

Memorandum 2007-51

**Civil Discovery: Deposition in Out-of-State Litigation
(Comments on Revised Tentative Recommendation)**

The Commission circulated for comment a revised tentative recommendation on *Deposition in Out-of-State Litigation*. In response, the Commission received a phonecall from Judge Leslie Nichols (Superior Court, County of Santa Clara) and the following written comments:

	<i>Exhibit p.</i>
• Herbert M. Barish, Glendale (11/7/07)	1
• Tony Klein, Process Server Institute (8/25/07, item #1)	4
• Tony Klein, Process Server Institute (8/25/07, item #2)	6
• State Bar of California, Committee on Administration of Justice (11/14/07)	8

This memorandum discusses the comments.

The memorandum also discusses issues relating to the final version of the Uniform Interstate Depositions and Discovery Act (2007), which has been released by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). For reference purposes, the final version of that Act is reproduced at Exhibit pages 13-26.

A staff draft of a final recommendation is attached for Commission members and other interested persons to consider. The Commission needs to decide whether to approve the draft, with or without revisions, as a final recommendation to be printed and submitted to the Legislature.

GENERAL NATURE OF THE COMMENTS

The comments offer various suggestions for improvement of specific aspects of the Commission’s proposal. None of the comments question the proposal’s basic premise: that it would be helpful to clarify the procedure for taking discovery in California for use in an out-of-state case.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

Rather, attorney Herb Barish describes the Commission’s study as a “worthwhile project,” which “deserves support.” Exhibit p. 3. In previous communications, process server Tony Klein has similarly expressed support for the Commission’s study. The State Bar Committee on Administration of Justice (“CAJ”) also “supports the CLRC’s efforts to clarify and refine the procedure for obtaining discovery from a witness in California for the purposes of a proceeding pending in another jurisdiction.” Exhibit p. 8. Likewise, Judge Nichols seemed to support the general concept of clarifying the law in this area.

SPECIFIC SUGGESTIONS FOR IMPROVEMENT

The specific suggestions for improvement of the Commission’s proposal are described and analyzed below. All suggestions relating to the same proposed provision are grouped together. The proposed provisions in question are discussed in numerical order.

Definitions (Proposed Code Civ. Proc. § 2029.200)

Proposed Section 2029.200(a) would define “foreign jurisdiction” to include both a “state other than this state” and a “foreign nation.” Proposed Section 2029.200(b) would define “foreign subpoena” as a “subpoena issued under authority of a court of record of a foreign jurisdiction.” Under specified conditions, proposed Sections 2029.300 and 2029.350 authorize issuance of a California subpoena upon receipt of a “foreign subpoena.” The recommended legislation would thus facilitate discovery for litigation in a foreign nation, not just for litigation in another United States jurisdiction.

Herb Barish raises questions about this approach:

Foreign jurisdictions include foreign nations. Good bye Hague — Hello California. Should this change be done so casually? Maybe it’s a good idea. How about reciprocity? Should foreign jurisdictions be given greater rights in California than in their own nation? Should they be given greater rights in California than they afford to litigants in California who seek discovery in those same foreign countries? These are serious policy issues that need to be widely discussed and considered before making such an extreme change.

Discovery by litigants in courts of foreign nations appears to be an area of law occupied by the feds. International discovery involves international relations. There’s this annoying problem with The Hague Evidence Convention, with 28 USCA 1781, 1782, and with sections of th[e] U.S. Constitution, such as Article 1, § 10,

Article II, § 2, and Article VI. California might lack jurisdiction to independently decide how to handle foreign discovery.

....

In view of the myriad of issues involving international discovery, most not mentioned here, the authors of this proposed legislation might consider limiting it to interstate discovery.

Exhibit p. 2.

The Commission has already discussed this matter a number of times. See CLRC Memorandum 2006-41, pp. 13-14; CLRC Minutes (Oct. 2006), p. 15; CLRC Memorandum 2006-46, pp. 11-12; CLRC Minutes (Dec. 2006), p. 8.

Notably, the uniform act newly approved by the NCCUSL (Exhibit pp. 13-26) would not apply to discovery for an action in a foreign nation. The Comment to Section 2 of that Act explains that “international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.” See Exhibit p. 22.

In contrast, however, the existing California provision governing discovery for an action in another jurisdiction — Code of Civil Procedure Section 2029.010 — expressly applies to discovery for an action in a foreign nation. Existing Section 2029.010 continues former Code of Civil Procedure Section 2029 without change. See Section 2029.010 Comment. That provision was enacted in 1986; the Comment to it explained:

This section authorizes the use of the subpoena power of the California Superior Courts to compel witnesses served within its borders to submit to a deposition in California for use in a lawsuit pending in another state *or in a foreign nation*. Although the statute itself does not apply to discovery carried on in actions pending in California, the cooperation that it extends to those administering civil justice in other states *and nations* undoubtedly affects their willingness to reciprocate with respect to cases pending in the courts of this state.

Subdivision (a) restates and slightly amplifies the provisions of the opening paragraph of present CCP § 2023. This paragraph embodies the Uniform Foreign Depositions Act...

State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986 (Jan. 1986), p. 58 (emphasis added, citation omitted).

As stated in the Comment to former Section 2029, the predecessor of that provision was former Code of Civil Procedure Section 2023, which was modeled on the Uniform Foreign Depositions Act (“UFDA”). Former Section 2023, enacted in 1959, did not refer to a “foreign nation,” but did refer to “any court of record

in any other state, territory, district or foreign jurisdiction.” 1959 Cal. Stat. ch. 1590, § 5 (emphasis added). That phrase was drawn directly from the UFDA. From the context, it is clear that the term “foreign jurisdiction” referred to a foreign nation, not another state, territory, or district.

NCCUSL adopted the UFDA in 1920. Although it was superseded by another uniform act in 1962, statutes based on the UFDA are still in force in many states. See Revised Tentative Recommendation on *Deposition in Out-of-State Litigation* (Aug. 2007), at 2 n.12 (hereafter, “Revised Tentative Recommendation”).

Despite extensive research, we are not aware of any problem stemming from application of any of these statutes to discovery for an action in a foreign nation. In particular, although California law has facilitated such discovery since 1959, there do not seem to have been any problems relating to it.

Mr. Barish is correct that foreign policy is a matter of national concern. In an earlier memo, we said:

Of key concern is protecting California citizens from potential harm or harassment, while maintaining good relations with other nations. Our hunch is that the proposed procedure generally will work fine *and if a foreign nation is potentially abusive, federal or international law would override any state statute that might be invoked for an improper purpose.*

CLRC Memorandum 2006-41, pp. 13-14 (emphasis added). We encouraged comments on whether that perception of the situation was correct. The consensus of the Commission, including members knowledgeable in international law, was that it would not be problematic to apply the proposed law to an action in a foreign nation.

We continue to encourage comments on this point, particularly from persons with expertise in international law. In the attached draft of a final recommendation, we have expanded the discussion of the matter (see p. 7, n. 34). Ideally, the Commission would have the benefit of a uniform act on the subject before deciding how to address discovery for an action in a foreign nation. If Section 2029.010 were repealed, however, and replaced with legislation that did not address discovery for such an action, a California court would have no guidance on how to handle such a discovery request. **Absent further input, it seems advisable to stick with the approach in the revised tentative recommendation.**

Issuance of Subpoena (Proposed Code Civ. Proc. §§ 2029.300, 2029.350, 2029.390)

Proposed Code of Civil Procedure Section 2029.300 would specify the procedure for asking a California court to issue a subpoena that compels discovery for an out-of-state case. Proposed Code of Civil Procedure Section 2029.350 would specify the circumstances under which local counsel could issue a subpoena that compels discovery for an out-of-state case. Proposed Code of Civil Procedure Section 2029.390 would direct the Judicial Council to prepare forms to be used in these two contexts.

Most of the suggestions and issues relate to these proposed provisions.

Revised NCCUSL Language

In finalizing the Uniform Interstate Depositions and Discovery Act (“UIDDA”), NCCUSL made some changes in the wording of Section 3. Because proposed Section 2029.300 is modeled in part on UIDDA Section 3, it should track the language of that provision as closely as possible, while conforming to California statutory drafting practices and preserving language necessary to provide additional guidance the Commission considers desirable.

That could be achieved by revising proposed Section 2029.300 and its Comment as shown below:

2029.300. (a) ~~A party may~~ To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. ~~The A request for and the issuance of a subpoena in this state under this section shall~~ does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed. ~~The subpoena shall incorporate the terms used in the foreign subpoena.~~

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

~~(2)~~ (4) It shall state the name of the court that issues it.

~~(3) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.~~

~~(4)~~ (5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

Comment. Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another United States jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and ~~(d)(3)~~ (d)(1)-(2) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions ~~(b)~~, ~~(d)(1)-(2)~~, and ~~(d)(4)~~ (b) and (d)(3)-(5) address additional procedural details.

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership...”); Cal. R. Ct. 966; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.640 (deposition on notice or agreement).

Proposed Section 2029.350 should also be revised to more closely track the final language of UIDDA Section 3. **That could be done as follows:**

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena issued by a court of record of a foreign jurisdiction, the attorney may issue a subpoena under this article, ~~incorporating the terms used in the foreign subpoena.~~

(b) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

~~(2)~~ (4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

~~(3) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.~~

~~(4)~~ (5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

Comment. Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

The section does not make retention of local counsel mandatory. For guidance on that point, see Section 2029.300(a); Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership....”); Cal. R. Ct. 966; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state

litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.640 (deposition on notice or agreement).

Revising Section 2029.350 as shown above would not only track the final language of UIDDA Section 3, but would also eliminate a concern expressed by Tony Klein, which stemmed from subdivision (a)'s reference to "a subpoena issued by a court of record of a foreign jurisdiction." See Exhibit p. 5. That phrase is not used in UIDDA Section 3 and would not be used in the revised version of proposed Section 2029.350.

Type of Document From Another Jurisdiction

To obtain a subpoena from a California court, a party would have to "submit the original or a true and correct copy of a *foreign subpoena* to the clerk of the superior court in the county in which discovery is sought to be conducted in this state." Proposed Code Civ. Proc. § 2029.300(a) (emphasis added). The term "foreign subpoena" would be defined as "a subpoena issued under authority of a court of record of a foreign jurisdiction." Proposed Code Civ. Proc. § 2029.200(b). The term "subpoena" would be broadly defined as follows:

(e) "Subpoena" means a document, *however denominated*, issued under authority of a court of record requiring a person to do any of the following:

- (1) Attend and give testimony at a deposition.
- (2) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
- (3) Permit inspection of premises under the control of the person.

Proposed Code Civ. Proc. § 2029.200(e) (emphasis added). The Comment to that definition would explain:

To facilitate discovery under this article, subdivision (e) defines "subpoena" broadly. *The term includes not only a document denominated a "subpoena," but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.*

(Emphasis added.)

Tony Klein expresses concern about the "subpoena" requirement:

The Application form should reference the issued subpoena, *but also continue to reference other documents that other states will continue to require unless or until they adopt the Uniform Interstate Depositions and Discovery Act*. Those documents will continue to be a part of the filing package. Would these documents, without a subpoena, allow the clerk to issue a California subpoena? The proposal replaces current law that authorizes issuance with the documents that will continue to be submitted by all other states, and perhaps most of them for the foreseeable future. Adopting the UIDDA before any other state, and replacing CCP 2029.010, puts California as the one state out-of-step with the others.

Exhibit p. 5 (emphasis added). Mr. Klein apparently does not realize that the term “subpoena” would be broadly defined to include documents such as a mandate, writ, letters rogatory, letter of request, or commission that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

His confusion is understandable. Although the situation is well-explained at page 6 of the preliminary part (narrative portion) of the revised tentative recommendation, it is not explained at all in the Comment to proposed Section 2029.300.

To prevent confusion about what type of document from out-of-state is required, **a new paragraph should be added to the Comment to proposed Section 2029.300:**

Comment. Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another United States jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and (d)(3) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b), (d)(1)-(2), and (d)(4) address additional procedural details.

To obtain a subpoena under this section, a party must submit the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

Subdivision (a) makes clear that

A similar change should be made in the Comment to proposed Section 2029.350:

Comment. Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

To issue a subpoena under this section, a California attorney acting as local counsel must receive the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

The section does not make retention of local counsel

Authenticity of the Document From Another Jurisdiction

By phone, Judge Nichols expressed concern about possible use of fraudulent documents. He would like some assurance that a document purporting to be from a court in another jurisdiction is actually what it purports to be.

The staff pointed out that proposed Sections 2029.300 and 2029.350 would require submission or receipt of “the original or a true and correct copy of a foreign subpoena.” We also pointed out that Section 2029.390 would direct the Judicial Council to prepare a subpoena application form. As noted in footnote 43 of the revised tentative recommendation, the application form could require the applicant to provide a copy of the foreign subpoena, together with a declaration attesting under penalty of perjury that it is a true and correct copy of what it purports to be.

Judge Nichols approved of these requirements. **The Commission should retain them in its final recommendation.**

Issuance of Subpoena Under Authority of the County in Which Discovery Is To Be Conducted

When a party seeks a subpoena compelling discovery in California for an out-of-state case, proposed Code of Civil Procedure Section 2029.300 would direct the party to apply to the superior court in “the county in which discovery is sought to be conducted.” It would not be possible to obtain the subpoena from the superior court in another California county.

Herb Barish questions that approach. Referring to the above requirement, he writes:

(1) Why? (2) Is an out-of-state attorney supposed to be familiar with county lines? (3) "The county in which discovery is sought to be conducted" is an uncertain term. For example, what happens when documents are sought from an individual or business that has offices and/or storage in a variety of counties? Why not require the subpoena to be issued from any county but be treated as issued by the State? This project is an effort to improve civil discovery among different states. Adding counties to the system creates an additional complication to what is intended to simplify procedures.

Exhibit p. 2 (emphasis in original).

The Commission has twice previously considered the possibility of allowing an out-of-state litigant to seek a subpoena from any California court, not just the court in which the discovery is to be conducted. See First Supplement to CLRC Memorandum 2006-7, pp. 5-6; CLRC Minutes (April 2006), p. 12; CLRC Memorandum 2007-35, p. 5; CLRC Minutes (Aug. 2007), pp. 4-5. The Commission rejected that possibility to protect a California resident who is subjected to discovery for an out-of-state case.

As the staff explained in an earlier memorandum,

As a matter of logistics and expense, it would be somewhat preferable for the deposing party to be able to obtain both subpoenas from the same superior court than to have to deal with two different courts.

....

From the standpoint of the deponent, it's important that (1) the deposition be held at a convenient location and (2) any disputes relating to the deposition be resolved at a convenient court. It does not matter to the deponent which court issues the subpoena, so long as that does not affect the location of the deposition or where disputes relating to the deposition are to be resolved.

But it does matter to the deponent *whether the subpoena indicates where disputes relating to the deposition are to be resolved*. That would be accomplished if the subpoena was issued by the court responsible for resolving those disputes and the caption or other indication on the subpoena reflected as much.

The same objective could perhaps also be accomplished if the subpoena was issued by another California court, but bore only the caption of the out-of-state case and included a statement indicating which California court was to resolve any disputes relating to the deposition. It would seem odd, however, for a court to issue a subpoena without indicating somewhere on the subpoena which court issued it. Yet if the subpoena did show which court issued it,

the deponent might get confused about which California court to approach in the event of a dispute: the court that issued the subpoena or the court identified as the one responsible for resolving disputes relating to the subpoena.

To prevent such confusion, it seems advisable to **stick with the Commission's current approach, requiring that each subpoena be issued by the superior court of the county in which the deposition is to be taken.** Although that approach may cause minor inconvenience to the deposing party in some cases, it would help provide clear guidance to witnesses located in California.

First Supplement to Memorandum 2006-7, p. 6 (emphasis in original). For the above reasons, the staff continues to believe that **a subpoena should be available only from the superior court in the county in which discovery is sought to be conducted, not from any other superior court.** That is consistent with the final version of UIDDA. See Exhibit p. 22 (UIDDA § 3(a)).

Mr. Barish sees ambiguity in the phrase "the county in which discovery is sought to be conducted." He asks what happens when an individual or business has offices or storage in more than one county. Exhibit p. 2.

To the staff, the answer seems clear. A document production or deposition is noticed in a particular location, such as an attorney's office. That is the place where "discovery is sought to be conducted." The county in which that place is located is "the county in which discovery is sought to be conducted." Although a document production occurs in a particular place, all documents in the possession, custody, or control of the deponent have to be produced, regardless of where they are located. See Code Civ. Proc. § 2031.010.

If the Commission considers it necessary, **an explanation along these lines could be included in the Comment to proposed Section 2029.300:**

Comment. Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another United States jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and (d)(3) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b), (d)(1)-(2), and (d)(4) address additional procedural details.

To protect the person subject to discovery and prevent confusion over where to seek relief in the event of a dispute, a subpoena under this section may only be issued by the superior court in the county in which discovery is sought to be conducted,

not by another superior court. With regard to a document production, the place of production is where “discovery is sought to be conducted.” The county in which that place is located is “the county in which discovery is sought to be conducted.” Although a document production occurs in a particular place, all documents in the possession, custody, or control of the deponent have to be produced, regardless of where they are located. See Section 2031.010.

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance

A similar change could be made in the Comment to proposed Section 2029.350:

Comment. Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

To protect the person subject to discovery and prevent confusion over where to seek relief in the event of a dispute, a subpoena issued under this section must include the name of the superior court of the county in which discovery is sought to be conducted. With regard to a document production, the place of production is where “discovery is sought to be conducted.” The county in which that place is located is “the county in which discovery is sought to be conducted.” Although a document production occurs in a particular place, all documents in the possession, custody, or control of the deponent have to be produced, regardless of where they are located. See Section 2031.010.

~~This~~ The section does not make retention of local counsel mandatory. For guidance

Civil Case Cover Sheet

Proposed Code of Civil Procedure Section 2029.300(b) would provide:

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

The sentence in subdivision (b)(1) stating that “No civil case cover sheet is required” was added at the suggestion of Tony Klein. He had pointed out that a civil case cover sheet must be signed by a California attorney (or by a party without an attorney). That requirement can be problematic when a party represented by counsel in an out-of-state case seeks a subpoena for discovery in California, because it necessitates the hiring of local counsel, at considerable expense. Preparation of a civil case cover sheet would also be an extra burden and expense for the party seeking a subpoena.

