prior to 1957, the statutes governing preservation of testimony (Sections 2083-2089) allowed presuit discovery not only when a petitioner expects to be a party to future litigation, but also when

> the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit.

Former Section 2084 (1953 Cal. Stat. ch. 1077, § 1).

This alternative basis was quite liberal, permitting presuit discovery of any matter that might become material even if there was no current expectation of a lawsuit. For example, it could be used to establish a petitioner's state of mind at the time a will was drafted for use in a subsequent will contest between the petitioner's heirs. See *Cailleaud v. Superior Court*, 108 Cal. App. 752, 292 P. 145 (1930).

The alternative basis for seeking presuit discovery was eliminated as part of the 1957 Discovery Act, which replaced Sections 2083-2089 with former Section 2017 (1957 Cal. Stat. ch. 1904, § 3), the predecessor of Section 2035. Section 2017

was similar in substance to Section 2035. It was based on Rule 27 of the Federal Rules of Civil Procedure — including the provision that the *petitioner* must expect to be a party to future litigation.

The 1957 Discovery Act was proposed by the State Bar Committee on Administration of Justice, because "the Federal Rules relating to 'discovery' are far superior to the statutory provisions regulating state practice in this regard." Comm. Admin. Just., *Discovery*, May-June 1956 Cal. St. B.J. 204, 205. At the time, the law in California restricted discovery *after* a suit had been filed, but permitted almost unlimited discovery *before* any lawsuit had been or might be initiated — without a showing of any necessity for the discovery. *Id*. at 206. To correct this anomaly, CAJ proposed the adoption of the federal approach (Rule 27) in California. *Id*. at 207.

CAJ was not the only critic of the liberal presuit discovery statutes as then existed. In *MacLeod v. Superior Court*, 115 Cal. App. 2d 180, 185, 251 P.2d 728 (1952), Justice Vallée grudgingly concurred in the court's affirmance of an order permitting a presuit deposition:

> I concur. I do so only because the Supreme Court says that literal compliance with the statute is sufficient....The statute, as written, permits a proceeding brought for the sole purpose of annoying, harassing or embarrassing another, or for some ulterior object. It permits one who does not have a cause of action to indulge in a meddlesome fishing expedition. That I think is this case. It should not be permitted. But the remedy lies in the field of legislation, and not in the creation of exceptions or qualifications under the guise of interpretation of the statute.

See also Comment, *Depositions Prior to Action: Proceedings to Perpetuate Testimony*, 44 Cal. L. Rev. 925 (1956) (noting that the perpetuation statutes had developed into a valuable discovery procedure — the exact reverse of the federal practice); Comment, *Petition to Perpetuate Testimony as a Presuit Discovery Device*, 3 Stan. L. Rev. 530 (1951).

Use of the perpetuation statutes to conduct discovery was severely restricted with the adoption of Section 2017:

> It has been said that the new section (2017) "tightens up the conditions of the proceeding so as to restrict its use to perpetuation purposes and to eliminate its use for the discovery purposes now adequately covered by other statutes."

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

This history reflects a clear legislative intent to prevent former Section 2017 (and now Section 2035) from being exploited as a means of conducting broad-ranging "fishing expeditions" for information before a lawsuit is filed.

Amending Section 2035 to permit presuit discovery on behalf of a successor in interest would not contravene the legislative intent. Section 2035(a) expressly prohibits the use of the statute for the purpose 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 proposed amendment would not alter the effect of this provision.

Furthermore, Section 2035 contains additional protections that did not exist in the pre-1957 law. The petitioner must show a present inability to bring the action or cause it to be brought (Section 2035(d)(2)). Notice and a contested hearing are required (Section 2035(e)). And, the court must find that the perpetuation of testimony "may prevent a failure or delay of justice" (Section 2035(f)). These requirements would apply with equal force to a petition to perpetuate testimony on behalf of a successor in interest. The staff recommends that **Section 2035 be expanded to cover an anticipated suit by a successor in interest, and that two additional safeguards be included.** These are discussed below.

Uniform Law

The perpetuation statutes in Oklahoma, Ohio, and Oregon are patterned after the 1959 Uniform Perpetuation of Testimony Act, which put forth the language permitting applicants to engage in presuit discovery on behalf of successors in interest ("the petitioner or his personal representatives, heirs, beneficiaries, successors or assigns may be parties to an action"). Unif. Perpetuation of Testimony Act, § 1(a). The Comment to the Uniform Act states:

> This section follows section (a)(1) of Rule 27 of the Federal Rules of Civil Procedure except for additional language in subsections (a) and (b) of this act. Subsection (a) 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.

The Uniform Act was withdrawn from recommendation for enactment by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1978, because it had become "obsolete." According to NCCUSL's Communications Officer, it was declared obsolete because it was almost 20 years old and, in all that time, only one state (Oklahoma) had adopted it in full. Email from Katie Robinson to Lynne Urman (Mar. 28, 2003) (on file with Commission). Oklahoma repealed the Uniform Act in 1982, although the proceedings under the new Oklahoma law are essentially the same, with a few exceptions not relevant to our discussion.