Mr. Klein comments that “[e]liminating the Civil Case Cover Sheet will get around the problem with courts rejecting a filing for lack of a California lawyer’s signature.” Exhibit p. 4. He worries, however, that unless there is a Civil Case Cover Sheet, a subpoena request will not receive a California case number, which may lead to other problems. *Id.*

In particular, he writes that “[w]ithout a case number, the witness may question the legitimacy of the subpoena.” *Id.* He says that this “has occasionally come up when serving corporations that receive foreign depositions regularly, such as Genentech, Google, and Yahoo.” *Id.* If the staff understands him correctly, he thinks this problem could be alleviated to some extent by including a reference to Section 2029.300 in any subpoena that is issued pursuant to that section. *See id.*

That is a good suggestion. Under proposed Section 2029.390, the Judicial Council would be responsible for preparing one or more subpoena forms that include clear instructions for use in issuance of a subpoena under Section 2029.300 or 2029.350. When the Judicial Council prepares those forms, it should be informed of Mr. Klein’s suggestion to include a reference to the statute authorizing issuance of the subpoena. To facilitate, this we have mentioned the matter in the attached draft of a final recommendation (see p. 9, n. 45).

Mr. Klein also expresses concern about a subpoena that seeks personal records of a consumer or employment records of an employee. He says:

[A] consumer is given standing to file a motion to quash or modify under CCP 1987.1 (See CCP 1985.3(g)) An employee whose records are subject to subpoena has a similar right under CCP 1985.6(f). Without a case number issuing upon application for subpoena under 2029.010, that would not be possible. Alternatively, a consumer or employee might be given similar standing to “petition to quash or modify” similar to the right given to the witness in proposed 2029.600.

Exhibit p. 4.

The staff is not convinced there is a problem. Under Code of Civil Procedure Section 1985.3(g), a nonparty consumer whose personal records are subpoenaed does not need to go to court to challenge the subpoena. The nonparty consumer need only serve a written objection as specified in the statute. If the subpoenaing party is unpersuaded by the written objection, the burden is on that party to seek relief in court. Code of Civil Procedure Section 1985.6(f), pertaining to employment records of an employee, is similar.

If a subpoena for personal records of a nonparty consumer was for purposes of an out-of-state case, proposed Code of Civil Procedure Section 2029.600 would specify the procedure for seeking such relief. In fact, the Comment would specifically refer to this situation:

A request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

Proposed Code of Civil Procedure Section 2029.610(b) would require the court to assign a case number once a petition was filed.

Further, the language of proposed Section 2029.600 is broad enough to include not only a petition for relief brought by a party, but also a petition brought by a nonparty consumer. The language of proposed Section 2029.610, relating to the fee for filing such a petition, is likewise broad enough to encompass a nonparty consumer.

The Commission’s proposal should thus work fine in the context of a subpoena for personal records of a consumer or employment records of an employee. We do not discern any problem, in this or any other context, that would make it necessary to require a party to submit a civil case cover sheet to obtain a subpoena compelling discovery for use in an out-of-state case. The procedure for obtaining such a subpoena should be kept simple. **Proposed Section 2029.300(b)(1) should continue to state that “No civil case cover sheet is required.”**

Further, we do not discern any problem that would make it necessary to require a court to assign a California case number when it issues a subpoena

compelling discovery for use in an out-of-state case. As presently drafted, the Commission's proposal would neither require a court to assign, nor preclude a court from assigning, a California case number at that time. To our knowledge, there is no statute conditioning that step on submission of a civil case cover sheet. If there is a court rule imposing such a condition, the Judicial Council could change it. The Commission's proposal would thus leave it to the Judicial Council and the courts to determine whether a court should assign a California case number when it issues a subpoena compelling discovery for use in an out-of-state case. **Absent a reason to address that aspect of court administration, the Commission should stick with its hands-off approach.**

Retention of the Subpoena Application and Related Records

Herb Barish expresses concern about whether the court will retain a record of an application that is submitted, or a subpoena that is issued, pursuant to proposed Section 2029.300. Exhibit p. 3. He writes:

There is normally no need for courts to involve themselves in subpoenas because California attorneys are officers of the California courts and pro pers are subject to the jurisdiction of the court. That reasoning fails to include those not permitted to practice in California. There are presently disputes with regard to search warrants because the courts do not maintain copies of warrants, whether signed or rejected. *It is preferable for government to maintain records of its actions, particularly when it involves orders as intrusive as ... subpoenas and depositions.*

It should not be forgotten that even civil subpoenas raise issues that involve constitutional protections regarding searches and seizures.

Id. (emphasis added). He recommends that when

a subpoena is issued pursuant to this proposal, the original foreign court order and subpoena should be copied into a statewide data base that is internet accessible. If rejected, the request for a subpoena should also be retained. This is not difficult in the 21st century.

Id.

Although retention of court records on an Internet-accessible, statewide database might be desirable, to our knowledge the courts do not yet have such a system in place. The process of computerizing the courts and coordinating their computer systems statewide has been expensive and challenging. Attempting to accelerate that process is beyond the scope of this study. **The Commission's**

proposal should not require the use of technology that courts do not already have in place.

However, the policy concerns Mr. Barish raises about retention of subpoenas and subpoena applications are significant. As he points out, a subpoena is intrusive, so it would be appropriate to require a court to maintain a record of how it handles any request for a subpoena. **That could be done by adding a new subdivision at the end of proposed Section 2029.300, along the following lines:**

(e) The superior court shall retain a true and correct copy of any subpoena it issues pursuant to this section. The court shall also retain the original or a true and correct copy of any foreign subpoena, application, or other document that is submitted pursuant to this section, regardless of whether the court issues the requested subpoena.

This provision would require retention of the records, but leave it to the courts to decide the manner of retention.

A similar subdivision should be added at the end of proposed Section 2029.350:

(c) An attorney who issues a subpoena pursuant to this section shall retain a true and correct copy of the subpoena. The attorney shall also retain the original or a true and correct copy of the foreign subpoena, as well as any document the attorney relied on in determining the authenticity of the foreign subpoena.

Information To Be Included in the Subpoena

Herb Barish comments that a subpoena issued pursuant to proposed Section 2029.300 or 2029.350 “should require that the original foreign court order be attached and perhaps also the pleading filed in the foreign jurisdiction justifying that court issuing the order.” Exhibit p. 3. He explains:

A client will contact an attorney’s office and ask, “What’s this?” That attorney should be able to have all the necessary information immediately available. The recipient of the subpoena should not suffer unnecessary and avoidable attorney fees.

Id.

Mr. Barish makes a good point. A recipient of a subpoena should not be required to incur substantial expense obtaining information that could be cheaply and readily provided as a routine matter.

Under proposed Code of Civil Procedure Section 2029.390, the Judicial Council would be responsible for preparing or modifying one or more subpoena

forms to include clear instructions for use in issuance of a subpoena under proposed Section 2029.300 or 2029.350. Proposed Section 2029.300 would require that the subpoena (1) be on a form prescribed by the Judicial Council, (2) incorporate the terms used in the foreign subpoena, (3) bear the caption and case number of the out-of-state case to which it relates, (4) state the name of the court that issues it, and (5) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel. Proposed Section 2029.350 would include similar requirements.

One possibility would be to expand these lists of requirements to address Mr. Barish's concern. Another possibility would be to alert the Judicial Council to his concern, so that the Council could take it into account in preparing the subpoena forms.

The staff recommends the latter approach. There are a variety of different documents that could be useful to the recipient of a California subpoena relating to an out-of-state case: the foreign subpoena, the application for a California subpoena, any document accompanying that application, any document that was filed in the foreign jurisdiction to justify issuance of the foreign subpoena, and perhaps other documents. Rather than statutorily mandating which, if any, of these documents would have to be attached to the California subpoena, it seems better to let the Judicial Council resolve that point in developing the subpoena forms. To help ensure that the Judicial Council considers Mr. Barish's suggestion and concern, we have referred to those points in the attached draft of a final recommendation (see p. 9, n. 45).

Time Frame

Herb Barish suggests that a subpoena issued under proposed Section 2029.300 or 2029.350 should include a time frame for service and execution. Exhibit p. 3.

The proposed legislation already includes such a time frame. Proposed Section 2029.400 would provide that a "subpoena issued under this article shall be personally served in compliance with the law of this state" A subpoena for purposes of an out-of-state case would thus be subject to the same constraints on the timing of service as a subpoena for purposes of a California case. For example, service of a deposition subpoena would have to be "effected a sufficient time in advance of the deposition to provide the deponent a reasonable

opportunity to locate and produce any designated business records, documents, and tangible things ..., and, where personal attendance is commanded, a reasonable time to travel to the place of deposition.” Code Civ. Proc. § 2020.220. **No change appears necessary to address this point.**

Mr. Barish also queries whether the proposed legislation should “include a time frame for issuing the subpoena in relation to when the foreign jurisdiction issued the order.” Exhibit p. 3. He points out that there is potential for abuse, because a clerk would issue a subpoena application under the proposed law, not a judge. *Id.*

This is a legitimate concern. The staff is not sure it is necessary, however, to impose a statutory time limit on the interval between the issuance of a foreign subpoena and the application for, or issuance of, a corresponding California subpoena. If there is any abuse (e.g., attempting to proceed with the California discovery after the out-of-state case has been settled), it could be addressed by filing a petition for relief under proposed Section 2029.600 or 2029.620. That seems preferable to imposing a statutory time limit, which would need to be enforced by the clerk of court every time a party requests a subpoena for discovery in an out-of-state case.

Absent further evidence of need for a statutory time limit on the interval between issuance of a foreign subpoena and the application for, or issuance of, a corresponding California subpoena, **the Commission should not attempt to specify one.** Such a limit could always be added later if it proves necessary.

Unauthorized Practice of Law

Proposed Section 2029.300(a) would state that the “request for and issuance of a subpoena in this state under this section shall not constitute making an appearance in the courts of this state.” The Comment would explain:

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 966, 983; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another

jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership...”); Cal. R. Ct. 966; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

Herb Barish says that the proposed legislation “should not only state that obtaining a subpoena is not making an appearance but also that any request for a court to otherwise act would constitute an appearance and therefore require authorization to practice law in the State of California.” Exhibit p. 2. He does not consider it reasonable to expect that “an out-of-state attorney will (1) have a code that includes the comments and (2) read the comments, and (3) be otherwise familiar with California law.” *Id.* at 1.

The staff thinks **it would be unwise to say anything further in the proposed legislation about what does and does not constitute unauthorized practice of law**. The matter is complicated, is already addressed in court rules and case law, and is better left to the courts and the State Bar.

The Comment to proposed Section 2029.300 would refer to the relevant authorities. Although Mr. Barish says Commission Comments are not included in the sources he uses, they are included in widely available sources such as West’s Annotated California Codes, Deering’s Annotated California Codes, Westlaw, and Lexis. Commission Comments and reports are legislative history and courts widely rely on them in interpreting statutes enacted on Commission recommendation. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997); *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 36, 34 Cal. Rptr. 3d 520 (2005); *2006-2007 Annual Report*, 36 Cal. L. Revision Comm’n Reports 1, 18-24 (2006). While some people might overlook the Comment to proposed Section 2029.300, others would find it useful.

However, the Comment includes obsolete references to the Rules of Court, which were recently reorganized. **The Comment should be revised as shown below to reflect that reorganization:**

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code §

6125; Cal. R. Ct. ~~966, 983~~ 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership....”); Cal. R. Ct. ~~966~~ 9.47; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

Similar changes should be made in the Comment to proposed Section 2029.350 and in the preliminary part (narrative portion) of the Commission’s proposal.

Related Case Pending in California

By phone, Judge Nichols pointed out that sometimes there may be both an out-of-state case and a California case involving similar subject matter. If a party to the out-of-state case seeks a subpoena from a California court, he believes that the judge assigned to the similar California case should be notified. He thinks that such notification would help to prevent gamesmanship.

This is a good point. **It could be addressed by adding a new subdivision to Section 2029.300, along the following lines:**

(f) If a party submits an application pursuant to this section and knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the party shall, in addition to complying with other service requirements, serve a copy of the application, the foreign subpoena, and the issued subpoena, if any, on the court where that case is pending in this state, together with a request that the copy be provided to the judge assigned to that case, if any.

A similar subdivision should be added to Section 2029.350, along the following lines:

(d) If the attorney or the attorney’s client knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the attorney shall, in addition to complying with other service requirements, serve a copy of the foreign subpoena

and the issued subpoena on the court where that case is pending in this state, together with a request that the copy be provided to the judge assigned to that case, if any.

Synthesis of the Recommended Changes

Various changes to proposed Section 2029.300 are recommended above. **If the Commission approves all of those recommended changes, proposed Section 2029.300 would read:**

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(e) The superior court shall retain a true and correct copy of any subpoena it issues pursuant to this section. The court shall also retain the original or a true and correct copy of any foreign subpoena, application, or other document that is submitted pursuant to this section, regardless of whether the court issues the requested subpoena.

(f) If a party submits an application pursuant to this section and knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the party shall, in addition to complying with other service requirements, serve a copy of the application, the foreign subpoena, and the issued subpoena, if any, on the court where that case is pending in this state, together with a request that the copy be provided to the judge assigned to that case, if any.

Comment. Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another United States jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b), (d)(3)-(5), (e), and (f) address additional procedural details.

To obtain a subpoena under this section, a party must submit the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

To protect the person subject to discovery and prevent confusion over where to seek relief in the event of a dispute, a subpoena under this section may only be issued by the superior court in the county in which discovery is sought to be conducted, not by another superior court. With regard to a document production, the place of production is where “discovery is sought to be conducted.” The county in which that place is located is “the county in which discovery is sought to be conducted.” Although a document production occurs in a particular place, all documents in the possession, custody, or control of the deponent have to be produced, regardless of where they are located. See Section 2031.010.

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to

out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership....”); Cal. R. Ct. 9.47; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.640 (deposition on notice or agreement

Similarly, various changes to proposed Section 2029.350 are recommended above. **If the Commission approves all of those recommended changes, proposed Section 2029.350 would read:**

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(c) An attorney who issues a subpoena pursuant to this section shall retain a true and correct copy of the subpoena. The attorney shall also retain the original or a true and correct copy of the foreign subpoena, as well as any document the attorney relied on in determining the authenticity of the foreign subpoena.

(d) If the attorney or the attorney’s client knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the attorney shall, in addition to complying with other service requirements, serve a copy of the foreign subpoena and the issued subpoena on the court where that case is pending in

this state, together with a request that the copy be provided to the judge assigned to that case, if any.

Comment. Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

To issue a subpoena under this section, a California attorney acting as local counsel must receive the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

To protect the person subject to discovery and prevent confusion over where to seek relief in the event of a dispute, a subpoena issued under this section must include the name of the superior court of the county in which discovery is sought to be conducted. With regard to a document production, the place of production is where “discovery is sought to be conducted.” The county in which that place is located is “the county in which discovery is sought to be conducted.” Although a document production occurs in a particular place, all documents in the possession, custody, or control of the deponent have to be produced, regardless of where they are located. See Section 2031.010.

This section does not make retention of local counsel mandatory. For guidance on that point, see Section 2029.300(a); Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership....”); Cal. R. Ct. 9.47; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.640 (deposition on notice or agreement).

The attached draft of a final recommendation incorporates the above versions of proposed Sections 2029.300 and 2029.350.

Deposition, Production, and Inspection (Proposed Code Civ. Proc. § 2029.500)

As presented in the revised tentative recommendation, proposed Code of Civil Procedure Section 2029.500 would provide:

§ 2029.500. Deposition, production, and inspection [UIDDA § 5]

2029.500. When a subpoena issued under this article commands a person to attend and give testimony at a deposition, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises, or discovery is taken in the state pursuant to properly issued notice or by agreement, the time and place and the manner of the taking of the deposition, the production, or the inspection shall comply with the law of this state, including, without limitation, Title 4 (commencing with Section 2016.010) of Part 4.

Comment. Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350 and to discovery taken in this state pursuant to properly issued notice or by agreement.

A few issues relate to this proposed provision.

Deposition on Notice or Agreement

CAJ notes that proposed Sections 2029.500 and 2029.640 would refer to discovery by “properly issued notice or by agreement.” Exhibit p. 8. CAJ “recognizes that existing Code of Civil Procedure section 2029.010 refers to a deposition ‘on notice or agreement’” *Id.* CAJ is nonetheless “concerned with potential confusion about that terminology, particularly because it does not specify whose agreement is required.” *Id.* “If sections 2029.500 and 2029.640 are going to introduce the concept of discovery by ‘agreement’ into the statutory scheme (as an alternative to a subpoena), CAJ believes the statutes should be clarified to provide that the agreement must be an agreement of the parties, the witness, and other individuals who may be affected, if those other individuals would otherwise have a right to object to the discovery in a case pending in California.” *Id.* at 8-9. For example, if the discovery involves production of employment records of an employee, the agreement would have to include the employee. *See id.*

Early in this study, the Commission considered the possibility of defining the phrase “deposition on notice or agreement.” The staff suggested including the following definition:

(h) For purposes of this section, a deposition “on notice or agreement” means a deposition in which the deponent is compelled to attend by issuance of notice or by a contractual agreement, as well as a deposition in which the deponent attends voluntarily.

Comment. ... Subdivision (h) is added to make clear that the references to a deposition “on notice or agreement” are to be interpreted broadly. For an example of a provision requiring a deponent to attend by issuance of notice, see Section 2025.280.

CLRC Memorandum 2006-7, p. 27. But the Commission “did not think it necessary to add language to Section 2029.010 clarifying the reference to a deposition ‘on notice or agreement.’” CLRC Minutes (April 2006), p. 9. The Commission concluded that “the existing language would encompass a witness who voluntarily agrees to appear at a deposition.” *Id.*

At this late point in the Commission’s study, the staff is hesitant to try to draft a definition of discovery by “properly issued notice or by agreement.” We fear that such an effort might inadvertently generate more confusion than it prevents. The phrase “deposition on notice or agreement” has been in California law since 1959. See 1986 Cal. Stat. ch. 1334, § 2 (former Code Civ. Proc. § 2029); 1959 Cal. Stat. ch. 1590, § 5 (former Code Civ. Proc. § 2023). It stems from the UFDA, which was approved by NCCUSL in 1920 and has been adopted in many states. To our knowledge, the phrase has not created any problems. Although CAJ’s suggested approach seems reasonable, implementing it might engender unexpected problems. If the Commission’s proposal is to be introduced in the Legislature in 2008, **the staff recommends against adding a last-minute definition of discovery by “properly issued notice or by agreement.”**

Revised NCCUSL Language

With exceptions as noted in the Comment, the version of proposed Section 2029.500 in the revised tentative recommendation tracks the language of UIDDA Section 5, as that provision was approved at NCCUSL’s annual meeting last summer. However, the wording of the final version of UIDDA Section 5 is quite different. It reads:

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to

compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

The staff prefers the earlier version. That version was easy to revise to (1) cover a subpoena issued by local counsel pursuant to proposed Section 2029.350, (2) cover discovery taken pursuant to properly issued notice or by agreement, and (3) include a catchall phrase to encompass provisions that are not located in the Civil Discovery Act. Adapting the new version to accomplish these objectives was more challenging.

To track the new version of UIDDA Section 5, the staff suggests the following:

~~2029.500. When a subpoena issued under this article commands a person to attend and give testimony at a deposition, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises, or discovery is taken in the state pursuant to properly issued notice or by agreement, the time and place and the manner of the taking of the deposition, the production, or the inspection shall comply with the law of this state, including, without limitation, Title 4 (commencing with Section 2016.010) of Part 4. Titles 3 (commencing with Section 1985) and 4 (commencing with Section 2016.010) of Part 4, and any other law or court rule of this state governing the time, place, or manner of a deposition, a production of documents or other tangible items, or an inspection of premises, apply to discovery under this article.~~

Comment. Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350 and to discovery taken in this state pursuant to properly issued notice or by agreement.

We have added a reference to Title 3 of Part 4 of the Code of Civil Procedure, because that part of the code includes key provisions governing subpoenas.

Discovery Dispute (Proposed Code Civ. Proc. § 2029.600)

Proposed Code of Civil Procedure Section 2029.600 would provide:

2029.600. (a) If a dispute arises relating to discovery under this article, and the dispute involves a person located in this state, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief shall comply with the applicable rules or statutes of this state and be filed in the superior court in the

county in which discovery is to be conducted. If the dispute does not involve a person located in this state, relief may be sought either in the foreign jurisdiction or in the superior court in the county in which discovery is to be conducted.

(b) A request for relief pursuant to this section shall be referred to as a petition notwithstanding any statute under which a request for the same relief would be referred to as a motion or by another term if it was brought in a proceeding pending in this state.

Comment. Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

A request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (deposition on notice or agreement), 2029.650 (writ petition).

A few issues relate to this provision.

Forum for Resolution of a Dispute

The Commission has wrestled with how to word proposed Section 2029.600 to indicate the proper forum for a dispute relating to discovery for an out-of-state case. Do all such disputes have to be resolved in California? If not, which ones must be resolved in California? Which ones can be resolved in the out-of-state jurisdiction? Can some disputes be resolved in either jurisdiction?

As explained at pages 10-11 of the revised tentative recommendation, proposed Section 2029.600 takes the following approach:

If a dispute arises regarding discovery conducted in California for a proceeding pending elsewhere, it may be necessary for the deponent, a party, or other interested person to seek relief in court. Section 2029.010 does not provide guidance on the proper procedure to follow in that situation.

The proposed law would eliminate this ambiguity. If the dispute involves a person located in California, any request for relief would have to comply with California law and be filed in the

superior court of the county in which discovery is to be conducted. That would further the state's interest in protecting its residents from unreasonable or unduly burdensome discovery requests. If the dispute does not involve a person located in California, relief could be sought either in the foreign jurisdiction or in the superior court of the county in which discovery is to be conducted.

(Footnotes omitted.)

The revised tentative recommendation includes a Note drawing attention to the forum selection issues:

The objective of proposed Section 2029.600 is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. The Commission is particularly interested in comments on whether the language used in proposed Section 2029.600 would accomplish this objective. Could the language be improved to better accomplish this objective? If so, how should the provision be rephrased?

In response to the Note, CAJ "had considerable discussion about the language of proposed new Code of Civil Procedure section 2029.600." Exhibit p. 9. CAJ focused its discussion on the proposed distinction between a dispute that "involves a person located in this state" and a dispute that "does not involve a person located in this state." *Id.* "In general, members of CAJ found that the term 'involves' is vague, and thought the proposed statutory language failed to provide clear guidance." *Id.*

Many CAJ members believe that any dispute relating to discovery under the proposed legislation "would — almost by definition — involve a person located in this state (either directly or indirectly)." *Id.* For example,

CAJ discussed a dispute concerning the timeliness or relevance of the discovery itself. The court's decision regarding either of those issues could determine whether a deposition of a person located in California will take place at all. To that extent, the dispute would "involve" a person in California.

Id. A majority of CAJ's members believe the solution to this problem is to revise proposed Section 2029.600(a) to read:

(a) If a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief shall comply with the applicable rules or statutes of this state and be filed in the superior court in the county in which discovery is to be conducted.

See id.

That solution would be somewhat similar to UIDDA Section 6, which reads:

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

But the Comment to UIDDA Section 6 alludes to a distinction between an application to the court that “affect[s] only the parties to the action” and an application that “directly affect[s] the deponent.” According to the Comment, the former type of application could be brought in the out-of-state jurisdiction, whereas the latter type of application would have to be brought in the discovery state (i.e., California).

Other CAJ members “believe that the proposed statutory language drawing a distinction between a dispute that ‘involves’ and ‘does not involve’ a person located in California should be clarified instead of being deleted.” *Id.* CAJ “discussed a number of hypothetical discovery disputes that would not seem to require resolution by the court in California.” *Id.* Unfortunately, however, CAJ “was unable ... to arrive at alternative statutory language that draws a clear line.” *Id.*

The staff considers this a difficult issue. We are stumped as to the best means of addressing it.

As CAJ points out, it seems likely that almost every dispute relating to discovery under the proposed legislation would to some extent “involve” or “affect” a person in California. In some instances, however, the degree of involvement may be minimal. For example, suppose the parties to an out-of-state case have a dispute over whether a particular person may attend a deposition. The deponent is indifferent and is willing to stipulate as much. Is it necessary to require that the dispute be resolved in California, rather than in the out-of-state jurisdiction? The solution proposed by the majority of CAJ members would seem to do that.

The staff’s tentative inclination is to stick with but refine the approach in the revised tentative recommendation. We suggest revising proposed Section 2029.600 to (1) clarify that if relief is sought in California, the request for relief must comply with California law, even if the dispute does not involve a person

in the state, and (2) expand the Comment to explain the objective of the provision and direct a court to interpret the provision with that objective in mind. **That could be done along the following lines:**

2029.600. (a) If a dispute arises relating to discovery under this article, and the dispute involves a person located in this state, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief shall comply with the applicable rules or statutes of this state and be filed in the superior court in the county in which discovery is to be conducted. If the dispute does not involve a person located in this state, relief may be sought either in the foreign jurisdiction or in the superior court in the county in which discovery is to be conducted. If relief is sought in the superior court in the county in which discovery is to be conducted, the request for relief shall comply with the applicable rules or statutes of this state.

(b) A request for relief pursuant to this section shall be referred to as a petition notwithstanding any statute under which a request for the same relief would be referred to as a motion or by another term if it was brought in a proceeding pending in this state.

Comment. Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

Under subdivision (a), if a dispute involves a person located in California, any request for relief would have to comply with California law and be filed in the superior court of the county in which discovery is to be conducted. If the dispute does not involve a person located in California, relief could be sought either in the foreign jurisdiction or in the superior court of the county in which discovery is to be conducted.

The objective of subdivision (a) is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. In particular, the state must be able to protect its residents from unreasonable or unduly burdensome discovery requests. A court should interpret the provision with this objective in mind.

Subdivision (b) makes clear that a A request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (deposition on notice or agreement), 2029.650 (writ petition).

Admittedly, the distinction between a dispute that “involves a person located in this state” and a dispute that “does not involve a person located in this state” is not clear-cut, as CAJ notes. It may be best, however, to let the courts flesh out the distinction in the context of actual cases.

The attached draft of a final recommendation takes the approach recommended above.

Civil Case Cover Sheet

As discussed above, proposed Section 2029.300(b)(1) would make clear that when a party merely seeks a California subpoena compelling discovery for an out-of-state case, “No civil case cover sheet is required.” If a dispute arose relating to discovery for an out-of-state case, however, and a party or other affected person sought relief in a California court under proposed Section 2029.600, it would be appropriate to require a civil case cover sheet. At that stage, judicial attention is needed and a civil case cover sheet may assist the court in processing the petition.

To prevent any confusion over whether a civil case cover sheet is needed when a petition is filed under proposed Section 2029.600, **the staff suggests adding a new subdivision to that section, which would provide:**

(c) A petition for relief pursuant to this section shall be accompanied by a civil case cover sheet.

A similar subdivision should be added at the end of proposed Code of Civil Procedure Section 2029.620, which would apply when there are multiple discovery disputes in the same county relating to the same out-of-state case.

Synthesis of the Recommended Reforms

If the Commission approves all of the recommended revisions of proposed Section 2029.600, the provision would read:

2029.600. (a) If a dispute arises relating to discovery under this article, and the dispute involves a person located in this state, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief shall comply with the applicable rules or statutes of this state and be filed in the superior court in the

county in which discovery is to be conducted. If the dispute does not involve a person located in this state, relief may be sought either in the foreign jurisdiction or in the superior court in the county in which discovery is to be conducted. If relief is sought in the superior court in the county in which discovery is to be conducted, the request for relief shall comply with the applicable rules or statutes of this state.

(b) A request for relief pursuant to this section shall be referred to as a petition notwithstanding any statute under which a request for the same relief would be referred to as a motion or by another term if it was brought in a proceeding pending in this state.

(c) A petition for relief pursuant to this section shall be accompanied by a civil case cover sheet.

Comment. Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

Under subdivision (a), if a dispute involves a person located in California, any request for relief would have to comply with California law and be filed in the superior court of the county in which discovery is to be conducted. If the dispute does not involve a person located in California, relief could be sought either in the foreign jurisdiction or in the superior court of the county in which discovery is to be conducted.

The objective of subdivision (a) is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. In particular, the state must be able to protect its residents from unreasonable or unduly burdensome discovery requests. A court should interpret the provision with this objective in mind.

Subdivision (b) makes clear that a request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (deposition on notice or agreement), 2029.650 (writ petition).

Writ Petition (Proposed Code Civ. Proc. § 2029.650)

Proposed Code of Civil Procedure Section 2029.650 would provide:

2029.650. (a) If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ.

(b) Immediately after filing a writ petition in a court of appeal under this section, the petitioner shall file a copy of it in the superior court that issued the challenged order.

(c) Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the discovery that is the subject of that order, or both.

(d) Immediately after the court of appeal decides the writ petition and its order on the petition becomes final, the clerk of the court of appeal shall file a copy of the final order with the clerk of the superior court.

Comment. Section 2029.650 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this article. The provision is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial) and 403.080 (writ of mandate to review order on reclassification motion).

CAJ makes a couple of suggestions regarding this provision.

Procedural Details

First, CAJ “questions the need for and desirability of all the language in section 2029.650 concerning procedures on writ review.” Exhibit pp. 10-11. In particular, CAJ says that proposed subdivisions (b) and (d) “seem unnecessary and confusing in light of similar requirements in the California Rules of Court.” *Id.* at 11. CAJ explains this point in detail, referring to and describing the relevant court rules. *Id.* at 11-12. CAJ “believes that these California Rules of Court are more comprehensive and complete than proposed subdivisions (b) and (d), and that parallel statutory provisions that are almost, but not quite, the same as the Rules of Court would tend to confuse things.” *Id.* at 12. CAJ recommends that the Commission “delete proposed subdivisions (b) and (d) and include references to the existing Rules of Court in comments to the new statute.” *Id.*

CAJ’s discussion of this point is persuasive and its suggested solution appears appropriate. **CAJ’s solution should be implemented by revising proposed Section 2029.650 as follows:**

2029.650. (a) If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ.

~~(b) Immediately after filing a writ petition in a court of appeal under this section, the petitioner shall file a copy of it in the superior court that issued the challenged order.~~

~~(c) Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the discovery that is the subject of that order, or both.~~

~~(d) Immediately after the court of appeal decides the writ petition and its order on the petition becomes final, the clerk of the court of appeal shall file a copy of the final order with the clerk of the superior court.~~

Comment. Section 2029.650 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this article. ~~The provision is modeled on Sections 400 (writ of mandate to review order on motion to change place of trial) and 403.080 (writ of mandate to review order on reclassification motion). For further guidance on that procedure, see in particular Cal. R. Ct. 8.264(a)(1) (when relevant, clerk of court of appeal shall promptly send court of appeal's opinion or order to lower court), 8.272(b) (transmittal of remittitur and opinion or order to lower court), 8.490(k) (notice to trial court with regard to writ), 8.490(f)(1) (writ petition shall be served on respondent superior court).~~

Exclusive Means of Review

Proposed Section 2029.650 would provide that if a superior court issues an order resolving a dispute relating to discovery for an out-of-state case, a person aggrieved by the order “*may* petition the appropriate court of appeal for an extraordinary writ.” (Emphasis added.) CAJ correctly notes that several California cases have permitted a person to appeal from a decision relating to discovery for an out-of-state case, instead of seeking review by writ. Exhibit p. 11. CAJ points out, however, that an appeal would entail “considerable delay.” *Id.* at 12. CAJ further explains that an appeal “would stay enforcement of the order (Code Civ. Proc., § 916), but would not stay the underlying out-of-state proceeding, and therefore could deprive the party seeking discovery in California of timely and effective discovery.” *Id.*

CAJ says that a “solution to this problem would be for proposed section 2029.650, subdivision (a) to expressly state that extraordinary writ review is the exclusive means of appellate review.” *Id.* According to CAJ, this “would have no effect on the scope of review on appeal from the judgment in the out-of-state proceeding because such an appeal would not encompass a prior ruling by a court of another state in any event.” *Id.* CAJ also provides references to several statutes that include provisions like what it is suggesting. *Id.*

CAJ's proposed solution is consistent with the Commission's previously expressed intent that review should be by writ and not by appeal. See CLRC Minutes (April 2006), p. 14; CLRC Memorandum 2006-41, p. 9; CLRC Minutes (Oct. 2006), p. 15. If the staff recollects correctly, a key factor prompting the Commission to select this approach was the potential for delay if review was by appeal, rather than by writ.

To make more clear that only writ review is available, proposed Section 2029.650(a) could be revised as follows:

(a) If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ. No order or other action of a court under this article is appealable in this state.

Synthesis of the Recommended Reforms

If the Commission approves all of the recommended revisions of proposed Section 2029.650, the provision would read:

2029.650. (a) If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ. No order or other action of a court under this article is appealable in this state.

(b) Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the discovery that is the subject of that order, or both.

Comment. Section 2029.650 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this article. For further guidance on that procedure, see in particular Cal. R. Ct. 8.264(a)(1) (when relevant, clerk of court of appeal shall promptly send court of appeal's opinion or order to lower court), 8.272(b)(transmittal of remittitur and opinion or order to lower court), 8.490(k) (notice to trial court with regard to writ), 8.490(f)(1) (writ petition shall be served on respondent superior court).

Notification of the Trial Judge and Any California Court Adjudicating a Related Case

CAJ suggests that if "there is an active out-of-state case resulting in a discovery dispute that is resolved under the proposed statutory scheme, ... a separate provision should be added that requires the parties to provide the out-of-state court with a copy of any order issuing from California." Exhibit p. 12.

“Although the parties would already be aware of any such orders, CAJ believes those orders should become part of the record of the out-of-state case.” *Id.*

This is a good point, similar to the one Judge Nichols raised regarding notification of a judge assigned to a related California case. To address both of those concerns, **the Commission could add a new provision to its proposal, along the following lines:**

Code Civ. Proc. § 2029.660. Notification of out-of-state court or California court adjudicating related case

2029.660. In addition to complying with other requirements governing service,

(a) A person filing a petition or other document pursuant to Section 2029.600, 2029.620, or 2029.650 shall serve a copy of that document on the court where the out-of-state case is pending, together with a request that the copy be provided to the judge assigned to that case, if any.

(b) If a person filing a petition or other document pursuant to Section 2029.600, 2029.620, or 2029.650 knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the person shall also serve a copy of the petition or other document on the court where that case is pending in this state, together with a request that the copy be provided to the judge assigned to that case, if any.

(c) When a court acts on a petition filed pursuant to Section 2029.600, 2029.620, or 2029.650, the prevailing party shall serve a copy of the court’s order, opinion, remittitur, or other document on the court where the out-of-state case is pending, together with a request that the copy be provided to the judge assigned to that case, if any.

(d) If the prevailing party knows of a case pending in this state that shares a question of law or fact with the out-of-state case, the prevailing party shall also serve a copy of the court’s order, opinion, remittitur or other document on the court where that case is pending in this state, together with a request that the copy be provided to the judge assigned to that case, if any.

Comment. Section 2029.660 is added to ensure that when a dispute arises relating to discovery for an out-of-state case, (1) the out-of-state court is kept fully informed and (2) any court adjudicating a related case in this state is kept fully informed. The provision serves to prevent gamesmanship.

Abusive Conduct

Herb Barish warns that a litigant might try to abuse the proposed procedures governing discovery for an out-of-state case. He says:

The proposal is written with a belief that those who use the procedures will be honest and professional. What happens when the rest of us ne'er-do-wells get involved? Each section of the proposed legislation should be examined for possible problems cause by us lesser and sleazier lawyers. Some of the following questions might be helpful when analyzing the proposal. How can any portion of the proposed legislation be abused? What problems can arise? What can go wrong when lawyers who lack skill and/or integrity seek to take advantage when applying the proposed legislation? What problems can arise when the crazy pro per charges ahead?

Exhibit p. 3.

This is sound advice. Some of the steps recommended above should help to prevent abusive conduct. We encourage Commission members and other interested persons to **consider the questions Mr. Barish raises and assess whether any further measures are needed to prevent such conduct.**

NEXT STEP

The attached draft of a final recommendation incorporates the revisions recommended above. The Commission needs to determine whether to approve that draft, with or without revisions, as a final recommendation for printing and submission to the Legislature. If the Commission approves a final recommendation, we will seek an author to introduce the proposal in the Legislature in 2008.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

LAW OFFICE OF
HERBERT M. BARISH
535 N. Brand Blvd., Suite 270
GLENDALE, CA 91203
(323)661-6288 • FAX (323)913-1187

November 7, 2007

To: California Law Revision Commission
Re; Tentative Recommendation - Deposition in Out-of-State Litigation

Preliminary and partial analysis for the Litigation Section / Los Angeles County Bar Association

The Litigation Section of the Los Angeles County Bar Association is beginning the process of analyzing and commenting on the proposed recommendations for changes regarding Deposition in Out-of-State Litigation. I'm a member of the Executive Committee of the Litigation Section of the LACBA and have been asked to provide a preliminary analysis. Actually, I'm on a subcommittee that was asked to review it. My cursory review was more than the other members so I got stuck with this.

The deadline of November 9, 2007 is prior to the next meeting of the Litigation Section's Executive Committee. Consequently, you are being provided the same working comments that will be provided to the members of the Executive Committee. The Litigation Section claims no responsibility for any of the following that may be dumb, ignorant, ridiculous, poorly thought out, consist of bad grammar, or otherwise be embarrassing. On the other hand, if any of the following has merit, the Litigation Section claims full credit.