The staff was unable to determine why only a few states adopted the Uniform Act in whole or in part. As noted in Memorandum 2002-33 (p. 5), there is a dearth of case law on the statutes, particularly with respect to successors in interest.

A couple of additional provisions of the Uniform Act are worth consideration with regard to the successor in interest issue. The Uniform Act requires that a copy of any written instrument the validity or construction of which may be called in question or is connected with the subject matter of the deposition be attached to the petition to perpetuate testimony. Unif. Perpetuation of Testimony Act, § 1(b). As explained in the Comment:

> [S]ubsection (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.

The Commission should consider including a similar requirement in Section 2035. This might alleviate some of CAJ's concerns about alignment of interests and adequate representation. **Subdivision (d)(3) could be amended to incorporate the language of Section 1(b) of the Uniform Act:**

> (d) 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 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 in question, or which is connected with the subject matter of the deposition shall be attached to the petition.
>
> ....

Section 1(a) of the Uniform Act also seems to require that both the petitioner and the successor in interest be presently unable to bring or defend an action:

> (a) That the petitioner or his personal representatives, heirs, beneficiaries, successors or assigns may be parties to an action or proceeding cognizable in a court but *are* presently unable to bring or defend it.

(Emphasis added.) A similar requirement should likewise be added to Section 2035(d)(2). CAJ contends that a successor in interest who "expects to be a party" (upon succeeding to the interest in question) is already permitted to take presuit discovery to protect his own interests (e.g., a perfected assignment). Under that scenario, the successor in interest (i.e., assignee) would be required to explain in the petition his present inability to bring an action or cause it to be brought. Shouldn't the same be required where the petitioner is seeking presuit discovery on behalf of the successor in interest? Thus, **subdivision (d)(2) could be revised to read:**

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

Conclusion

Amending Section 2035 to permit presuit discovery on behalf of a successor in interest would not be a significant extension of the statute, might be useful, and would at least provide guidance on the point (arguably, Section 2035 could be construed to implicitly cover successors in interest even though they are not covered expressly). The existing safeguards (e.g., showing of necessity), in conjunction with the proposed requirements that the petitioner demonstrate the successor's present inability to bring or defend an action and attach any relevant

writing, should inhibit any attempted use of the statute for pure "investigative" purposes.

DUTY TO AUTOMATICALLY SUPPLEMENT DISCOVERY RESPONSE

The Commission decided to explore the possibility of imposing an automatic duty to supplement discovery responses. Currently, California law does not prescribe such a duty. In fact, interrogatories that impose a duty to supplement answers with later-acquired information ("continuing interrogatories") are expressly prohibited. Section 2030(c)(7). Subject to certain restrictions, a party may propound a supplemental interrogatory (Section 2030(c)(8)) or a supplemental inspection demand (Section 2031(e)) to elicit later-acquired information.

In contrast, Rule 26(e) of the Federal Rules of Civil Procedure imposes significant supplementation duties. Parties must supplement responses to required mandatory disclosures (initial, expert, pretrial) and to other forms of formal discovery (interrogatories, production requests, requests for admission) to correct information that is, in some *material* respect, incomplete or incorrect, unless the corrective or additional information has otherwise been made known to the other parties. A party who fails to comply with this duty without substantial justification is not permitted to use any undisclosed witness or information as evidence at trial, at a hearing, or on a motion, unless such failure is harmless. Fed. R. Civ. P. 37(c). The court may also impose a wide range of other sanctions that are not self-executing. *Id*.

An alternative between these two systems was suggested by Richard Best, former San Francisco court commissioner:

> Perhaps there should be some focused, limited and combined mandatory disclosure and duty to supplement, e.g. documents or witness expected to be presented at trial with the enforcement provision that those not disclosed when known cannot be introduced except on some significant showing of excusable neglect etc. Perhaps a mandatory disclosure of this limited but critical information could be made with the initial pleadings and on request or periodically thereafter. This has the appeal of getting the key discovery immediately at lower cost and without formal responses that tend to be expensive and counterproductive. The specificity of the requirement avoids the difficulty of enforcing a vague obligation.

Memorandum 2002-33, Exhibit p. 1.

Mr. Best also suggested contacting Judge David Levi (United States District Court, Eastern District of California) for information regarding empirical evidence on the federal procedure. *Id*. The Commission directed the staff to follow up on Commissioner's Best's suggestion to seek information from Judge David Levi or others regarding empirical evidence and experience with automatic supplementation of discovery responses in federal court. Minutes (July 11-12, 2002), p. 20.

The staff has not yet had the opportunity to meet with Judge Levi. However, the staff has located two recent studies on federal discovery that contain empirical data regarding the rate of failure to supplement discovery responses. These studies are discussed below. Additional comments from Mr. Best and CAJ regarding automatic supplementation are also addressed.