Because of my own time constraints, my review of the document was somewhat cursory. This is not a position paper. The Executive Committee of the Litigation Section will have an opportunity to begin a more thorough review beginning at its meeting on November 14, 2007.

Following are some thoughts to consider.

1. SOMETHING IS MISSING - WHAT AN OUT OF STATE LAWYER - CANNOT DO.

Page 10 of the Tentative Recommendations - "Local counsel *may* be needed . . . to appear in a California Court . . . Because these matters are already governed by California law, it *might not* be necessary to address them in this proposal." (Emphasis added.) It is then explained in the footnotes that comments to the proposed legislation cover the issue. The expectation is that an out-of-state attorney will (1) have a code that includes the comments and (2) read the comments, and (3) be otherwise familiar with California law.

This attorney hasn't read comments to legislation since the new Evidence Code was adopted. (You are invited to research when that was.) I just checked my single volume of the Evidence Code. The West Publishing Company didn't bother including comments. Being curious, I also just checked an internet legal service I use. No comments are included with that version of the Evidence Code.

I am unfamiliar with California law regarding out of state attorneys.

The proposed legislation should not only state that obtaining a subpoena is not making an appearance but also that any request for a court to otherwise act would constitute an appearance and therefore require authorization to practice law in the State of California.

2. FOREIGN NATIONS GET CALIFORNIA DISCOVERY?

12029.200 - Foreign jurisdictions include foreign nations. Good bye Hague - Hello California. Should this change be done so casually? Maybe it's a good idea. How about reciprocity? Should foreign jurisdictions be given greater rights in California than in their own nation? Should they be given greater rights in California than they afford to litigants in California who seek discovery in those same foreign countries? These are serious policy issues that need to be widely discussed and considered before making such an extreme change.

Discovery by litigants in courts of foreign nations appears to be an area of law occupied by the feds. International discovery involves international relations. There's this annoying problem with The Hague Evidence Convention, with 28 USCA 1781, 1782, and with sections of that U.S. Constitution, such as Article I§10, Article II§2, and Article VI. California might lack jurisdiction to independently decide how to handle foreign discovery.

Although the State Flag includes the words 'California Republic', and despite what Arnold may think, California is still subject to the laws of the United States.

In view of the myriad of issues involving international discovery, most not mentioned here, the authors of this proposed legislation might consider limiting it to interstate discovery.

3. A SUBPOENA SHOULD NOT BE TIED TO A COUNTY.

12029.300 - Requires the subpoena to be issued ". . . [I]n the county in which discovery is sought to be conducted in this state." (1) Why? (2) Is an out-of-state attorney supposed to be familiar with county lines? (3) "The county in which discovery is sought to be conducted" is an uncertain term. For example, what happens when documents are sought from an individual or business that has offices and/or storage in a variety of counties? Why not require the subpoena to be issued from any county but be treated as issued by the State? This project is an effort to improve civil discovery among different states. Adding counties to the system creates an additional complication to what is intended to simplify procedures.

4. THE SUBPOENA NEEDS MORE INFORMATION.

The procedures could use some tweaking. The subpoena should require that the original foreign court order be attached and perhaps also the pleading filed in the foreign jurisdiction justifying that court issuing the order. A client will contact an attorney's office and ask, "What's this?" That attorney should be able to have all the necessary information immediately available. The recipient of the subpoena should not suffer unnecessary and avoidable attorney fees.

5. A STATEWIDE DATA BASE IS DESIRABLE.

When a subpoena is issued pursuant to this proposal, the original foreign court order and subpoena should be copied into a statewide data base that is internet accessible. If rejected, the request for a subpoena should also be retained. This is not difficult in the 21st century.

There is normally no need for courts to involve themselves in subpoenas because California attorneys are officers of the California courts and pro pers are subject to the jurisdiction of the court. That reasoning fails to include those not permitted to practice in California. There are presently disputes with regard to search warrants because the courts do not maintain copies of warrants, whether signed or rejected. It is preferable for government to maintain records of its actions, particularly when it involves orders as intrusive as a subpoenas and depositions.

It should not be forgotten that even civil subpoenas raise issues that involve constitutional protections regarding searches and seizures.

6. A TIME FRAME.

Should the issued subpoenas include a time frame for service and execution? Should the proposed legislation include a time frame for issuing the subpoena in relation to when the foreign jurisdiction issued the order? Without a court reviewing the request, a lack of time constraints may open an area for abuse.

7. GENERAL THOUGHTS.

The proposal is written with a belief that those who use the procedures will be honest and professional. What happens when the rest of us ne'er-do-wells get involved? Each section of the proposed legislation should be examined for possible problems caused by us lessor and sleazier lawyers. Some of the following questions might be helpful when analyzing the proposal. How can any portion of the proposed legislation be abused? What problems can arise? What can go wrong when lawyers who lack skill and/or integrity seek to take advantage when applying the proposed legislation? What problems can arise when the crazy pro per charges ahead?

This effort at simplifying out of state discovery deserves support. These suggestions of areas that may deserve further consideration should not be considered a rejection of this worthwhile project.

Herb Barish

**EMAIL FROM TONY KLEIN, PROCESS SERVER INSTITUTE
(8/25/07, ITEM #1)**

Re: Comments to Memo 2007-35

I have a few comments regarding the proposal:

Civil Case Cover Sheet

Eliminating the Civil Case Cover Sheet will get around the problem with courts rejecting a filing for lack of a California lawyer's signature. Using a Judicial Council Mandatory Form Application will get around the "appearance" problem, but it may create another set of problems.

Without a case number, the witness may question the legitimacy of the subpoena. This has occasionally come up when serving corporations that receive foreign depositions regularly, such as Genentech, Google, and Yahoo. Fully citing reference to the statute to the new subpoena might give it more credibility.

Also, a consumer is given standing to file a motion to quash or modify under CCP 1987.1. (See CCP 1985.3(g)) An employee whose records are subject to subpoena has a similar right under CCP 1985.6(f). Without a case number issuing upon application for subpoena under 2029.010, that would not be possible. Alternatively, a consumer or employee might be given similar standing to "petition to quash or modify" similar to the right given to the witness in proposed 2029.600.

One of the arguments courts have made justifying a full "first appearance" filing fee is that to generate a case number they need a Civil Case Cover Sheet, time to docket and create a court file.

There is a precedent for a minimal filing fee to generate a new case number. When the judgment debtor lives more than 150 miles from the court, the judgment must be filed in the county of the debtor's residence (CCP 708.160). Once filed, a case number is issued, and an order for examination can issue to compel examination of the debtor at a court hearing.

I bring it to your attention because of the analogy for the issuance of a case number. The impact on the court for issuing a foreign deposition subpoena is minimal compared to a debtor's exam.

Furthermore, disputes over these subpoenas are rare, which means that 1 out of 300 ever involve motions.

So if a foreign deposition subpoena can obtain a case number upon filing of the application, and the only way to obtain one is by filing a Civil Case Cover Sheet, perhaps a box could be added to the for this procedure. Authorization for signatures by out-of-state counsel should be clearly stated.

Perhaps that could be a Rule of Court setting forth the concept of comity between states and that filing the application does not constitute an unauthorized practice of law. The rule could be included on the Mandatory Form presented with the Civil Case Cover Sheet, or even cross-referenced (See Item X on the "Application for Issuance of a Foreign Deposition Subpoena".)

With or without a Civil Case Cover Sheet, the Judicial Council will probably need to weigh in on it.

Proposed 2029.350

The language authorizes an attorney to issue a subpoena upon receipt of a subpoena “issued by a court”. By making that distinction in 2029.350 and not 2029.300 implies that attorney issued subpoenas cannot issue a subpoena upon receipt of a “self executed subpoena.”

Proposed Application form

The Application form should reference the issued subpoena, but also continue to reference other documents that other states will continue to require unless or until they adopt the Uniform Interstate Depositions and Discovery Act. Those documents will continue to be a part of the filing package. Would these documents, without a subpoena, allow the clerk to issue a California subpoena? The proposal replaces current law that authorizes issuance with the documents that will continue to be submitted by all other states, and perhaps most of them for the foreseeable future. Adopting the UIDDA before any other state, and replacing CCP 2029.010, puts California as the one state out-of-step with the others.

For instance, the California Judicial Council just proposed a Commission form and it is still a requirement for depositions taken in other states for California actions. (CCP 2026.010). It will continue to be required for those non-adopting states.

Tony Klein
Process Server Institute
667 Folsom St., 2d Fl.
San Francisco, CA 94107
415/495-3850
<http://psinstitute.com>

**EMAIL FROM TONY KLEIN, PROCESS SERVER INSTITUTE
(8/25/07, ITEM #2)**

Re: Application form

Barbara:

Attached is a prototype of a proposed form entitled “Application for Issuance of Foreign Deposition Subpoena”, tracking the language of the proposed statute if it left intact existing CCP 2029.010.

Tony Klein
Process Server Institute
667 Folsom St., 2d Fl.
San Francisco, CA 94107
415/495-3850
<http://psinstitute.com>

ATTORNEY OR PARTY WITHOUT ATTORNEY	
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF _____	
PLAINTIFF:	FOREIGN COURT:
DEFENDANT:	FOREIGN CASE NUMBER:
APPLICATION FOR ISSUANCE OF FOREIGN DEPOSITION SUBPOENA	CASE NUMBER:

I, _____, am

- an attorney of record in the proceeding to which the subpoena relates.
- party in pro per not represented by counsel.
- other:

An action is pending in the above-referenced court.

The names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel are:

See attached.

Attached is an original or true copy of one or more of the following document(s):

- Subpoena issued from the foreign court
- Mandate
- Writ
- Letters Rogatory
- Letter of Request
- Commission
- Notice
- Agreement

I make application for issuance of a deposition subpoena by this court to take the deposition of a witness residing or doing business in this county.

Executed on _____

Note: Application for issuance of a subpoena under CCP §§ 2029.010, et seq. does not constitute an appearance or an unauthorized practice of law.



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON ADMINISTRATION OF JUSTICE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

TO: The California Law Revision Commission

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

DATE: November 14, 2007

SUBJECT: Deposition in Out-of-State Litigation – Revised Tentative Recommendation

The State Bar of California's Committee on Administrative of Justice (CAJ) has reviewed and analyzed the August 2007 Revised Tentative Recommendation of the California Law Revision Commission (CLRC), *Deposition in Out-of-State Litigation*, and appreciates the opportunity to comment on the proposal. CAJ supports the CLRC's efforts to clarify and refine the procedure for obtaining discovery from a witness in California for the purposes of a proceeding pending in another jurisdiction. In general, CAJ commends the CLRC's proposal. CAJ's specific comments are set out below.

1. Discovery by "notice or agreement" – Code of Civil Procedure sections 2029.500 and 2029.640

Proposed Code of Civil Procedure sections 2029.500 and 2029.640 refer to discovery by "properly issued notice or by agreement." CAJ recognizes that existing Code of Civil Procedure section 2029.010 refers to a deposition "on notice or agreement" but is concerned with potential confusion about that terminology, particularly because it does not specify whose agreement is required.

In the context of cases pending in California, Code of Civil Procedure section 2020.010(a) provides that the process by which a *nonparty* is required to provide discovery is a deposition subpoena, except as provided in section 2025.280(a), which covers an officer, director, managing agent, or employee of a party. The statute does not use the term "notice or agreement" as an alternative to a subpoena. Section 1985.6 refers to an agreement in the specific context of employment records sought by a subpoena duces tecum. Under subdivision (f)(3), a witness is not required to produce employment records after receiving notice of a motion to quash or modify the subpoena brought by an employee, or after receiving a written objection from a nonparty employee, except upon order of the court or "by agreement of *the parties, witnesses, and employees affected.*" (Emphasis added).

If sections 2029.500 and 2029.640 are going to introduce the concept of discovery by "agreement" into the statutory scheme (as an alternative to a subpoena), CAJ believes the

statutes should be clarified to provide that the agreement must be an agreement of the parties, the witness, and other individuals who may be affected, if those other individuals would otherwise have a right to object to the discovery in a case pending in California.

2. Discovery dispute – Code of Civil Procedure Section 2029.600

CAJ had considerable discussion about the language of proposed new Code of Civil Procedure section 2029.600. CAJ understands that the objective of the proposed new section, as described in the staff note, “is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state.” CAJ focused its discussion on the statutory distinction in subdivision (a) between a dispute that “involves a person located in this state” and a dispute that “does not involve a person located in this state.” In general, members of CAJ found that the term “involves” is vague, and thought the proposed statutory language failed to provide clear guidance.

CAJ notes that proposed section 2029.600 begins by providing: “If a dispute arises relating to discovery under this article, ...” Many members of CAJ believe that a dispute “relating to discovery under this article” would – almost by definition – involve a person located in this state (either directly or indirectly). As examples, CAJ discussed a dispute concerning the timeliness or relevance of the discovery itself. The court’s decision regarding either of those issues could determine whether a deposition of a person located in California will take place at all. To that extent, the dispute would “involve” a person in California. The majority of CAJ’s members believe the solution to this problem is to delete “and the dispute involves a person located in this state” from the first sentence of section 2029.600, and the last sentence of section 2029.600. That way, the section would simply cover any dispute that “arises relating to discovery under this article.”

Some members of CAJ believe that the proposed statutory language drawing a distinction between a dispute that “involves” and “does not involve” a person located in California should be clarified instead of being deleted. CAJ discussed a number of hypothetical discovery disputes that would not seem to *require* resolution by the court in California. CAJ was unable, however, to arrive at alternative statutory language that draws a clear line.

3. Writ petition – Code of Civil Procedure Section 2029.650

- a. Proposed provisions regarding procedures on writ review are unnecessary and somewhat inconsistent with the Rules of Court

Proposed new Code of Civil Procedure section 2029.650 is modeled after Code of Civil Procedure sections 400 and 403.080, which provide for writ review of an order on a motion to change the place of trial and an order on a motion for reclassification, respectively. CAJ questions the need for and desirability of all the language in section 2029.650 concerning

procedures on writ review.¹ Proposed subdivisions (b) and (d), in particular, seem unnecessary and confusing in light of similar requirements in the California Rules of Court.

Subdivision (b) of proposed section 2029.650 states:

“(b) Immediately after filing a writ petition in a court of appeal under this section, the petitioner shall file a copy of it in the superior court that issued the challenged order.”

California Rules of Court, rule 8.490(f)(1), governing original proceedings in the reviewing court, states:

“If the respondent is the superior court or a judge of that court, the petition and one set of supporting documents must be served on any named real party in interest, but only the petition must be served on the respondent.”

Under rule 8.490(f)(1), a petition filed in the Court of Appeal in which the superior court is the respondent must be *served* on the respondent court (i.e., the superior court). This seems adequate to inform the respondent court of the appellate proceeding, and CAJ does not understand why the petitioner should be required to “file” the petition in the superior court “immediately after” filing the petition in the court of appeal, rather than merely “serve” it on the superior court.

Subdivision (d) of proposed section 2029.650 states:

“(d) Immediately after the court of appeal decides the writ petition and its order on the petition becomes final, the clerk of the court of appeal shall file a copy of the final order with the clerk of the superior court.”

The Court of Appeal can resolve a writ petition either in an order or an opinion. Proposed subdivision (d) makes no reference to an opinion and therefore is underinclusive. California Rules of Court, rule 8.264(a)(1) requires prompt notice to all parties, including the respondent court, of all “opinions and orders” in appellate proceedings (including both interlocutory and dispositive orders):

“The Court of Appeal clerk must promptly file all opinions and orders of the court and promptly send copies showing the filing date to the parties and, when relevant, to the lower court or tribunal.”

California Rules of Court, rule 8.272(b)(1)(B) states that when an appellate proceeding is resolved and the decision is not reviewed by the Supreme Court, “The clerk must send the lower court or tribunal the Court of Appeal remittitur and a file-stamped copy of the opinion or order.”

¹ CAJ also questions the need for and desirability of that language in sections 400 and 403.080, but recognizes that changes to those statutes are beyond the scope of this CLRC project.

California Rules of Court, rule 8.490(k) requires prompt notice to the superior court if a writ or order issues directed to the superior court, including telephonic notice in some circumstances, which proposed subdivision (d) does not mention:

“(1) If a writ or order issues directed to any judge, court, board, or other officer, the reviewing court clerk must promptly send a certified copy of the writ or order to the person or entity to whom it is addressed.

“(2) If the writ or order stays or prohibits proceedings set to occur within seven days or requires action within 7 days or requires action within 7 days—or in any other urgent situation—the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. The clerk of the respondent court must then notify the judge or officer most directly concerned.

“(3) The clerk need not give telephonic notice of the summary denial of a writ, whether or not a stay previously issued.”

CAJ believes that these California Rules of Court are more comprehensive and complete than proposed subdivisions (b) and (d), and that parallel statutory provisions that are almost, but not quite, the same as the Rules of Court would tend to confuse things. CAJ therefore recommends that the CLRC delete proposed subdivisions (b) and (d) and include references to the existing Rules of Court in comments to the new statute.

b. Extraordinary writ review should be made the exclusive means of appellate review

Proposed new Code of Civil Procedure section 2029.650, subdivision (a) states that an aggrieved person “may” petition for an extraordinary writ, but does not state that extraordinary writ review is the exclusive means of appellate review. Courts have held that an order by a California court concerning discovery in California for an action out-of-state is an appealable order, explaining that the order is a final order in an “independent proceeding” (*Adams v. Woods* (1861) 18 Cal. 30, 31), and that there is no other opportunity for review of the decision in an appeal in California (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 885-886; *Warfield v. Medeiros* (1984) 160 Cal.App.3d 1035, 1041).² The CLRC cited *Warfield* in an earlier memo on this subject (Dec. 1, 2006, Staff Memorandum 2006-46, pp. 7-8) and seemed to question its reasoning, but did not specifically address the significance of even a potential right of appellate review.

² This is consistent with the collateral order doctrine. “When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]” (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.)

The significance of the right of appellate review of such an order is the considerable delay that an appeal would entail. An appeal would stay enforcement of the order (Code Civ. Proc., § 916), but would not stay the underlying out-of-state proceeding, and therefore could deprive the party seeking discovery in California of timely and effective discovery. A solution to this problem would be for proposed section 2029.650, subdivision (a) to expressly state that extraordinary writ review is the exclusive means of appellate review. Examples of statutes that so state are Code of Civil Procedure section 405.39, Government Code section 6259, subdivision (c), Business and Professions Code section 2337 (see *Leone v. Medical Board* (2000) 22 Cal.4th 660, 666-670 [upholding the constitutionality of the statute]), and Business and Professions Code section 6180.13. This would have no effect on the scope of review on appeal from the judgment in the out-of-state proceeding because such an appeal would not encompass a prior ruling by a court of another state in any event.