Empirical Data on Automatic Supplementation

In 1997, the Advisory Committee on Civil Rules asked the Federal Judicial Center ("FJC") to conduct empirical research on discovery. FJC's completed report includes findings from a national survey of attorneys in 1,000 closed federal civil cases considered to have a high probability of discovery activity. The survey had a response rate of 59% (1178 out of 2000 attorneys), with almost equal representation of plaintiff and defense attorneys. See T. Willging et al., Federal Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change (1997), *reprinted in* Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998) [page references are to the latter publication].

FJC's report includes significant findings regarding a number of discovery procedures and issues, which should prove useful throughout the Commission's study. The report includes findings regarding the duty to supplement initial disclosures and expert disclosures. At the time of the survey, Rule 26 still allowed district courts to "opt out" of the initial disclosure requirement, so the findings pertain only to those attorneys who participated in initial disclosure.

Thirty-seven percent of the attorneys who participated in initial disclosure perceived one or more problems with its implementation. Of that number, only 12% complained that a party failed to supplement or update the disclosures. *Id*. at 564.

The survey also found that among the four principal types of discovery (document production, initial disclosure, depositions, expert disclosure), expert disclosure had the second lowest rate of reported problems — 27%. Of those

attorneys reporting problems, only 9% complained of a failure to supplement or update the expert disclosures. *Id.* at 567-68.

In contrast, a survey relating solely to expert testimony found that of the 70% of attorneys who received one or more written expert reports from opposing counsel, 27% contended that the opposition failed to supplement or update its expert reports. See Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol'y & L. 309, 324 (2002). This survey was conducted in 1999 of 458 lead plaintiff and defendant attorneys in federal civil trials involving expert testimony. The survey had a 66% response rate (302 respondents) split evenly between plaintiff and defense counsel. *Id.* at 315, 318.

Despite the disparity in the findings of the two studies with regard to supplementation of expert disclosures, the studies demonstrate that the majority of attorneys have not encountered problems with the automatic supplementation rule with regard to initial disclosure and expert disclosure.

At the time of the studies, Rule 37(c) authorized a federal trial court to impose sanctions for the failure to supplement initial and expert disclosures. In 2000, the failure to supplement formal discovery responses was added as a basis for sanctions under Rule 37(c). Therefore, there is reason to believe that the rate of respondents' failure to supplement formal discovery responses would be equally low.

Comments of CAJ and Mr. Best

CAJ supports further inquiry into the duty to automatically supplement discovery responses, but "recommends" that the Commission "refrain from adopting a rule that would impose an automatic duty to supplement, *absent adoption of other procedures employed in federal court*, such as the duty to disclose." Exhibit p. 1 (emphasis added).

> If adopted in California without a duty to disclose, a rule requiring a duty to supplement would require counsel to review prior discovery responses every time additional information is received, to ensure that the prior responses took into account the newly-received information. In essence, this is a burden that is already imposed in federal court, because the continuing duty to *disclose* is part of the federal rules. Thus, the duty to supplement discovery responses in federal court adds little to the existing burden. In California, in contrast, parties presently have *no affirmative duty* to disclose. Thus, the adoption of a rule requiring parties to supplement their prior responses would add a substantial

> burden that does not presently exist in state court practice. Moreover, if such a rule were adopted, there would likely be an increase in litigation over the *failure* to supplement prior responses if later discovered information is revealed either prior to or during trial.

Id. at 2. CAJ "strongly urges the CLRC to consider the duty to supplement *together with* the duty to disclose...." *Id*. at 2-3 (emphasis in original).

A duty to supplement is not inextricably tied to a duty to disclose. The mandatory disclosures required under Rule 26 came into effect in 1993. Before then, Rule 26(e) still imposed a duty to disclose — albeit a much narrower one. Generally, there was no duty to supplement a discovery response that was complete when made, *except* with respect to the identity of witnesses (expert and lay) and to prior responses later found to be incorrect. If an earlier response was correct when made but no longer true, the responding party had a duty to supplement where the failure to amend the response would be in substance a *knowing concealment*. A duty to supplement could also be imposed by order of the court, party agreement, or at any time prior to trial through new requests for supplementation of prior responses.

Mr. Best has referred us to certain discovery rules in Washington State that he believes are worthy of the Commission's attention. Email from Richard Best to Barbara Gaal (Sept. 8, 2002) (on file with Commission). One such rule is Washington's Civil Rule 26(e), which pertains to supplementation. That rule is identical to Federal Rule 26(e) as it existed prior to 1993. Washington does not appear to have a mandatory disclosure rule, so it is an example of a jurisdiction imposing a duty to supplement without a duty of mandatory disclosure.