3. Additional requirement to file any California discovery orders in the out-of-state case

If there is an active out-of-state case resulting in a discovery dispute that is resolved under the proposed statutory scheme, CAJ believes a separate provision should be added that requires the parties to provide the out-of-state court with a copy of any order issuing from California. Although the parties would already be aware of any such orders, CAJ believes those orders should become part of the record of the out-of-state case.

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.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA

July 27 – August 3, 2007

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 7, 2007

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**DRAFTING COMMITTEE ON UNIFORM INTERSTATE DEPOSITIONS AND
DISCOVERY ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

RICHARD B. LONG, P.O. Box 2039, 20 Hawley St., East Tower, Binghamton, NY 13902,
Chair

FRANCISCO L. ACEVEDO, P.O. Box 9023905, San Juan, PR 00902-3905

GEORGE H. BUXTON, III, 31 E. Tennessee Ave., Oak Ridge, TN 37830

M. MICHAEL CRAMER, 4 Whisperwood Ct., Rockville, MD 20852

PATRICK DEBLASE, 8648 Wilshire Blvd., Beverly Hills, CA 90211-2910

TIMOTHY D. DEGIUSTI, 204 N. Robinson, Suite 1550, Oklahoma City, OK 73102

HARRY D. LEINENWEBER, U.S. District Court, 219 S. Dearborn St., Suite 1946, Chicago, IL
60604

HAROLD E. MEIER, Box 491, Dayton, WY 82836

FREDERICK D. NELSON, Hamilton County Courthouse, 1000 Main St., Rm. 320, Cincinnati,
OH 45202

DAVID T. PROSSER, JR., P.O. Box 1688, Madison, WI 53701

KAREN ROBERTS WASHINGTON, 2929 Carlisle, Suite 250, Dallas, TX 75204

THOMAS A. MAUET, University of Arizona, James E. Rogers College of Law, P.O. Box
210176, Tucson, AZ 85721-0176, *Reporter*

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*

DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LIN HUGHES, 1300 Capitol Center, 919 Congress Ave., Austin, TX 78701, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

TABLE OF CONTENTS

Prefatory Note 1
SECTION 1. SHORT TITLE 5
SECTION 2. DEFINITIONS 5
SECTION 3. ISSUANCE OF SUBPOENA 6
SECTION 4. SERVICE OF SUBPOENA 8
SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION 8
SECTION 6. APPLICATION TO COURT 9
SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION 10
SECTION 8. APPLICATION TO PENDING ACTIONS 10
SECTION 9. EFFECTIVE DATE 10

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation “due to its being obsolete.” Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the “courts” or “judicial proceedings” of the other state. Some states allow depositions for any “proceeding.” The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term “party” without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any “interested party” to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the “testimony” of witnesses. The UIIPA expressly applies to “testimony or documents or other things.” Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness “to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises...”

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent’s home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter

rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness “may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.” The UIIPA provides that methods of service includes service “in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.” State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent’s home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction’s discovery procedure applies?

A significant issue is whether the trial state’s or discovery state’s discovery procedure controls, and on what issues. The general Restatement rule is that the forum state’s (the discovery state’s) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state’s or discovery state’s courts can issue protective orders. Both states have interests: the trial state’s courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state’s courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state’s courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Foreign jurisdiction” means a state other than this state.

(2) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.

(5) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

Comment

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term “Subpoena” does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

SECTION 3. ISSUANCE OF SUBPOENA.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a court of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court’s procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

(A) incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Comment

The term “Court of Record” was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A “Court of Record” includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term “Presented” to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk’s office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk’s office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk’s office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena (“issue” includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal

the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

SECTION 4. SERVICE OF SUBPOENA. A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

SECTION 8. APPLICATION TO PENDING ACTIONS. This [act] applies to requests for discovery in cases pending on [the effective date of this [act]].

SECTION 9. EFFECTIVE DATE. This [act] takes effect ____.

#J-505

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Deposition in Out-of-State Litigation

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF RECOMMENDATION

The Law Revision Commission proposes to clarify and refine the procedure for obtaining discovery from a witness in this state for purposes of a proceeding pending in another jurisdiction. The recommended legislation is based in part on the Uniform Interstate Depositions and Discovery Act (2007) (“UIDDA”), which was recently approved by the National Conference of Commissioners on Uniform State Laws. The recommended legislation also addresses procedural details not addressed in UIDDA. The Commission solicits comments on these reforms.

Among other things, the recommended legislation would:

- Make clear that discovery for an out-of-state proceeding can be taken from an entity located in California, not just from a natural person.
- Eliminate any doubt that such discovery can include a deposition solely for the production of tangible items.
- Expressly allow an inspection of land or other property for purposes of an out-of-state proceeding.
- Simplify procedure by permitting issuance of a California subpoena to be based on any document from an out-of-state court that commands a person in California to testify or provide other discovery.
- Specify the fee and other procedural requirements for obtaining a subpoena from a California court for discovery in an out-of-state proceeding.
- Direct the Judicial Council to prepare a subpoena form and a subpoena application form for use in obtaining discovery for an out-of-state proceeding (or modify an existing form to expressly address that situation).
- Make clear that under specified circumstances local counsel can issue a subpoena for discovery in an out-of-state proceeding.

The recommended legislation would also clarify the procedure for resolving a dispute relating to discovery for an out-of-state proceeding. To resolve such a dispute in a California court, a litigant or deponent would need to file a petition in the superior court for the county in which the discovery is being conducted. The recommended legislation would specify the proper fee, briefing schedule, hearing date, and other procedural details.

By providing guidance on these points and related matters, the recommended legislation would help to prevent confusion, disputes, unnecessary expenditure of resources, and inconsistent treatment of litigants. The recommended reforms would not only benefit litigants in out-of-state proceedings, but would also assist California court personnel, process servers, witnesses, and others affected by discovery conducted for out-of-state litigation.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

DEPOSITION IN OUT-OF-STATE LITIGATION

1 The Law Revision Commission is engaged in a study of civil discovery and has
2 issued several recommendations on that topic, all of which have been enacted.¹ In
3 this tentative recommendation, the Commission proposes to revise the law to
4 provide clear guidance on the procedure that litigants, courts, and witnesses are to
5 follow when discovery is taken in California for purposes of an out-of-state
6 proceeding.

7 The recommended reforms are based in part on the Uniform Interstate
8 Depositions and Discovery Act (2007) (“UIDDA”), which was recently approved
9 by the National Conference of Commissioners on Uniform State Laws
10 (“NCCUSL”).² The recommended legislation also addresses procedural details
11 that are not addressed in UIDDA.

12 The Commission solicits comments on these reforms.

13 Existing Law

14 Code of Civil Procedure Section 2029.010³ governs the procedure for deposing⁴
15 a witness in California for purposes of a proceeding pending in another
16 jurisdiction. The provision applies when an out-of-state court issues a mandate,⁵

1. *Time Limits for Discovery in an Unlawful Detainer Case*, 36 Cal. L. Revision Comm’n Reports 271 (2006), implemented by 2007 Cal. Stat. ch. 113; *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm’n Reports 161 (2004), implemented by 2005 Cal. Stat. ch. 294; *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm’n Reports 137 (2004), implemented by 2005 Cal. Stat. ch. 294; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003), implemented by 2004 Cal. Stat. ch. 182.

Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

2. In response to concerns about how the California courts were handling discovery for out-of-state litigation, the Commission began studying this topic in July 2005. NCCUSL began drafting a uniform act on the topic soon afterwards. The Commission decided to await the completion of NCCUSL’s study before finalizing its own recommendation.

3. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Code of Civil Procedure Section 2029 without change. See Code Civ. Proc. § 2029.010 Comment.

4. In California, a “deposition” is defined as “a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine.” Code Civ. Proc. § 2004. The term “deposition” is used to refer to: (1) a pretrial proceeding in which a witness orally testifies and the answers are transcribed (Code Civ. Proc. §§ 2020.310, 2025.010-2025.620), (2) a pretrial proceeding in which a witness answers written questions under oath (Code Civ. Proc. §§ 2028.010-2028.080), (3) a pretrial proceeding in which a witness testifies and produces documents or other tangible things (Code Civ. Proc. §§ 2020.510, 2025.010-2025.620), and (4) a pretrial proceeding in which a witness is only required to produce business records for copying (Code Civ. Proc. §§ 2020.410-2020.440; Evid. Code §§ 1560-1567).

5. A “mandate” is a “judicial command.” Cochran’s Law Lexicon (5th ed. 1973).

1 writ,⁶ letters rogatory,⁷ letter of request,⁸ or commission⁹ requesting that a person
2 in California testify or produce materials for use in an out-of-state case. It states:

3 2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or
4 commission is issued out of any court of record in any other state, territory, or
5 district of the United States, or in a foreign nation, or whenever, on notice or
6 agreement, it is required to take the oral or written deposition of a natural person
7 in California, the deponent may be compelled to appear and testify, and to
8 produce documents and things, in the same manner, and by the same process as
9 may be employed for the purpose of taking testimony in actions pending in
10 California.

11 Under this provision, a California court can use its subpoena power to compel a
12 witness in the state to submit to a deposition for purposes of a proceeding pending
13 elsewhere.¹⁰ Because an out-of-state tribunal may be unable to compel discovery
14 from a non-party witness located in California, the provision can be critical in
15 ascertaining the truth and achieving justice in an out-of-state proceeding.¹¹ The
16 assistance that the provision extends to other jurisdictions may in turn prompt such
17 jurisdictions to reciprocate with respect to cases pending in California.¹²

6. A “writ” is a “court’s written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.” Black’s Law Dictionary (8th ed. 2004).

7. The term “letters rogatory” is synonymous with “letter of request.” It refers to a “document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.” Black’s Law Dictionary 916 (8th ed. 2004).

8. For what constitutes a “letter of request,” see *supra* note 7.

9. A “commission” is a “warrant or authority, from the government or a court, that empowers the person named to execute official acts.” Black’s Law Dictionary (8th ed. 2004).

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

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

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

Other states have not adopted UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 14.

1 **Inadequacies of Existing Law**

2 Section 2029.010 does not specify the details of the procedure for issuing a
3 subpoena to take a deposition in California for purposes of an out-of-state
4 proceeding. It is not clear from the statutory text what type of paper the deposing
5 party must submit to the court, whether that party must pay a fee and, if so, what
6 fee applies, whether an attorney (rather than the court) may issue a subpoena, what
7 format to use for the subpoena, and whether it is necessary to retain local
8 counsel.¹³ Because the provision applies to a “natural person,” it is also
9 questionable whether an organization located in California can be deposed for an
10 out-of-state proceeding. The statute covers a deposition in which the witness is
11 required to produce documents as well as testify, but is ambiguous as to whether it
12 covers a deposition solely for the production of documents. Its applicability to an
13 inspection of land or other premises is also debatable.¹⁴

13. Code of Civil Procedure Section 1986 provides some additional guidance but does not fully address the issues raised. It states:

1986. A subpoena is obtainable as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is obtainable from the clerk of the court in which the action or proceeding is pending, or if there is no clerk then from a judge or justice of such court.

(b) *To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined.*

(c) To require attendance out of court, in cases not provided for in subdivision (a), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is obtainable from the judge, justice, or other officer before whom the attendance is required.

If the subpoena is to require attendance before a court, or at the trial of an issue therein, it is obtainable from the clerk, as of course, upon the application of the party desiring it. *If it is obtained to require attendance before a commissioner or other officer upon the taking of a deposition, it must be obtained, as of course, from the clerk of the superior court of the county wherein the attendance is required upon the application of the party requiring it.*

(Emphasis added.) Assuming that the last sentence of Section 1986 is meant to apply not only to a deposition subpoena for a California case but also to a deposition subpoena for an out-of-state proceeding, it is consistent with but less detailed than the procedure proposed by the Commission specifically for the latter situation.

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

UIIPA was approved by NCCUSL in 1962 and was intended to supersede UFDA. It has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821-13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). NCCUSL withdrew UIIPA in 1977. See NCCUSL, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its 105th Year, Table IV, at 578 (1996). For this reason, and because it was not widely adopted, Section 3.02 of UIIPA is of limited value as a model for nationwide uniformity.

1 Further, the statute does not make clear how to seek relief when a dispute arises
2 in a deposition taken in California for purposes of an out-of-state proceeding. The
3 proper enforcement procedure is particularly uncertain when a deposition is taken
4 on notice or agreement without issuance of a California subpoena.

5 Because the statute fails to provide guidance on these points, California courts
6 vary widely in how they handle such matters.¹⁵ This inconsistent and unpredictable
7 treatment is unfair.

8 To ensure even-handedness and prevent confusion, the Law Revision
9 Commission proposes to repeal the provision and replace it with a new set of
10 provisions, based in part on UIDDA. The new provisions would give guidance as
11 detailed below. The recommended reforms to clarify and improve the process will
12 not only benefit litigants in out-of-state proceedings, but will also assist California
13 court personnel, process servers, witnesses, and others affected by application of
14 the provision.

15 **Recommended Reforms**

16 The Commission proposes clarifications and improvements relating to: (1) the
17 types of deponent permitted, (2) the types of discovery permitted, (3) which out-

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

15. A recent Texas case in which discovery was taken in several California counties provides a good illustration of the disparity in treatment. In that case, a clerk in San Mateo County Superior Court issued a subpoena simply upon presentation of documentation from the Texas court. No fee was required. The same thing happened in San Diego County Superior Court.

In San Francisco County Superior Court, however, the request for a subpoena was repeatedly rejected. The clerk did not issue the subpoena until after the applicant presented certified documentation from the Texas court, hired a California attorney to sign a civil case cover sheet and prepare a petition and declaration, paid the full fee for filing a new case, and complied with other requirements orally conveyed by the clerk. See Email from Tony Klein to Barbara Gaal (Aug. 6, 2007) (Commission Staff Memorandum 2007-35, Exhibit pp. 1-17).

For further examples, see Email from Tony Klein to Barbara Gaal (April 25, 2006) (Second Supplement to Commission Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (Commission Staff Memorandum 2006-7, Exhibit p. 9); Email from Tony Klein to Barbara Gaal (July 6, 2005) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004) (Commission Staff Memorandum 2005-26, Exhibit pp. 4-6).

1 of-state documents are acceptable, (4) other aspects of the procedure for issuing a
2 subpoena that compels discovery for an out-of-state proceeding, (5) the use of
3 local counsel in conducting such discovery, and (6) the procedure for resolving a
4 dispute arising in connection with discovery.

5 ***Type of Deponent***

6 By its terms, Section 2029.010 is limited to “the oral or written deposition of a
7 natural person in California” This limitation was deliberately imposed in the
8 Civil Discovery Act of 1986.¹⁶ The drafters’ apparent concern was that some
9 jurisdictions might not permit a deposition of an organization (as opposed to a
10 natural person) and litigants might try to subvert such a restriction by seeking to
11 depose an organization in California instead of the forum state.¹⁷

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

15 As a matter of policy, deposing an organization located in California may be just
16 as important to the pursuit of truth as deposing an individual who resides in
17 California. UIDDA recognizes as much, by permitting discovery from “a
18 person,”¹⁸ and defining “person” to mean “an individual, corporation, limited
19 liability company, association, joint venture, public corporation, government or
20 governmental subdivision, agency or instrumentality, or any other legal or
21 commercial entity.”¹⁹ The Commission recommends that California follow
22 UIDDA’s approach on this point.²⁰

23 ***Type of Discovery Sought***

24 From the statutory language, it is clear that Section 2029.010 encompasses not
25 only a deposition requiring testimony alone, but also one requiring both testimony
26 and the production of tangible evidence. It is ambiguous, however, whether the
27 language encompasses a deposition in which no testimony is required, only the
28 production of documents or other tangible evidence.²¹ It is also ambiguous
29 whether the language encompasses a request to inspect land or other premises.

30 In contrast, UIDDA clearly encompasses a deposition that is solely for the
31 production of tangible items.²² UIDDA also expressly encompasses a request to

16. State Bar-Judicial Council Report, *supra* note 10, at 59.

17. See *id.*

18. UIDDA § 5.

19. UIDDA § 2(3).

20. See proposed Code Civ. Proc. § 2029.200(c) *infra*.

21. For key provisions governing such a deposition, see Code Civ. Proc. §§ 2020.010(a)(3), 2020.410-2020.440.

22. UIDDA § 2(5).

1 inspect land or other premises.²³ The Commission recommends that California
2 follow UIDDA’s approach on these points.²⁴

3 ***Acceptable Out-of-State Documents***

4 By its terms, Section 2029.010 does not apply unless (1) a court of another
5 jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or
6 commission, or (2) the deposition of a natural person in California is required by
7 notice or agreement. If neither of these requirements is satisfied, a California court
8 lacks authority to issue a subpoena under the statute.

9 It may be costly and time-consuming, however, to obtain a letter of request or
10 other document enumerated in the statute. To eliminate unnecessary expense and
11 delay, UIDDA simply requires submission of a “subpoena” from a court of
12 record²⁵ of another jurisdiction.²⁶ “Subpoena” is broadly defined as:

13 ... a document, *however denominated*, issued under authority of a court of record
14 requiring a person to:

15 (A) attend and give testimony at a deposition;

16 (B) produce and permit inspection and copying of designated books,
17 documents, records, electronically stored information, or tangible things in the
18 possession, custody, or control of the person; or

19 (C) permit inspection of premises under the control of the person.²⁷

20 The Commission agrees that the focus should be on the function served by a
21 document, not its name or format. Any document from an out-of-state court that
22 commands a person in California to testify or provide another form of discovery
23 should be sufficient for purposes of obtaining a California subpoena compelling
24 such discovery. It should just be necessary to provide assurance that the document
25 is what it purports to be. That could be achieved by submitting either the original
26 or a true and correct copy.

27 The Commission therefore recommends that California adopt UIDDA’s
28 definition of “subpoena” in this context²⁸ and UIDDA’s requirement that a
29 “subpoena” be submitted to the California court from which a subpoena is
30 requested.²⁹ Either the original or a true and correct copy would suffice.³⁰

23. *Id.*

24. See proposed Code Civ. Proc. § 2029.200(e) *infra*.

25. UIDDA only applies to a discovery request in a proceeding conducted in a court of record, not to other proceedings such as an arbitration. See UIDDA § 3 comment. The recommended legislation takes the same approach. See proposed Code Civ. Proc. § 2029.200 *infra*.

26. UIDDA § 3; see also UIDDA § 2(2) (defining “foreign subpoena”).

27. UIDDA § 2(5) (emphasis added).

28. See proposed Code Civ. Proc. § 2029.200 *infra*.

29. See proposed Code Civ. Proc. § 2029.300 *infra*.

30. *Id.* A true and correct copy of the required document should be sufficient. It would not be appropriate to insist on the original or a certified copy, because the original might not be accessible to the

1 ***Other Aspects of the Procedure for Issuance of a Subpoena By a California Court***

2 Aside from having to present one of the enumerated documents, it is not
3 altogether clear what a litigant must do to obtain a subpoena from a California
4 court under Section 2029.010. The requirements reportedly differ from court to
5 court and sometimes even from clerk to clerk.³¹ In some instances, a clerk will
6 issue a subpoena on mere presentation of the original or a copy of one of the
7 documents listed in the statute. Other times, a court may require greater formality,
8 such as the filing of a formal petition or civil case cover sheet, or attendance at a
9 hearing.³²

10 There is also great disparity in the fees California courts charge for issuance of a
11 subpoena to take a deposition in the state for purposes of an out-of-state
12 proceeding. Some courts charge a first appearance fee and at least one court
13 charges multiple first appearance fees if a litigant seeks more than one subpoena.
14 Other courts require more modest fees.³³

15 The Commission recommends that the procedure for obtaining a California
16 subpoena for purposes of an out-of-state proceeding be clear, simple, and uniform
17 from county to county. Under UIDDA, submission of a subpoena from another
18 jurisdiction³⁴ would be sufficient to compel the clerk of a court to issue a subpoena

litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

31. See sources cited in note 15 *supra*.

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

33. Email from Tony Klein to Barbara Gaal (Aug. 6, 2007) (Commission Staff Memorandum 2007-35, Exhibit pp. 1-17); Email from Tony Klein to Barbara Gaal (July 6, 2005) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3); see also Email from Tony Klein to Barbara Gaal (April 25, 2006) (Second Supplement to Commission Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (Commission Staff Memorandum 2006-7, Exhibit p. 9).

The Uniform Civil Fees and Standard Fee Schedule Act of 2005 does not expressly address what fee to charge in this situation. See 2005 Cal. Stat. ch. 75.

34. UIDDA only applies with respect to litigation pending in another “State,” which is defined as “a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.” UIDDA § 2(4) (brackets in original.) In contrast, the recommended legislation would also apply to litigation pending in a foreign nation. See proposed Code Civ. Proc. § 2029.200 & Comment *infra*.

In this respect, the recommended legislation is similar to existing Section 2029.010, which expressly applies to a “mandate, writ, letters rogatory, letter of request, or commission ... issued out of any court of record ... in a foreign nation” The predecessors of Section 2029.010 also applied to discovery for an action in a foreign nation, as did UFDA, upon which many state statutes are modeled. See former Code Civ. Proc. §§ 2023 (1959 Cal. Stat. ch. 1590, § 5), 2029 (1986 Cal. Stat. ch. 1334, § 2); *supra* note 12. If the recommended legislation did not address litigation pending in a foreign nation, California courts would have no guidance on how to handle a discovery request relating to such litigation.

1 with the same terms under the authority of that court.³⁵ UIDDA does not specify a
2 fee for the service, but contemplates that there will be one.³⁶ UIDDA also
3 recognizes that it might be helpful to provide a short transmittal letter along with
4 the out-of-state subpoena, which would advise the clerk that a local subpoena is
5 being sought and cite the state statute authorizing issuance of such a subpoena.³⁷

6 The Commission recommends a similar but not identical approach. To obtain a
7 subpoena from a California court compelling discovery for an out-of-state case, a
8 party would have to: (1) submit the original or a true and correct copy of a
9 subpoena from the jurisdiction where the case is pending,³⁸ (2) pay a fee of \$20
10 per subpoena, which is comparable to the fee for issuing a commission to take an
11 out-of-state deposition,³⁹ and (3) submit an application on a form prescribed by the
12 Judicial Council.⁴⁰ The proper court for submitting the application would be the
13 superior court of the county in which the discovery is to be taken.⁴¹

14 The content of the application form would be left to the Judicial Council to
15 develop, perhaps drawing on requirements stated in some of the more detailed
16 statutes from other states.⁴² The intent is to prevent confusion, ensure that court
17 clerks receive all necessary information, and draw attention to applicable
18 requirements for taking the requested discovery in California.⁴³ This would

35. UIDDA § 3.

36. UIDDA § 3 comment.

37. *Id.*

38. See proposed Code Civ. Proc. § 2029.300 *infra*.

39. See proposed amendment to Gov't Code § 70626 *infra*.

40. See proposed Code Civ. Proc. §§ 2029.300, 2029.390 *infra*.

41. See proposed Code Civ. Proc. §§ 2029.300 *infra*. See also Code Civ. Proc. § 1986. The court would be required to retain a true and correct copy of any subpoena it issues for an out-of-state case, as well as the original or a true and correct copy of the subpoena application and the out-of-state document on which it is based. See proposed Section 2029.300(3) *infra*. The court would thus have a record of its action, which would be available in the event of a challenge to that action.

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

43. These objectives might be achieved by a simple form that would:

- Include a space at the top for indicating the caption and case number of the out-of-state case.
- Include another space for indicating the name of the court in which the application is filed.
- State that the applicant is requesting issuance of a subpoena pursuant to Code of Civil Procedure Sections 2029.100-2029.900.
- Require the applicant to attach a copy of the document from the out-of-state court requesting discovery.
- Require a declaration under penalty of perjury that the attached document is a true and correct copy of what it purports to be.
- Require the applicant to attach a California subpoena that is ready for the court to issue with identical terms as the out-of-state document.
- Perhaps also alert the applicant to requirements such as the necessary fee, California rules governing service of process, and applicable witness fees.

1 streamline the process for litigants, court clerks, process servers, attorneys, and
2 other affected parties.

3 To further streamline the process, the proposed law would also direct the
4 Judicial Council to prepare one or more subpoena forms that include clear
5 instructions for use in issuance of a subpoena for discovery in an out-of-state
6 proceeding.⁴⁴ The Judicial Council would have the option of either creating new
7 forms or modifying existing forms to meet this requirement.⁴⁵ To ensure that the
8 deponent has key information to seek protection if needed, the subpoena would
9 have to bear the caption and case number of the out-of-state case to which it
10 relates, as well as the name of the superior court that authorized the discovery and
11 has jurisdiction in the event of a problem.

12 *Retention of Local Counsel*

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

16 By statute, a person may not practice law in California unless the person is an
17 active member of the State Bar.⁴⁶ A recently adopted rule of court makes clear,
18 however, that under specified conditions it is permissible for an attorney duly
19 licensed to practice in another state to perform litigation tasks in California on a
20 temporary basis for a proceeding pending in another jurisdiction.⁴⁷

44. See proposed Code Civ. Proc. § 2029.390 *infra*.

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

In particular, it may be useful to include a reference to the statute governing discovery for an out-of-state case. The Council should also strive to ensure that a subpoena recipient is not required to incur substantial expense obtaining information that could be cheaply and readily provided as a routine matter. For example, a subpoena recipient is likely to wonder why the subpoena has been issued. The answer to that question might be clear if a copy of the subpoena application or other documentation (e.g., the foreign subpoena, any document that accompanied the subpoena application, or any document that was filed in the foreign jurisdiction to justify issuance of the foreign subpoena) was attached to the subpoena. Absent such documentation, the recipient might pay an attorney to figure out why the subpoena was issued.

46. Bus. & Prof. Code § 6125.

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

1 The drafters of this rule specifically considered the situation in which an out-of-
2 state attorney deposes a witness in California for purposes of an out-of-state
3 proceeding.⁴⁸ Thus, if a party is represented by an out-of-state attorney in an out-
4 of-state proceeding under the conditions specified in the rule, the party does not
5 have to retain local counsel to be able to depose a witness in California. Further, if
6 a party is self-represented in an out-of-state proceeding, the party does not have to
7 retain local counsel to be able to depose a witness in California.⁴⁹ Local counsel
8 may be needed, however, if a discovery dispute arises in a deposition for an out-
9 of-state proceeding and it is necessary to appear in a California court to resolve the
10 dispute.

11 Because these matters are already governed by other California law, it might not
12 be necessary to address them in this proposal.⁵⁰ But UIDDA includes a sentence
13 stating that a “request for the issuance of a subpoena under this act does not
14 constitute an appearance in the courts of this state.”⁵¹ This sentence was included
15 at the request of NCCUSL delegates from other states, in which there might not be
16 as much guidance on authorized practice of law as there is in California. The
17 sentence is included in the recommended legislation,⁵² because omitting it might
18 trigger concerns that the rule is different in California.

19 *Issuance of a Subpoena By Counsel*

20 For an action pending in California, an attorney of record may issue a subpoena
21 instead of having to obtain a subpoena from the court.⁵³ Section 2029.010 does not
22 specify, however, whether an attorney may issue a subpoena to depose a witness
23 in California for a proceeding pending in another jurisdiction.

24 The Commission proposes to add a new provision that would make clear that an
25 active member of the California Bar retained to represent a party in an out-of-state
26 proceeding may issue a deposition subpoena pursuant to the statute for purposes of
27 that proceeding.⁵⁴ The proposed law would not extend that privilege to an out-of-

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

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

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

50. To assist persons involved in discovery for an out-of-state case, the relevant authorities would be referenced in the Comments to proposed Code of Civil Procedure Sections 2029.300 and 2029.350 *infra*.

51. UIDDA § 3.

52. See proposed Code Civ. Proc. § 2029.300 *infra*.

53. Code Civ. Proc. § 1985(c).

54. See proposed Code Civ. Proc. § 2029.350 *infra*.

1 state attorney. It seems reasonable to require the involvement of either a California
2 court or a California attorney to issue process under the authority of the State of
3 California.⁵⁵

4 ***Discovery Dispute***

5 If a dispute arises regarding discovery conducted in California for a proceeding
6 pending elsewhere, it may be necessary for the deponent, a party, or other
7 interested person to seek relief in court. Section 2029.010 does not provide
8 guidance on the proper procedure to follow in that situation.

9 The proposed law would eliminate this ambiguity. If the dispute involves a
10 person located in California, any request for relief would have to comply with
11 California law and be filed in the superior court of the county in which discovery
12 is to be conducted.⁵⁶ That would further the state's interest in protecting its
13 residents from unreasonable or unduly burdensome discovery requests. If the
14 dispute does not involve a person located in California, relief could be sought
15 either in the foreign jurisdiction or in the superior court of the county in which
16 discovery is to be conducted.⁵⁷

17 UIDDA appears to take essentially the same approach. The pertinent text does
18 not draw a distinction between a dispute that affects the deponent and one that
19 does not, but the corresponding Comment does.⁵⁸

20 Upon seeking relief in a California court, the petitioner would have to pay a first
21 appearance fee,⁵⁹ as would each person who responds to the petition.⁶⁰ The amount

The attorney would be required to retain a true and correct copy of any subpoena the attorney issues for an out-of-state case, as well as the original or a true and correct copy of the foreign subpoena and any document the attorney relied on in determining the authenticity of the foreign subpoena. See proposed Code Civ. Proc. § 2029.350(c) *infra*. The attorney would thus have a record of the matter, which would be available in the event of a challenge to the attorney's action.

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

56. See proposed Code Civ. Proc. § 2029.600(a) *infra*. A request for relief pursuant to this section would be denominated a "petition," not a "motion," because there would not be a pending California case in which to file a "motion."

For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Code of Civil Procedure Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a "petition" to enforce the subpoena, not a "motion" as Section 1985.3(g) prescribes for a case pending in California. See proposed Code Civ. Proc. § 2029.600(b) *infra*.

57. See proposed Code Civ. Proc. § 2029.600(a) *infra*. Sometimes it may be most appropriate to seek relief in the out-of-state tribunal, because that tribunal is familiar with the parties, the facts of the case, and the history of the litigation. On other occasions, it may be convenient to seek relief in a California court, as when a deposition is in progress and it would be easiest for the participants to appear before a local court.

58. See UIDDA § 6 (as approved on Aug. 2, 2007) & Comment.

59. See proposed Code Civ. Proc. § 2029.610(a) *infra*.

60. See proposed Code Civ. Proc. § 2029.610(c) *infra*.

1 of these first appearance fees would be \$320, the same as the corresponding first
2 appearance fees for an unlimited civil case pending in a California court.⁶¹ This fee
3 amount is appropriate because resolving the dispute might involve difficult choice-
4 of-law issues or other complications arising because the discovery in question is
5 being conducted for an out-of-state case, not a California case. Additionally,
6 although the matter consists of a discovery dispute rather than an entire case, it
7 may require at least as much effort for the court to resolve as many cases that are
8 filed in California.⁶²

9 A special rule would apply to a person who is not a party to the out-of-state
10 case. If such a person were the petitioner, the fee for filing the petition would be
11 \$40, the same as for a discovery motion in a California case.⁶³ If such a person
12 were responding to a petition, there would be no fee for filing the response.⁶⁴ This
13 would parallel the treatment of a nonparty in a California case.⁶⁵

14 To ensure that all documents relating to the same out-of-state case are filed
15 together (including the subpoena application, subpoena, and documents relating to
16 any subsequent discovery dispute), the petition and any response to it would have
17 to bear the caption and case number of the out-of-state case.⁶⁶ To ensure that all
18 persons involved in a dispute know which California court is handling the dispute,
19 the first page of the petition or any response would also have to include the name
20 of the court in which the document is filed.⁶⁷ In addition, the proposed law would
21 require the superior court to assign a California case number.⁶⁸

22 Further, the proposed law would clarify the briefing schedule and notice
23 requirements that apply to a petition for relief pertaining to discovery in an out-of-

61. See proposed Code Civ. Proc. § 2029.610(a), (c) *infra*; Gov't Code §§ 70611, 70612.

The Commission considered the possibility of varying the amount charged depending on the nature of the out-of-state case. For example, if the out-of-state case were comparable to a limited civil case, the fee would be the same as the first appearance fee for a limited civil case; if the out-of-state case were comparable to an unlimited civil case, the fee would be the same as the first appearance fee for an unlimited civil case. The Commission rejected this approach because there might be disputes over whether an out-of-state case is comparable to a particular type of California proceeding and because it would be difficult for a court clerk to make such determinations.

62. Frequently, the only action in a California case will be the filing of pleadings and perhaps taking of some discovery, followed by settlement. Nonetheless, each party must pay a first appearance fee, even though the case consumes few judicial resources. Resolving a dispute regarding discovery for an out-of-state case may actually be more burdensome on a California court than a typical California case.

63. See proposed Code Civ. Proc. § 2029.610(a) *infra*.

64. See proposed Code Civ. Proc. § 2029.610(c) *infra*.

65. Only a party or an intervenor must pay a first appearance fee in a California case. See, e.g., Gov't Code §§ 70611, 70612.

66. See proposed Code Civ. Proc. § 2029.610(d) *infra*.

67. *Id.*

68. See proposed Code Civ. Proc. § 2029.610(b) *infra*.

1 state case. Those matters would be governed by Code of Civil Procedure Section
2 1005, the same as for a discovery motion in a case pending within the state.⁶⁹

3 ***Subsequent Discovery Dispute in Same Case and County***

4 On occasion, more than one discovery dispute relating to a particular out-of-
5 state case might arise in the same county. In some instances, both disputes might
6 involve the same disputants in the same roles (petitioner or respondent). Other
7 times, there might be little or no overlap between the first dispute and a
8 subsequent dispute: the disputants might be different⁷⁰ or their roles might be
9 reversed.⁷¹

10 Regardless of which situation occurs, the superior court should be aware of all
11 previous actions it has taken with regard to the out-of-state case. This is necessary
12 to promote efficiency and fairness and to minimize inconsistent results.

13 By requiring use of the out-of-state caption and case number on all documents
14 relating to an out-of-state case, the recommended legislation would facilitate that
15 objective.⁷² To further ensure that all documents relating to the same out-of-state
16 case are filed together, the first page of any subsequent petition would have to
17 include the same California case number that the court assigned to the first petition
18 filed in connection with the out-of-state case.⁷³

19 The proposed legislation would also make clear what fee applies when multiple
20 discovery disputes relating to the same out-of-state case arise in the same county.
21 If a disputant is a party to the out-of-state case and has not previously paid a first
22 appearance fee, the disputant would have to pay such a fee.⁷⁴ If a disputant is not a
23 party to the out-of-state case, or has previously paid a first appearance fee, the
24 disputant would only have to pay \$40 for filing a petition and would not have to
25 pay anything for filing a response.⁷⁵ To assist in determination of the appropriate
26 fees, the first page of a subsequent petition would have to clearly indicate that it is
27 not the first petition filed in the county pertaining to the out-of-state case.⁷⁶

69. See proposed Code Civ. Proc. § 2029.630 *infra*.

70. For example, the first dispute might be between the plaintiff in an out-of-state case and a California deponent who refuses to produce a particular document; the second dispute might be between a defendant in the out-of-state case and a different deponent.

71. For example, a deponent might seek a protective order with regard to a particular document requested by the plaintiff in the out-of-state case; later, the plaintiff might move to compel the same deponent to answer a particular question at the deposition.

72. See proposed Code Civ. Proc. §§ 2029.300(d), 2029.350(b)(3), 2029.610(d)(1), 2029.620(e)(1) *infra*. If the caption on a petition were based on the names and roles of the disputants instead, documents relating to the same out-of-state case might be placed in different files, causing confusion or other adverse consequences.

73. See proposed Code Civ. Proc. § 2029.620(e)(3) *infra*.

74. See proposed Code Civ. Proc. § 2029.620(c), (d) *infra*.

75. *Id.*

76. See proposed Code Civ. Proc. § 2029.620(b) & Comment *infra*. See also Code Civ. Proc. § 1991.

1 ***Subsequent Discovery Dispute in Another County***

2 At times, two or more discovery disputes relating to the same out-of-state case
3 might arise in different counties. In that situation, the recommended legislation
4 would require that each petition for relief be filed in the superior court of the
5 county in which the discovery in question is being conducted.⁷⁷ This approach is
6 necessary to avoid forcing a California witness to appear in a court far away from
7 where the witness resides.

8 In appropriate circumstances, a petition could be transferred and consolidated
9 with a petition pending in another county.⁷⁸ In determining whether to order a
10 transfer, a court should consider factors such as convenience of the deponent and
11 similarity of issues.

12 ***Deposition on Notice or Agreement***

13 Section 2029.010 expressly applies “whenever, on notice or agreement, it is
14 required to take the oral or written deposition of a natural person in California
15”⁷⁹ If a deposition is required on notice or agreement, the deposing party may
16 see no need to subpoena the witness under the statute because the witness is
17 already obligated to attend the deposition.⁸⁰ The statute does not make clear,
18 however, whether issuance of a California subpoena is a prerequisite to invoking
19 the enforcement power of a California court in the event of a discovery dispute.