CAJ's concerns regarding increased litigation over the failure to supplement are understandable and should be considered by the Commission in deciding whether and in what form to adopt an automatic supplementation rule in California. As the studies demonstrate, however, failure to supplement is reported in only a minority of cases. Litigation over the consequences of such failure is minimized in federal court by virtue of the automatic exclusion rule (Fed. R. Civ. P. 37(c)). In contrast, Washington's Civil Rule 26(e)(4) provides that "[f]ailure to seasonably supplement … will subject the party to such terms and conditions as the trial court may deem appropriate." The decision to exclude evidence for failure to supplement is within the court's discretion, but is not self-executing. See *M/V La Conte, Inc. v. Leisure*, 55 Wash. App. 396, 402, 777 P.2d 1061 (1989). This type of exclusionary rule would require greater court involvement in

determining the appropriate sanction to impose and whether the failure to supplement amounted to a "knowing concealment."

Recommendation

As suggested by CAJ, the **staff recommends deferring further work on automatic supplementation**. Whether, and to what extent, a duty to supplement should be imposed are considerations dependent to some degree on the decisions the Commission makes with regard to the underlying discovery procedures. Additionally, any automatic supplementation rule that is drafted at this time may need to be substantially revised to conform to decisions the Commission makes with regard to pretrial disclosures.

ONE-DEPOSITION RULE IN A LIMITED CIVIL CASE

Another topic the Commission decided to explore is the one-deposition rule in a limited civil case. Under Section 94(b), a party in a limited civil case may take only one oral or written deposition as to each adverse party. Attorney Christine Wilson seeks clarification of the rule's application to a deposition of an organization:

> Specifically, the question is, under the "one deposition" rule, if a deposition of an entity is set to testify on a number of subjects, must the entity produce several individuals if no one person is knowledgeable in all areas? Or, are they required only to produce one person even if that individual knows nothing about some of the subject areas?

Memorandum 2002-21, Exhibit p. 20. Ms. Wilson reports that "we have actually had to seek an order from the trial judge each time this issue has come up." *Id*.

Because the one-deposition rule applies only in limited civil cases, there is a lack of appellate decisions (or other scholarly writings) analyzing the rule and its application. The staff did find the following published commentary, which highlights the need for clarity in this area:

> 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., California Practice Guide: Civil Procedure Before Trial, *Discovery* ¶ 8:1809.1 (2002).

Analysis and Recommendation

Section 94(b) provides that a party may use one oral or written deposition *under Sections 2025 to 2028, inclusive*. Section 2025(d) requires that a deposition notice (or subpoena) directed to a corporation or other organization "describe with reasonable particularity the matters on which examination is requested." The organization is then 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 as to those matters to the extent of any information known or reasonably available to the deponent." *Id*. (emphasis added).

The statutory language regarding an organization's duty to designate is expressed with reference to more than one person. Although Section 17 provides that the singular includes the plural and the plural the singular, the use of the plural in Section 2025(d) is contrary to modern statutory drafting conventions. The implication is that the Legislature intended for the organization to designate as many witnesses as necessary to testify on the matters described in the notice (or subpoena). This has been the practice, at least with regard to unlimited civil cases. See, e.g., *Maldonado v. Superior Court*, 94 Cal. App. 4th 1390, 115 Cal. Rptr. 2d 137 (2002) (plaintiffs entitled to have corporate defendant's three designated witnesses bring requested documents to depositions and prove they had undertaken some effort to familiarize themselves with areas of their supposed "knowledge"). See also former Section 2019, 1985 Cal. Stat. ch. 444, § 2, which directed an organization to designate "one or more officers...."

Of course, there are no limits on the number of depositions that may be taken in unlimited civil cases. Nevertheless, whether in a limited or an unlimited civil case, *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 fragmented among several individuals.

Moreover, it is the organization that designates the individuals who will testify on its behalf. If Section 94(b) limited the deposition of an organization to one officer, agent, or employee, increased opportunities for gamesmanship could occur. For example, an organization could designate as a witness the employee or officer most qualified to testify on one of five topics identified in a deposition

notice, even though another person is most qualified to testify on the remaining four topics. The deponent would have the power unilaterally to exclude relevant information from being discovered.

The purpose of the discovery rules is to "enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise." *Williams v. Volkswagenwerk Aktiengesellschaft,* 180 Cal. App. 3d 1244, 1254, 226 Cal. Rptr. 306 (1986). The staff therefore **proposes the following revision** of Section 94(b) to clarify the relationship between the one-deposition rule and organization depositions:

Code Civ. Proc. § 94 (amended). Permissible forms of discovery

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 Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 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 Section 2030.

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

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

(b) One oral or written deposition under Sections 2025 to 2028, inclusive. <u>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 to testify pursuant to Section 2025(d).</u>

(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 Section 2032.

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

Comment. Subdivision (b) of Section 94 is amended to make clear that the deposition of an organization is to be treated as a single deposition even if the organization designates more than one witness to testify on its behalf under Section 2025(d).

This amendment would be consistent with the federal approach. See Fed. R. Civ. Proc. 30 advisory committee's notes (for purposes of the federal limit on the number of depositions, a deposition of an organization should "be treated as a single deposition even though more than one person may be designated to testify.").

EQUAL RIGHT TO VIDEO DEPOSITION

Richard Best seeks clarification of Section 2025(*l*) regarding audio and video recording of deposition testimony. Subdivision (*l*) provides in part:

> Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically. 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 audio or video record of the deposition*, provided that 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 subdivision (c), and on any deponent whose attendance is being compelled by a deposition subpoena under Section 2020.

(Emphasis added.)

Mr. Best proposes an amendment to subdivision (*l*) "to assure that any party has the right to record any deposition by audio or video recording device." Exhibit p. 24. He explains:

> In effect, the current statute gives the party noticing the deposition full control over whether a deposition will be video or audio taped. Unless the noticing party elects to do so, other participants have no clear right to audio or videotape the only deposition of a natural person.

Id.

As Mr. Best notes, the ambiguity regarding a non-noticing party's right to audio or video record a deposition stems from use of the term "simultaneous" and its placement within 2025(*l*) (see highlighted portion above). *Id*. n.2. The staff agrees that it is unclear whether "simultaneous" refers to any noticed deposition

or only to ones for which the noticing party has noticed a video or audio recording of the deposition. Mr. Best further points out that "lawyers cannot rely on courts or opposing parties permitting variations without time consuming and expensive motions." *Id*. at 25 n.6.

The staff has been unable to find any cases on point. *Green v. GTE California, Inc.*, 29 Cal. App. 4th 407, 34 Cal. Rptr. 2d 517 (1994), cited by Mr. Best (Exhibit p. 24 n.2), is not helpful since the facts suggest that the noticing party was also videotaping the deposition.

Background

As originally proposed in 1986 by the State Bar-Judicial Council Joint Commission on Discovery (hereafter "Discovery Commission"), Section 2025(d) would have permitted the party noticing a deposition to select stenography, audiotape, or videotape as the method for recording the testimony. Subdivision (*l*) would have given each party an independent right to simultaneously record the testimony by any of those same methods:

> **(*l*) General Procedure.** The deposition officer shall put the deponent on oath. The testimony, as well as any objections, shall be recorded in the manner specified in the deposition notice. *Any party, at that party's expense, may make a simultaneous stenographic, audiotape, or videotape record of the deposition*.

(Emphasis added). See also Reporter's Notes to (proposed) Section 2025(*l*):

> The second sentence reflects the Commission's decision that a deposition notice may specify the use of audiotape, as well as stenography or videotape as the method of recording the testimony.... The third sentence gives any other party the right to record the deposition by a method of that party's choosing.

The Legislature, however, chose to continue the requirement of a stenographic record, absent court order or party stipulation. If the testimony is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record for purposes of trial and any subsequent hearing or appeal. Section 2025(p).

Professor James E. Hogan was a member of the Discovery Commission and served as its Reporter. He also guided the Discovery Commission's proposal through the legislative process. J. Hogan, Modern California Discovery at vi (4th ed. 1988). In his treatise on discovery, Professor Hogan states the following with regard to the Discovery Commission's proposal:

> The Legislature ultimately decided to adhere to the existing requirement that a stenographic recording must be made of a discovery deposition "[un]less the parties agree or the court orders otherwise."
>
> However, the party noticing the deposition is permitted to make a *simultaneous* audiotape or videotape record of the testimony if its deposition notice states an intention to do so....
>
> Moreover, any other party is permitted to make a *simultaneous* record of the deposition by audiotape or by videotape. It is a prerequisite to the exercise of this right that this party give written notice, no later than three calendar days in advance of the deposition, of its intent to do so.

Id. at 93-94 (emphasis added).

At least with regard to the noticing party's right to video record the deposition, Professor Hogan appears to use the word "simultaneous" to mean "at the same time as the stenographic record is made." Whether this same meaning was intended — by Professor Hogan and the Legislature — to apply to the non-noticing party's right to video record the deposition is unclear.

The staff's research into the legislative history of the 1986 Discovery Act indicates significant involvement by court reporters and their associations. Presumably, their main concern was in ensuring that video or audiotape of a deposition would not replace the requirement of a stenographic record. It is conceivable, however, that allowing non-noticing parties to videotape a deposition when the noticing party notices only a stenographic record could have an impact on court reporters (e.g., reduce orders for transcript copies). Whether this was a factor in the revisions that were made to the Discovery Commission's proposal is unknown. The staff raises it only to demonstrate the possibility that the Legislature intended to limit the non-noticing party's right to video record a deposition.

Other Jurisdictions

Other jurisdictions have adopted a variety of approaches to this matter.