20 It should be possible for the deponent or party to resort to the California court
21 regardless of whether the deposition is being taken pursuant to a California
22 subpoena. The opposite approach — requiring a California subpoena to enforce
23 discovery rights and obligations relating to a deposition on notice or agreement
24 taken in California for an out-of-state case — would entail needless paperwork,
25 expense, and expenditure of judicial and litigant resources in the many instances in
26 which no discovery dispute occurs. The recommended legislation would thus
27 make clear that if a party to an out-of-state case deposes a witness in this state by
28 properly issued notice or by agreement, the deponent or any party may seek relief
29 in a California court regardless of whether the deposing party obtained a subpoena
30 from a California court.⁸¹

77. See proposed Code Civ. Proc. § 2029.600(a) *infra*.

78. See Code Civ. Proc. §§ 403 (transfer), 1048(a) (consolidation); see also Gov’t Code § 70618 (transfer fees).

79. UFDA and many statutes modeled on UFDA also encompass a deposition on notice or agreement. See sources cited in note 12 *supra*.

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

81. See proposed Code Civ. Proc. § 2029.640 *infra*.

1 ***Review of Superior Court Decision in Discovery Dispute***

2 A further issue is how to obtain appellate review of a superior court decision
3 resolving a dispute relating to discovery for an out-of-state case. The
4 recommended legislation would permit a party or deponent aggrieved by a
5 decision to seek an extraordinary writ in the appropriate court of appeal.⁸² Review
6 by way of writ is proper because the decision would be equivalent to a pretrial
7 ruling on a discovery issue, not a final judgment. The court of appeal is the
8 appropriate tribunal because the superior court proceeding would be treated like an
9 unlimited civil case, due to the potential complexity of the issues.⁸³

10 ***Notification of Out-of-State Court or California Court Adjudicating a Related Case***

11 When a dispute arises relating to discovery in California for use in an out-of-
12 state case, the out-of-state court should be kept fully informed. This would help
13 prevent unfair tactical manipulation.

14 Similarly, suppose an out-of-state case and a California case are related (i.e.,
15 they share a question of law or fact). If a party to the out-of-state case attempts to
16 take discovery in California for use in that case, the judge assigned to the related
17 California case should be notified, and should be further notified if any dispute
18 arises relating to that discovery.

19 The recommended legislation includes provisions designed to ensure that both
20 the out-of-state court and any California court adjudicating a related case are kept
21 fully informed.⁸⁴

22 **Effect of the Proposed Reforms**

23 The procedure for obtaining discovery from a California resident for use in out-
24 of-state litigation should be clear and simple, while still protecting the interests of
25 the public generally and the deponent in particular. The reforms recommended by
26 the Commission would help to achieve justice, prevent confusion, and make such
27 discovery more workable for all concerned. If UIDDA is adopted in other
28 jurisdictions as well as in California, the state will also reap the benefits of
29 uniformity.

82. See proposed Code Civ. Proc. § 2029.650 *infra*.

83. See discussion of “Discovery Dispute” *supra*.

84. See proposed Code Civ. Proc. §§ 2029.300(f), 2029.350(d), 2029.660 *infra*.

Contents

Heading of Chapter 12 (commencing with Section 2029.010) (amended).....	19
Code Civ. Proc. § 2029.010 (repealed). Deposition in action pending outside California	19
Code Civ. Proc. §§ 2029.100-2029.900 (added). Interstate and International Depositions and Discovery Act.....	19
Article 1. Interstate and International Depositions and Discovery Act.....	19
§ 2029.100. Short title [UIDDA § 1].....	19
§ 2029.200. Definitions [UIDDA § 2].....	20
§ 2029.300. Issuance of subpoena by clerk of court [UIDDA § 3]	21
§ 2029.350. Issuance of subpoena by local counsel	23
§ 2029.390. Judicial Council forms	25
§ 2029.400. Service of subpoena [UIDDA § 4].....	25
§ 2029.500. Deposition, production, and inspection [UIDDA § 5].....	25
§ 2029.600. Discovery dispute [UIDDA § 6]	26
§ 2029.610. Fees and format of papers relating to discovery dispute	26
§ 2029.620. Subsequent discovery dispute in same case and county	27
§ 2029.630. Hearing date and briefing schedule.....	28
§ 2029.640. Discovery on notice or agreement	28
§ 2029.650. Writ petition.....	29
§ 2029.660. Notification of out-of-state court or California court adjudicating related case	29
§ 2029.700. Uniformity of application and construction [UIDDA § 7]	30
§ 2029.800. Application to pending action [UIDDA § 8].....	30
§ 2029.900. Operative date [UIDDA § 9]	30
Gov't Code § 70626 (amended). Miscellaneous filing fees.....	30

PROPOSED LEGISLATION

1 **Heading of Chapter 12 (commencing with Section 2029.010) (amended)**

2 SECTION 1. The heading of Chapter 12 (commencing with Section 2029.010)
3 of Title 4 of Part 4 of the Code of Civil Procedure is amended to read:

4 CHAPTER 12. ~~DEPOSITION~~ DISCOVERY IN ACTION PENDING
5 OUTSIDE CALIFORNIA

6 **Comment.** To improve clarity, the heading of Chapter 12 is amended to replace the reference
7 to “Deposition” with a reference to “Discovery.” This change helps to emphasize that the chapter
8 applies not only to an oral deposition, but also to other forms of discovery. For example, the
9 chapter applies to a deposition solely for the production of business records (see Sections
10 2020.010(a)(3), 2020.410-2020.440), yet some in some jurisdictions such a procedure might not
11 be referred to as a “deposition.”

12 **Code Civ. Proc. § 2029.010 (repealed). Deposition in action pending outside California**

13 SEC. 2. Section 2029.010 of the Code of Civil Procedure is repealed.

14 ~~2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or~~
15 ~~commission is issued out of any court of record in any other state, territory, or~~
16 ~~district of the United States, or in a foreign nation, or whenever, on notice or~~
17 ~~agreement, it is required to take the oral or written deposition of a natural person~~
18 ~~in California, the deponent may be compelled to appear and testify, and to produce~~
19 ~~documents and things, in the same manner, and by the same process as may be~~
20 ~~employed for the purpose of taking testimony in actions pending in California.~~

21 **Comment.** Former Section 2029.010 is superseded by enactment of the Interstate and
22 International Depositions and Discovery Act (Sections 2029.100-2029.900).

23 **Code Civ. Proc. §§ 2029.100-2029.900 (added). Interstate and International Depositions and**
24 **Discovery Act**

25 SEC. 3. Article 1 (commencing with Section 2029.100) is added to Chapter 12
26 of Title 4 of Part 4 of the Code of Civil Procedure, to read:

27 Article 1. Interstate and International Depositions and Discovery Act

28 **§ 2029.100. Short title [UIDDA § 1]**

29 2029.100. This article may be cited as the Interstate and International
30 Depositions and Discovery Act.

31 **Comment.** Section 2029.100 is similar to Section 1 of the Uniform Interstate Depositions and
32 Discovery Act (2007) (“UIDDA”). This article differs in two significant respects from UIDDA:
33 (1) it addresses procedural details not addressed in UIDDA (see Sections 2029.300, 2029.350,
34 2029.390, 2029.600, 2029.610, 2029.620, 2029.630, 2029.640, 2029.650, 2029.660), and (2) it
35 governs discovery for purposes of an action pending in a foreign nation, not just discovery for

1 purposes of an action pending in another jurisdiction of the United States (see Section
2 2029.200(a)(2) & Comment).

3 The entire article may be referred to as the “Interstate and International Depositions and
4 Discovery Act.” The portions of the article that are drawn from the Uniform Interstate
5 Depositions and Discovery Act may collectively be referred to as the “California version of the
6 Uniform Interstate Depositions and Discovery Act.” See Section 2029.700 (uniformity of
7 application and construction).

8 **§ 2029.200. Definitions [UIDDA § 2]**

9 2029.200. In this article:

10 (a) “Foreign jurisdiction” means either of the following:

11 (1) A state other than this state.

12 (2) A foreign nation.

13 (b) “Foreign subpoena” means a subpoena issued under authority of a court of
14 record of a foreign jurisdiction.

15 (c) “Person” means an individual, corporation, business trust, estate, trust,
16 partnership, limited liability company, association, joint venture, public
17 corporation, government, or governmental subdivision, agency, or instrumentality,
18 or any other legal or commercial entity.

19 (d) “State” means a state of the United States, the District of Columbia, Puerto
20 Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or
21 insular possession subject to the jurisdiction of the United States.

22 (e) “Subpoena” means a document, however denominated, issued under
23 authority of a court of record requiring a person to do any of the following:

24 (1) Attend and give testimony at a deposition.

25 (2) Produce and permit inspection and copying of designated books, documents,
26 records, electronically stored information, or tangible things in the possession,
27 custody, or control of the person.

28 (3) Permit inspection of premises under the control of the person.

29 **Comment.** Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions
30 and Discovery Act (2007), except that (1) the definition of “foreign jurisdiction” in subdivision
31 (a) includes a foreign nation, not just a state other than California, and (2) the term “Virgin
32 Islands” is substituted for “United States Virgin Islands” in subdivision (d), because “Virgin
33 Islands” is the official name for the entity in question.

34 Subdivision (c) defines “person” broadly. This is consistent with the general code-wide
35 definition in Section 17 (“the word ‘person’ includes a corporation as well as a natural person”).
36 For guidance on interpreting other provisions of this code referring to a “person,” see *Hassan v.*
37 *Mercy American River Hospital*, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623
38 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes
39 corporation or non-corporate entity “is ultimately a question of legislative intent”); *Diamond*
40 *View Limited v. Herz*, 180 Cal. App. 3d 612, 616-19, 225 Cal. Rptr. 651 (1986) (“[T]he
41 preliminary definition contained in section 17 is superseded when it obviously conflicts with the
42 Legislature’s subsequent use of the term in a different statute.”); *Oil Workers Int’l Union v.*
43 *Superior Court*, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is
44 “person” for purpose of statutes in Code of Civil Procedure governing contempt).

45 To facilitate discovery under this article, subdivision (e) defines “subpoena” broadly. The term
46 includes not only a document denominated a “subpoena,” but also a mandate, writ, letters

1 rogatory, letter of request, commission, or other court document that requires a person to testify at
2 a deposition, produce documents or other items, or permit inspection of property.

3 **Background from Uniform Act**

4 The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena in the
5 Act is based on the language of Rule 45 of the Federal Rules of Civil Procedure.

6 The term “Subpoena” does not include a subpoena for the inspection of a person (subdivision
7 (e)(3) is limited to inspection of premises). Medical examinations in a personal injury case, for
8 example, are separately controlled by state discovery rules (the corresponding federal rule is Rule
9 35 of the Federal Rules of Civil Procedure). Since the plaintiff is already subject to the
10 jurisdiction of the trial state, a subpoena is never necessary.

11 The term “Court of Record” was chosen to exclude non-court of record proceedings from the
12 ambit of the Act. Extending the Act to such proceedings as arbitrations would be a significant
13 expansion that might generate resistance to the Act. A “Court of Record” includes anyone who is
14 authorized to issue a subpoena under the laws of that state, which usually includes an attorney of
15 record for a party in the proceeding.

16 [Adapted from UIDDA § 2 comment & § 3 comment.]

17 **§ 2029.300. Issuance of subpoena by clerk of court [UIDDA § 3]**

18 2029.300. (a) To request issuance of a subpoena under this section, a party shall
19 submit the original or a true and correct copy of a foreign subpoena to the clerk of
20 the superior court in the county in which discovery is sought to be conducted in
21 this state. A request for the issuance of a subpoena under this section does not
22 constitute making an appearance in the courts of this state.

23 (b) In addition to submitting a foreign subpoena under subdivision (a), a party
24 seeking discovery shall do both of the following:

25 (1) Submit an application requesting that the superior court issue a subpoena
26 with the same terms as the foreign subpoena. The application shall be on a form
27 prescribed by the Judicial Council pursuant to Section 2029.390. No civil case
28 cover sheet is required.

29 (2) Pay the fee specified in Section 70626 of the Government Code.

30 (c) When a party submits a foreign subpoena to the clerk of the superior court in
31 accordance with subdivision (a), and satisfies the requirements of subdivision (b),
32 the clerk shall promptly issue a subpoena for service upon the person to which the
33 foreign subpoena is directed.

34 (d) A subpoena issued under this section shall satisfy all of the following
35 conditions:

36 (1) It shall incorporate the terms used in the foreign subpoena.

37 (2) It shall contain or be accompanied by the names, addresses, and telephone
38 numbers of all counsel of record in the proceeding to which the subpoena relates
39 and of any party not represented by counsel.

40 (3) It shall bear the caption and case number of the out-of-state case to which it
41 relates.

42 (4) It shall state the name of the court that issues it.

43 (5) It shall be on a form prescribed by the Judicial Council pursuant to Section
44 2029.390.

1 (e) The superior court shall retain a true and correct copy of any subpoena it
2 issues pursuant to this section. The court shall also retain the original or a true and
3 correct copy of any foreign subpoena, application, or other document that is
4 submitted pursuant to this section, regardless of whether the court issues the
5 requested subpoena.

6 (f) If a party submits an application pursuant to this section and knows of a case
7 pending in this state that shares a question of law or fact with the out-of-state case,
8 the party shall, in addition to complying with other service requirements, serve a
9 copy of the application, the foreign subpoena, and the issued subpoena, if any, on
10 the court where that case is pending in this state, together with a request that the
11 copy be provided to the judge assigned to that case, if any.

12 **Comment.** Section 2029.300 is added to clarify the procedure for obtaining a California
13 subpoena to obtain discovery from a witness in this state for use in a proceeding pending in
14 another United States jurisdiction. For the benefit of the party seeking the subpoena and the court
15 issuing it, the procedure is designed to be simple and expeditious.

16 Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the Uniform Interstate
17 Depositions and Discovery Act (2007). Subdivisions (b), (d)(3)-(5), (e), and (f) address additional
18 procedural details.

19 To obtain a subpoena under this section, a party must submit the original or a true and correct
20 copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section
21 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document
22 denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request,
23 commission, or other court document that requires a person to testify at a deposition, produce
24 documents or other items, or permit inspection of property.

25 To protect the person subject to discovery and prevent confusion over where to seek relief in
26 the event of a dispute, a subpoena under this section may only be issued by the superior court in
27 the county in which discovery is sought to be conducted, not by another superior court. With
28 regard to a document production, the place of production is where “discovery is sought to be
29 conducted.” The county in which that place is located is “the county in which discovery is sought
30 to be conducted.” Although a document production occurs in a particular place, all documents in
31 the possession, custody, or control of the deponent have to be produced, regardless of where they
32 are located. See Section 2031.010.

33 Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does
34 not constitute making an appearance in the California courts. For further guidance on avoiding
35 unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the
36 California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report
37 and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on
38 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a
39 party to out-of-state litigation may take a deposition in California without retaining local counsel
40 if the party is self-represented or represented by an attorney duly admitted to practice in another
41 jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr.
42 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests
43 regardless of State Bar membership...”); Cal. R. Ct. 9.47; Final Report and Recommendations,
44 *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in
45 connection with such a deposition and a party to out-of-state litigation wants to appear in a
46 California court with respect to the dispute.

47 See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.640 (discovery on
48 notice or agreement).

1 **Background from Uniform Act**

2 The term “Submitted” to a clerk of court includes delivering to or filing. Presenting a subpoena
3 to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the
4 discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in
5 turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

6 The committee envisions the standard procedure under this section will become as follows,
7 using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives
8 in California (the discovery state): A lawyer of record for a party in the action pending in Kansas
9 will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in
10 pending actions). That lawyer will then check with the clerk’s office, in the California county in
11 which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk’s office
12 will usually have a Web page explaining its forms and procedures). The lawyer will then prepare
13 a California subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then
14 hire a process server (or local counsel) in California, who will take the completed and executed
15 Kansas subpoena and the completed but not yet executed California subpoena to the clerk’s office
16 in California. The clerk of court, upon being given the Kansas subpoena, will then issue the
17 identical California subpoena. The process server (or other agent of the party) will pay any
18 necessary filing fees, and then serve the California subpoena on the deponent in accordance with
19 California law (which includes any applicable local rules).

20 The advantages of this process are readily apparent. The act of the clerk of court is ministerial,
21 yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only
22 documents that need to be presented to the clerk of court in the discovery state are the subpoena
23 issued in the trial state and the draft subpoena of the discovery state. [Note: In California, an
24 application form would also be required.] There is no need to hire local counsel to have the
25 subpoena issued in the discovery state, and there is no need to present the matter to a judge in the
26 discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery
27 state simply reissues the subpoena of the trial state, and the new subpoena is then served on the
28 deponent in accordance with the laws of the discovery state. The process is simple and efficient,
29 costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have
30 the subpoena issued and served in the discovery state.

31 The Act will not change or repeal the law in those states that still require a commission or
32 letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the
33 law in those discovery states that still require a commission or letter rogatory from a trial state
34 before a deposition can be taken in those states. It is the hope of the Conference that this Act will
35 encourage states that still require the use of commissions or letters rogatory to repeal those laws.

36 The Act requires that, when the subpoena is served, it contain or be accompanied by the names,
37 addresses, and telephone numbers of all counsel of record and of any party not represented by
38 counsel. The committee believes that this requirement imposes no significant burden on the
39 lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of
40 deposition to every counsel of record and any unrepresented parties. The benefits in the discovery
41 state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will
42 frequently be the case, the deponent’s lawyer) to learn the names of and contact the other lawyers
43 in the case. This requirement can easily be met, since the subpoena will contain or be
44 accompanied by the names, addresses, and telephone numbers of all counsel of record and of any
45 party not represented by counsel (which is the same information that will ordinarily be contained
46 on a notice of deposition and proof of service).

47 [Adapted from UIDDA § 3 comment.]

48 **§ 2029.350. Issuance of subpoena by local counsel**

49 2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a
50 proceeding pending in a foreign jurisdiction retains an attorney licensed to practice
51 in this state, who is an active member of the State Bar, and that attorney receives

1 the original or a true and correct copy of a foreign subpoena, the attorney may
2 issue a subpoena under this article.

3 (b) A subpoena issued under this section shall satisfy all of the following
4 conditions:

5 (1) It shall incorporate the terms used in the foreign subpoena.

6 (2) It shall contain or be accompanied by the names, addresses, and telephone
7 numbers of all counsel of record in the proceeding to which the subpoena relates
8 and of any party not represented by counsel.

9 (3) It shall bear the caption and case number of the out-of-state case to which it
10 relates.

11 (4) It shall state the name of the superior court of the county in which the
12 discovery is to be conducted.

13 (5) It shall be on a form prescribed by the Judicial Council pursuant to Section
14 2029.390.

15 (c) An attorney who issues a subpoena pursuant to this section shall retain a true
16 and correct copy of the subpoena. The attorney shall also retain the original or a
17 true and correct copy of the foreign subpoena, as well as any document the
18 attorney relied on in determining the authenticity of the foreign subpoena.