Federal Approach

Rule 30(b)(2) of the Federal Rules of Civil Procedure provides that the party taking the deposition shall state in the notice the method by which the testimony shall be recorded, which may be by sound, sound-and-visual, or stenographic means (unless the court orders otherwise). Rule 30(b)(3) then provides:

> (3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

The federal rule thus appears to permit non-noticing parties to record the testimony only by a method not otherwise being used by the noticing party. See W. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial, *Disclosure and Discovery* ¶¶ 11:1495-96 (2003). The federal rule is followed in some states. See, e.g., Colo. Ct. R. Civ. P. 30(b); Ark. R. Civ. P. 30(b).

Uniform Act

In 1978, NCCUSL approved a Uniform Audio-Visual Deposition Act, which several states have since adopted in whole or in part (e.g., North Dakota, Virginia). Section 1 provides in part:

> (a) Any deposition may be recorded by audio-visual means without a stenographic record. Any party may make at his own expense a simultaneous stenographic or audio record of the deposition. Upon his request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.
>
> (b) The audio-visual recording is an official record of the deposition. A transcript prepared by an official court reporter is also an official record of the deposition.

The Uniform Act, like the federal rule, apparently does not permit simultaneous video recording of a deposition.

Maine

Rule 30(b) of the Maine Rules of Civil Procedure requires that the notice of deposition state the method by which the deposition will be recorded, which includes video camera recording. In contrast to the federal rule and the Uniform Act, it provides:

> Any other party may record a deposition by any means, provided that the recording does not disrupt or impede the deposition process. The method of recording specified in the notice by the party noticing the deposition shall constitute the only official record of the deposition.

Id. In Maine, simultaneous recording by the same method is permissible, but only the noticing party's recording would constitute the official record.

New York

New York presents yet another variation. The notice or subpoena must state that the deposition is to be videotaped. The parties may make audio copies of the deposition and "thereafter may purchase additional audio and audio-visual copies." In addition, where a deposition is taken upon notice by audio recording alone, "any party, at least five days before the date noticed for taking the deposition, may apply to the court for an order establishing additional or alternate procedures for the taking of such audio deposition." N.Y. Ct. R. § 202.15.

Proposed Revision

Mr. Best proposes deleting the word "simultaneous" from section 2025(*l*). Exhibit p. 25. The **staff concurs**. The staff has been unable to find any evidence that the Legislature intended to prohibit a non-noticing party from video or audio recording deposition testimony when the noticing party is only recording the testimony stenographically. Moreover, protections are in place to ensure that a non-noticing party's video or audio recording is reliable and accurate. Section 2025(*l*)(2) sets forth in considerable detail the procedures that must be followed if the deposition is recorded by audio or video technology *by, or at the direction of any 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). Finally, as long as the deposition testimony is recorded stenographically, the stenographic record will serve as the official record of the testimony.

Therefore, the relevant portion of subdivision (*l*) would be revised to read:

> 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…
>
> ....
>
> **Comment.** Section 2025(*l*) is amended to make clear that the right of a non-noticing 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, except as otherwise provided by court order or party stipulation.

TERMINOLOGY REVISIONS

The Legislature in 2002 enacted legislation that, among other things, replaced references to "audiotape" and "videotape" in statutes governing oral depositions with terms that reflect advances in technology. 2002 Cal. Stat. ch. 1068 (AB 2842 (Harman)). Hence, references to "videotape" were changed in Sections 2020, 2025, and 2025.1 to "video technology," "video recording," or "video record," as the context warranted. References to "audiotape" were similarly corrected.

Section 2025 is the primary section governing the taking of oral depositions. It is a lengthy statute that contained numerous references to videotape and audiotape before its amendment last year. AB 2842 changed all such references with the exception of two in subdivision (*l*)(2)(H)-(I). The staff believes that these omissions were oversights. We recommend **revising the references to conform to the terminology changes made in 2002**:

> (H) At the conclusion of a deposition, a statement shall be made on camera or on the audio recording that the deposition is ended and shall set forth any stipulations made by counsel concerning the custody of the ~~audiotape or videotape~~ audio or video recording and the exhibits, or concerning other pertinent matters.
>
> (I) A party intending to offer an audio or video recording of a deposition in evidence under subdivision (u) shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing. The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering a ~~videotape or an audiotape~~ video or audio recording of that testimony under subdivision (u) shall accompany that offer with a stenographic transcript prepared from that recording.
>
> ....
>
> **Comment.** Subdivision (*l*)(2)(H)-(I) of Section 2025 is amended for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

Similar revisions should be made in Section 2032, which governs physical and mental examinations of parties and party-related witnesses. Subdivision (g)(1)-(2) authorizes the recording of a physical or mental examination by audiotape. For internal consistency within the Discovery Act, the staff recommends **revising subdivision (g) to reflect the new terminology**:

> (g) (1) 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. This observer may monitor the examination, but shall not participate in or disrupt it. 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.
>
> ....
>
> (2) The examiner and examinee shall have the right to record a mental examination ~~on audio tape~~ by audio technology. However, nothing in this article 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 (g)(1)-(2) of Section 2032 is amended for consistency of terminology. See 2002 Cal. Stat. ch. 1068.