19 (d) If the attorney or the attorney's client knows of a case pending in this state
20 that shares a question of law or fact with the out-of-state case, the attorney shall, in
21 addition to complying with other service requirements, serve a copy of the foreign
22 subpoena and the issued subpoena on the court where that case is pending in this
23 state, together with a request that the copy be provided to the judge assigned to
24 that case, if any.

25 **Comment.** Section 2029.350 is added to make clear that if certain conditions are satisfied,
26 local counsel may issue process compelling a California witness to appear at a deposition for an
27 action pending in another jurisdiction.

28 To issue a subpoena under this section, a California attorney acting as local counsel must
29 receive the original or a true and correct copy of a "foreign subpoena." For definitions of "foreign
30 subpoena" and "subpoena," see Section 2029.200 (definitions). The definition of "subpoena" is
31 broad, encompassing not only a document denominated a "subpoena," but also a mandate, writ,
32 letters rogatory, letter of request, commission, or other court document that requires a person to
33 testify at a deposition, produce documents or other items, or permit inspection of property.

34 To protect the person subject to discovery and prevent confusion over where to seek relief in
35 the event of a dispute, a subpoena issued under this section must include the name of the superior
36 court of the county in which discovery is sought to be conducted. With regard to a document
37 production, the place of production is where "discovery is sought to be conducted." The county in
38 which that place is located is "the county in which discovery is sought to be conducted."
39 Although a document production occurs in a particular place, all documents in the possession,
40 custody, or control of the deponent have to be produced, regardless of where they are located. See
41 Section 2031.010.

42 This section does not make retention of local counsel mandatory. For guidance on that point,
43 see Section 2029.300(a); Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the
44 California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report
45 and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on
46 Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a
47 party to out-of-state litigation may take a deposition in California without retaining local counsel

1 if the party is self-represented or represented by an attorney duly admitted to practice in another
2 jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 70 Cal. Rptr.
3 2d 304, 949 P.2d 1 (1998) (“[P]ersons may represent themselves and their own interests
4 regardless of State Bar membership....”); Cal. R. Ct. 9.47; Final Report and Recommendations,
5 *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in
6 connection with such a deposition and a party to out-of-state litigation wants to appear in a
7 California court with respect to the dispute.

8 See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.640 (discovery on
9 notice or agreement).

10 **§ 2029.390. Judicial Council forms**

11 2029.390. On or before January 1, 2010, the Judicial Council shall do all of the
12 following:

13 (a) Prepare an application form to be used for purposes of Section 2029.300.

14 (b) Prepare one or more new subpoena forms that include clear instructions for
15 use in issuance of a subpoena under Section 2029.300 or 2029.350. Alternatively,
16 the Judicial Council may modify one or more existing subpoena forms to include
17 clear instructions for use in issuance of a subpoena under Section 2029.300 or
18 2029.350.

19 **Comment.** Section 2029.390 is new. The Judicial Council is to prepare forms to facilitate
20 compliance with this article.

21 **§ 2029.400. Service of subpoena [UIDDA § 4]**

22 2029.400. A subpoena issued under this article shall be personally served in
23 compliance with the law of this state, including, without limitation, Section 1985.

24 **Comment.** Section 2029.400 is similar to Section 4 of the Uniform Interstate Depositions and
25 Discovery Act (2007). Section 2029.400 applies not only to a subpoena issued by a clerk of court
26 under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350.

27 **§ 2029.500. Deposition, production, and inspection [UIDDA § 5]**

28 2029.500. Titles 3 (commencing with Section 1985) and 4 (commencing with
29 Section 2016.010) of Part 4, and any other law or court rule of this state governing
30 the time, place, or manner of a deposition, a production of documents or other
31 tangible items, or an inspection of premises, apply to discovery under this article.

32 **Comment.** Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and
33 Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court
34 under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350
35 and to discovery taken in this state pursuant to properly issued notice or by agreement.

36 **Background from Uniform Act**

37 The Act requires that the discovery permitted by this section must comply with the laws of the
38 discovery state. The discovery state has a significant interest in these cases in protecting its
39 residents who become non-party witnesses in an action pending in a foreign jurisdiction from any
40 unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the
41 discovery procedure must be the same as it would be if the case had originally been filed in the
42 discovery state.

43 [Adapted from UIDDA § 5 comment.]

1 **§ 2029.600. Discovery dispute [UIDDA § 6]**

2 2029.600. (a) If a dispute arises relating to discovery under this article, and the
3 dispute involves a person located in this state, any request for a protective order or
4 to enforce, quash, or modify a subpoena, or for other relief shall comply with the
5 applicable rules or statutes of this state and be filed in the superior court in the
6 county in which discovery is to be conducted. If the dispute does not involve a
7 person located in this state, relief may be sought either in the foreign jurisdiction
8 or in the superior court in the county in which discovery is to be conducted. If
9 relief is sought in the superior court in the county in which discovery is to be
10 conducted, the request for relief shall comply with the applicable rules or statutes
11 of this state.

12 (b) A request for relief pursuant to this section shall be referred to as a petition
13 notwithstanding any statute under which a request for the same relief would be
14 referred to as a motion or by another term if it was brought in a proceeding
15 pending in this state.

16 (c) A petition for relief pursuant to this section shall be accompanied by a civil
17 case cover sheet.

18 **Comment.** Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and
19 Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a
20 dispute relating to discovery conducted in this state for purposes of a proceeding pending in
21 another jurisdiction.

22 Under subdivision (a), if a dispute involves a person located in California, any request for relief
23 would have to comply with California law and be filed in the superior court of the county in
24 which discovery is to be conducted. If the dispute does not involve a person located in California,
25 relief could be sought either in the foreign jurisdiction or in the superior court of the county in
26 which discovery is to be conducted.

27 The objective of subdivision (a) is to ensure that if a dispute arises relating to discovery under
28 this article, California is able to protect its policy interests and the interests of persons located in
29 the state. In particular, the state must be able to protect its residents from unreasonable or unduly
30 burdensome discovery requests. A court should interpret the provision with this objective in
31 mind.

32 Subdivision (b) makes clear that a request for relief pursuant to this section is properly
33 denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state
34 proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the
35 nonparty consumer serves a written objection to production as authorized by the statute. To
36 obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena,
37 not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

38 See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620
39 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing
40 schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition), 2029.660
41 (notification of out-of-state court or California court adjudicating related case).

42 **§ 2029.610. Fees and format of papers relating to discovery dispute**

43 2029.610. (a) On filing a petition under Section 2029.600, a petitioner who is a
44 party to the out-of-state proceeding shall pay a first appearance fee as specified in
45 Section 70611 of the Government Code. A petitioner who is not a party to the out-

1 of-state proceeding shall pay a motion fee as specified in subdivision (a) of
2 Section 70617 of the Government Code.

3 (b) The court in which the petition is filed shall assign it a case number.

4 (c) On responding to a petition under Section 2029.600, a party to the out-of-
5 state proceeding shall pay a first appearance fee as specified in Section 70612 of
6 the Government Code. A person who is not a party to the out-of-state proceeding
7 may file a response without paying a fee.

8 (d) Any petition, response, or other document filed under this section shall
9 satisfy all of the following conditions:

10 (1) It shall bear the caption and case number of the out-of-state case to which it
11 relates.

12 (2) The first page shall state the name of the court in which the document is
13 filed.

14 (3) The first page shall state the case number assigned by the court under
15 subdivision (b).

16 **Comment.** Section 2029.610 is added to clarify procedural details for resolution of a dispute
17 relating to discovery under this article.

18 See also Sections 2029.600 (discovery dispute), 2029.620 (subsequent discovery dispute in
19 same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on
20 notice or agreement), 2029.650 (writ petition), 2029.660 (notification of out-of-state court or
21 California court adjudicating related case).

22 **§ 2029.620. Subsequent discovery dispute in same case and county**

23 2029.620. (a) If a petition has been filed under Section 2029.600 and another
24 dispute later arises relating to discovery being conducted in the same county for
25 purposes of the same out-of-state proceeding, the deponent or other disputant may
26 file a petition for appropriate relief in the same superior court as the previous
27 petition.

28 (b) The first page of the petition shall clearly indicate that it is not the first
29 petition filed in that court that relates to the out-of-state case.

30 (c) If the petitioner in the new dispute is not a party to the out-of-state case, or is
31 a party who previously paid a first appearance fee under this article, the petitioner
32 shall pay a motion fee as specified in subdivision (a) of Section 70617 of the
33 Government Code. If the petitioner in the new dispute is a party to the out-of-state
34 case but has not previously paid a first appearance fee under this article, the
35 petitioner shall pay a first appearance fee as specified in Section 70611 of the
36 Government Code.

37 (d) If a person responding to the new petition is not a party to the out-of-state
38 case, or is a party who previously paid a first appearance fee under this article, that
39 person does not have to pay a fee for responding. If a person responding to the
40 new petition is a party to the out-of-state case but has not previously paid a first
41 appearance fee under this article, that person shall pay a first appearance fee as
42 specified in Section 70612 of the Government Code.

1 (e) Any petition, response, or other document filed under this section shall
2 satisfy all of the following conditions:

3 (1) It shall bear the caption and case number of the out-of-state case to which it
4 relates.

5 (2) The first page shall state the name of the court in which the document is
6 filed.

7 (3) The first page shall state the same case number that the court assigned to the
8 first petition relating to the out-of-state case.

9 (f) A petition for relief pursuant to this section shall be accompanied by a civil
10 case cover sheet.

11 **Comment.** Section 2029.620 is added to clarify the procedure that applies when two or more
12 discovery disputes relating to the same out-of-state proceeding arise in the same county. To
13 promote efficiency and fairness and minimize inconsistent results, all documents relating to the
14 same out-of-state case are to be filed together, bearing the same California case number.

15 In addition, subdivision (b) requires the first page of a subsequent petition to clearly indicate
16 that it is not the first petition filed in the court relating to the out-of-state case. If the petitioner
17 does not know the history of the case, the petitioner has a duty to determine whether a previous
18 petition has been filed. That duty should not be difficult to satisfy, because the petitioner has an
19 obligation to meet and confer with the other disputant before seeking relief in court.

20 Section 2029.620 does not apply when discovery disputes relate to the same out-of-state case
21 but arise in different counties. In that situation, each petition for relief must be filed in the
22 superior court of the county in which the deposition is being taken. See Sections 2029.600,
23 2029.600(a). In appropriate circumstances, a petition may be transferred and consolidated with a
24 petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also
25 Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should
26 consider factors such as convenience of the deponent and similarity of issues.

27 See also Sections 2029.600 (discovery dispute), 2029.610 (fees and format of papers relating to
28 discovery dispute), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice
29 or agreement), 2029.650 (writ petition), 2029.660 (notification of out-of-state court or California
30 court adjudicating related case).

31 **§ 2029.630. Hearing date and briefing schedule**

32 2029.630. A petition under Section 2029.600 or Section 2029.620 is subject to
33 the requirements of Section 1005 relating to notice and to filing and service of
34 papers.

35 **Comment.** Section 2029.630 is added to clarify the proper hearing date and briefing schedule
36 for a petition under Section 2029.600 or 2029.620. The petition is to be treated in the same
37 manner as a discovery motion in a case pending within the state.

38 **§ 2029.640. Discovery on notice or agreement**

39 2029.640. If a party to a proceeding pending in a foreign jurisdiction seeks
40 discovery from a witness in this state by properly issued notice or by agreement, it
41 is not necessary for that party to obtain a subpoena under this article to be able to
42 seek relief under Section 2029.600 or 2029.620. The deponent or any other party
43 may also seek relief under Section 2029.600 or 2029.620 in those circumstances,
44 regardless of whether the deponent was subpoenaed under this article.

1 **Comment.** Section 2029.640 is added to clarify how this article applies when a party to a
2 proceeding pending in another jurisdiction seeks discovery from a witness in this state by
3 properly issued notice or by agreement. See also Section 2029.500 (deposition, production, and
4 inspection).

5 **§ 2029.650. Writ petition**

6 2029.650. (a) If a superior court issues an order granting, denying, or otherwise
7 resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by
8 the order may petition the appropriate court of appeal for an extraordinary writ. No
9 order or other action of a court under this article is appealable in this state.

10 (b) Pending its decision on the writ petition, the court of appeal may stay the
11 order of the superior court, the discovery that is the subject of that order, or both.

12 **Comment.** Section 2029.650 is added to clarify the procedure for reviewing a decision of a
13 superior court on a dispute arising in connection with discovery under this article. For further
14 guidance on that procedure, see in particular Cal. R. Ct. 8.264(a)(1) (when relevant, clerk of court
15 of appeal shall promptly send court of appeal's opinion or order to lower court), 8.272(b)
16 (transmittal of remittitur and opinion or order to lower court), 8.490(k) (notice to trial court with
17 regard to writ), 8.490(f)(1) (writ petition shall be served on respondent superior court).

18 **§ 2029.660. Notification of out-of-state court or California court adjudicating related case**

19 2029.660. In addition to complying with other requirements governing service,

20 (a) A person filing a petition or other document pursuant to Section 2029.600,
21 2029.620, or 2029.650 shall serve a copy of that document on the court where the
22 out-of-state case is pending, together with a request that the copy be provided to
23 the judge assigned to that case, if any.

24 (b) If a person filing a petition or other document pursuant to Section 2029.600,
25 2029.620, or 2029.650 knows of a case pending in this state that shares a question
26 of law or fact with the out-of-state case, the person shall also serve a copy of the
27 petition or other document on the court where that case is pending in this state,
28 together with a request that the copy be provided to the judge assigned to that case,
29 if any.

30 (c) When a court acts on a petition filed pursuant to Section 2029.600, 2029.620,
31 or 2029.650, the prevailing party shall serve a copy of the court's order, opinion,
32 remittitur, or other document on the court where the out-of-state case is pending,
33 together with a request that the copy be provided to the judge assigned to that case,
34 if any.

35 (d) If the prevailing party knows of a case pending in this state that shares a
36 question of law or fact with the out-of-state case, the prevailing party shall also
37 serve a copy of the court's order, opinion, remittitur or other document on the
38 court where that case is pending in this state, together with a request that the copy
39 be provided to the judge assigned to that case, if any.

40 **Comment.** Section 2029.660 is added to ensure that when a dispute arises relating to discovery
41 for an out-of-state case, (1) the out-of-state court is kept fully informed and (2) any court
42 adjudicating a related case in this state is kept fully informed. The provision serves to prevent
43 gamesmanship.

1 **§ 2029.700. Uniformity of application and construction [UIDDA § 7]**

2 2029.700. (a) Sections 2029.100, 2029.200, 2029.300, 2029.400, 2029.500,
3 2029.600, 2029.800, 2029.900, and this section, collectively, constitute and may
4 be referred to as the “California version of the Uniform Interstate Depositions and
5 Discovery Act.”

6 (b) In applying and construing this uniform act, consideration shall be given to
7 the need to promote uniformity of the law with respect to its subject matter among
8 the states that enact it.

9 **Comment.** Subdivision (a) of Section 2029.700 provides a convenient means of referring to
10 the sections within this article that are drawn from the Uniform Interstate Depositions and
11 Discovery Act (2007). The entire article may be referred to as the “Interstate and International
12 Depositions and Discovery Act.” See Section 2029.100 & Comment.

13 Subdivision (b) is similar to Section 7 of the Uniform Interstate Depositions and Discovery
14 Act.

15 **§ 2029.800. Application to pending action [UIDDA § 8]**

16 2029.800. This article applies to requests for discovery in cases pending on or
17 after the operative date of this section.

18 **Comment.** Section 2029.800 is the same as Section 8 of the Uniform Interstate Depositions
19 and Discovery Act (2007), except “or after” is inserted to improve clarity and “operative date” is
20 substituted for “effective date.”

21 In California, “effective date” refers to the date on which a statute is recognized as constituting
22 California law. In contrast, “operative date” refers to the date on which the statute actually
23 becomes operative. See, e.g., *People v. Palomar*, 171 Cal. App. 3d 131, 134 (1985) (“The
24 ‘enactment is a law on its effective date only in the sense that it cannot be changed except by
25 legislative process; the rights of individuals under its provisions are not substantially affected
26 until the provision operates as law.’”).

27 The effective date of this article is January 1 of the year following its enactment. See Cal.
28 Const. art. IV, § 8(c)(1); Gov’t Code § 9600(a). Usually, the operative date of a statute is the
29 same as the effective date. *People v. Henderson*, 107 Cal. App. 3d 475, 488 (1980). In some
30 instances, a statute may specify a different operative date. *Cline v. Lewis*, 175 Cal. 315, 318;
31 *Johnston v. Alexis*, 153 Cal. App. 3d 33, 40 (1984). Here, the operative date for this article
32 (except for Section 2029.390) is delayed to allow time for the Judicial Council to prepare forms
33 pursuant to Section 2029.390. See Section 2029.900.

34 **§ 2029.900. Operative date [UIDDA § 9]**

35 2029.900. Section 2029.390 is operative on January 1, 2009. The remainder of
36 this article is operative on January 1, 2010.

37 **Comment.** Section 2029.900 is similar to Section 9 of the Uniform Interstate Depositions and
38 Discovery Act (2007), except that “operative date” is substituted for “effective date” and the
39 operative date for the article (except for Section 2029.390) is delayed to allow time for the
40 Judicial Council to prepare forms pursuant to Section 2029.390. For an explanation of the
41 distinction between “effective date” and “operative date” in California, see Section 2029.800
42 Comment.

43 **Gov’t Code § 70626 (amended). Miscellaneous filing fees**

44 SEC. 4. Section 70626 of the Government Code is amended to read:

1 70626. (a) The fee for each of the following services is fifteen dollars (\$15).
2 Amounts collected shall be distributed to the Trial Court Trust Fund under Section
3 68085.1.

4 (1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of
5 sale, a writ of possession, a writ of prohibition, or any other writ for the
6 enforcement of any order or judgment.

7 (2) Issuing an abstract of judgment.

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

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

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

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

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

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

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

20 (1) Issuing an order of sale.

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

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

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

28 (5) Issuing a commission to take a deposition in another state or place under
29 Section 2026.010 of the Code of Civil Procedure, or issuing a subpoena under
30 Section 2029.300 to take a deposition in this state for purposes of a proceeding
31 pending in another jurisdiction.

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

34 (7) Filing an affidavit of publication of notice of dissolution of partnership.

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

37 (9) Filing an affidavit under Section 13200 of the Probate Code, together with
38 the issuance of one certified copy of the affidavit under Section 13202 of the
39 Probate Code.

40 (10) Filing and indexing all papers for which a charge is not elsewhere provided,
41 other than papers filed in actions or special proceedings, official bonds, or
42 certificates of appointment.