Respectfully submitted,

Lynne Urman
Staff Counsel

Exhibit

COMMENTS OF COMMITTEE ON ADMINISTRATION OF JUSTICE

MEMORANDUM

TO: California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: September 25, 2002

SUBJECT: Memorandum 2002-33
Discovery Improvements from Other Jurisdictions [Study J-503]

COMMITTEE POSITIONS:

Duty to automatically supplement discovery responses

The State Bar of California's Committee on Administration of Justice ("CAJ") supports further inquiry into the duty to automatically supplement discovery responses as that duty has operated in federal court, but recommends that the California Law Revision Commission ("CLRC") refrain from adopting a rule that would impose an automatic duty to supplement, absent adoption of other procedures employed in federal court, such as the duty to disclose. CAJ believes that particular elements of federal discovery practice should not be adopted piecemeal, but must be viewed in the context of other, related federal rules. A particular procedure that might work quite well in federal court would not work the same in state court, in the absence of other, related rules. In a word, CAJ's position is simply that an automatic duty to supplement *should not* be imposed in isolation, *not* that such a duty *should be imposed* together with other provisions.

Presuit discovery

(1) CAJ takes no position on the proposed revision to subdivision (g) of Code of Civil Procedure Section 2035.

(2) CAJ opposes the proposed revision to subdivision (a) of Code of Civil Procedure Section 2035. There is nothing that demonstrates that the existing language has actually created any problems, and the proposed revision might raise new issues and create new problems that do not exist under the current statutory language.

ANALYSIS:

Duty to automatically supplement discovery responses

In its Memorandum 2002-33, dated July 2, 2002, CLRC staff recommends that the CLRC refrain from taking a position on the issue of a duty to automatically supplement discovery responses until it follows up on Commissioner Best's suggestion to contact Judge David Levy (United States District Court, Eastern District of California), and attempt to obtain further information on the federal experience. Staff also notes that it "tentatively leans" toward the federal approach of Rule 26(e)(2).

CAJ agrees that the CLRC should obtain further information on the federal experience with the automatic duty to supplement discovery responses, and believes the federal experience will be informative. CAJ also believes, however, that adoption of a continuing duty to supplement discovery responses in California would not be effective without the adoption of some form of disclosure requirement, and that the CLRC should therefore consider these issues together. This belief should not be construed to mean that CAJ necessarily supports the wholesale adoption of the federal court disclosure scheme.[*] CAJ's position is simply that the existence of a continuing disclosure requirement is what makes the continuing duty to supplement discovery responses workable in federal court.

If adopted in California without a duty to disclose, a rule requiring a duty to supplement would require counsel to review prior discovery responses every time additional information is received, to ensure that the prior responses took into account the newly-received information. In essence, this is a burden that is already imposed in federal court, because the continuing duty to *disclose* is part of the federal rules. Thus, the duty to supplement discovery responses in federal court adds little to the existing burden. In California, in contrast, parties presently have *no affirmative duty* to disclose. Thus, the adoption of a rule requiring parties to supplement their prior responses would add a substantial burden that does not presently exist in state court practice. Moreover, if such a rule were adopted, there would likely be an increase in litigation over the *failure* to supplement prior responses if later discovered information is revealed either prior to or during trial.

The CLRC memorandum touches upon the point that CAJ would like to emphasize. In that memorandum, CLRC staff, following its discussion of Commissioner Best's proposed "alternative approach" concerning "some focused, limited and combined mandatory disclosure and duty to supplement," notes that this "is an interesting possibility, which the Commission could consider in connection with the complex topic of pretrial disclosure." CAJ strongly urges the CLRC to consider the duty to supplement

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[*] CAJ provided its views on the subject of required disclosures in a previous report to the CLRC. See CAJ Report on Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts [Study J-500], dated February 11, 2002.

together with the duty to disclose, and refrain from adopting a rule that would impose an automatic duty to supplement, absent adoption of other procedures employed in federal court, such as the duty to disclosure. To clarify: CAJ's position is simply that an automatic duty to supplement *should not* be imposed in isolation, *not* that such a duty *should be imposed* together with other provisions.

Presuit discovery

Under subdivision (a) of Code of Civil Procedure Section 2035, "[o]ne who expects to be a party" may obtain presuit discovery. The question raised by the CLRC memorandum is whether this language should be expanded to cover "[o]ne who expects to be a party or expects a successor in interest to be a party."

CAJ believes the statute should not be amended. CAJ agrees with Ellen Nudelman's conclusion that there is no pressing policy reason to adopt the expanded rule, particularly in the absence of anything that demonstrates that the existing language has actually created any problems.

More significantly, CAJ believes that amending the statute as proposed could raise new issues and create new problems that do not exist under the current statutory language. Under the existing statute, it appears as though a successor in interest who "expects to be a party" (upon succeeding to the interest in question) is already permitted to take presuit discovery to protect his or her own interests. Thus, although *a person* might not be able to take presuit discovery in anticipation of a suit *brought by that person's successor in interest*, the successor in interest could take that discovery in his or her own name. The statute therefore provides a mechanism whereby a person *and* that person's successor in interest can *directly* protect their respective presuit interests.

Expanding the statute to allow a person to essentially take presuit discovery on behalf of or for somebody else – that person's successor in interest – would introduce an unnecessary and entirely new level of complexity, including questions about adequacy of representation, alignment of interests, and preclusion of subsequent discovery by the successor in interest. For all of these reasons, CAJ believes the statute should not be amended as proposed.

DISCLAIMER:

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

COMMENTS OF RICHARD E. BEST
EQUAL RIGHT TO VIDEO DEPOSITION

Code of Civil Procedure §2025(l) provides for audio and video recording of depositions[1]. The statute provides in relevant part:

> "The party noticing the deposition may also" notice the video or audio recording of the deposition. "Any other party… may make a **simultaneous** audiotape or videotape record of the deposition, provided that other party promptly… serves a written notice of this intention …."

In effect, the current statute gives the party noticing the deposition full control over whether a deposition will be video or audio taped. Unless the noticing party elects to do so, other participants have no clear right to audio or videotape the only deposition of a natural person[2]. The purpose of this proposed amendment is to assure that any party has the right to record any deposition by audio or video recording device.

Only one deposition may be taken of a natural person[3] . Although that deposition may be formally noticed by one of many parties, all noticed parties must[4] participate as a practical matter. Videotaped depositions are invaluable for conveying the full testimony

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[1] The party noticing the deposition may also record the testimony by audiotape or videotape 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 audiotape or videotape record of the deposition, provided that 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 audiotape or videotape 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 subdivision (c), and on any deponent whose attendance is being compelled by a deposition subpoena under Section 2020. If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011

[2] See *Green v. G.T. E. California, Inc.* (1994), 29 Cal.App.4th 407 [party defending depo attempted to videotape opposing counsel without any prior notice then moved to terminate the deposition, was sanctioned on that motion and appealed; sanctions affirmed; court suggests that in an appropriate case, a motion to permit videotaping prior to the depo might be appropriate; court questions appropriateness of videotaping opposing counsel; court erroneously suggests a 3 day notice might have been sufficient but that is only appropriate for "simultaneous" videotaping]. One can argue that "simultaneous" refers to any noticed deposition and is not limited to depositions for which notice of video or audio has been given. However, the section and context and the placement within 2025 as a whole does not support that position. At a minimum the statute should be clarified in the former interpretation were deemed proper.

[3] CCP §2025(t)

[4] See CCP §2025(u)

of a witness and are becoming the norm[5] . Currently, for all practical purposes, the party noticing the deposition has full control[6] over whether the deposition will be videotaped. If that party does not notice the videotaping, there is no clear right of another party to notice the videotaping. If the noticing party gives notice that it will videotape the deposition but decides not to do so, there is no requirement to advise other parties of a change in procedure, no authority for them to compel the noticing party to video record, and no authority for another participant to videotape the sole deposition of the natural person. It is unlikely that a party would give notice that it intended to simultaneously video record since one video would suffice. Even if others gave notice, that notice is only for a "simultaneous" video taping and if the noticing party is not videotaping no one else would be able to do so "simultaneously"[7].

Code of Civil Procedure Section 2025 (l) should be amended to allow all participants the right to record any deposition in any audio or video format. Notice of intent to do so should be required. Such amendment would promote full and accurate recording of the testimony, would equalize the rights of the participants to record the testimony, would clarify the statute to avoid confusion, disputes and costly motions, and would provide a full record for motions or trial. The following amendment is suggested:

> The party noticing the deposition may also record the testimony by audiotape or videotape 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~~tape~~ or video~~tape~~ record of the deposition, provided that 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 audio ~~tape~~ or video~~tape~~ **record** 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 subdivision (c), and on any deponent whose attendance is being compelled by a deposition subpoena under Section 2020. If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011.

Richard E. Best

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[5] *Emerson Electric Co.v. Superior Court*(1997),16 Cal.4th 1101 [tr ct aff'd; compelling diagramming location of saw and reenacting accident]; AB 421 will expand the use and reduce the costs of video taping of depositions of experts and treating physicians.

[6] Arguments can be made and remedies may be available but the strict wording of the statute would support this position and lawyers cannot rely on courts or opposing parties permitting variations without time consuming and expensive motions. There are no express provisions for multiple notices and time constraints might prevent such attempts without obtaining an order shortening time.

[7] Of course, lawyers could argue about whether simultaneous refers to the same time of "the deposition" or of "the video deposition".